Monthly Information Newsletter – Tax & Super

<Month Year>

Wash sale arrangements under scrutiny

The ATO is warning taxpayers not to engage in 'asset wash sales' to artificially increase their losses in order to reduce capital gains or expected gains. It cautions that they are a form of tax avoidance.

These arrangements typically involve the disposal of assets such as cryptocurrency and shares just before the end of the financial year where, after a short period of time, the taxpayer reacquires the same or substantially similar assets. This may be a wash sale and is done to create a loss to offset against a gain already derived, or expected to be derived, in certain circumstances, in a tax return.

Wash sales differ from the normal buying and selling of assets because wash sales are undertaken for the artificial purpose of generating a tax benefit for the current financial year. The taxpayer disposes of and quickly reacquires the asset for the deliberate purpose of realising a capital loss and obtaining an unfair tax benefit by offsetting it against a capital gain.

In terms of detection, the ATO states that its sophisticated data analytics can identify wash sales through access to data from share registries and crypto asset exchanges. When the ATO identifies this behaviour, the capital loss is rejected. Of course, the selling and repurchasing of the same CGT asset within a short period of time – resulting in a loss – can in some cases just be as a result of rational investing and not driven by tax. The disposal and acquisition may be explicable by reference to market changes, for instance the improvement in share price and demand for the stock may also be regarded as consistent with the way in which taxpayers usually hold and realise investments. The disposal and reacquisition within a short period of time may be referrable to a change in investor sentiment and market activity. This tends against the dominant purpose of obtaining a tax benefit (see example 6 of ATO tax ruling TR 2008/1).

This ATO ruling states that there is no set period of time between sale and reacquisition in order for a sale to be classed as a wash sale. It will depend on the overall circumstances, as it should. By contrast, in the United States by way of example, there is a 61-day rule. A loss from selling stock or mutual fund shares is disallowed for federal income tax purposes if, within the 61-day period beginning 30 days before the date of the loss sale and ending 30 days after that date, you buy substantially identical securities.

The take-home message it's still ok to sell and quickly reacquire shares and cryptocurrency within a short period of time – provided it's not done to create an artificial loss. This can be a difficult topic to understand, therefore touch base with us if you are selling shares or crypto and are uncertain about how the law may apply.