

Taxation Law Committee

Submission on the proposed roll-over relief for small business restructures

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NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The NSW Young Lawyers Taxation Law Committee (**Committee**) consists of young practitioners and law students from NSW who share an interest in, and passion for, taxation law. The Committee represents a group of emerging legal practitioners who will be at the forefront of tax planning advice and tax disputes over the coming years.

The Committee thanks Treasury for the invitation to make submissions on the proposed roll-over relief for small business restructures.

Summary of Recommendations

The Committee submits that the proposed rollover would have positive consequences for small businesses and makes a number of recommendations on key features of the exposure draft.

Threshold asset test and turnover requirements

The proposed roll-over relief for small business restructures makes it a threshold requirement that a small business taken together with its affiliates and connected entities only qualifies for the small business restructure roll-overs where they meet two requirements: (i) their turnover is less than \$2 million **and** (ii) the net value of their capital gains tax (**CGT**) assets is less than \$6 million. The current CGT concessions granting roll-over relief to small businesses only require that one of these requirements is met. The Committee considers that the proposed threshold requirements are an unnecessary restriction on eligibility for roll-over relief and that small businesses should be able to qualify for the proposed roll-over on the basis of the current threshold requirements for small business CGT roll-overs.

Roll-over relief applies in relation to the ‘restructure of a business’

It is a requirement under section 328-440(c) of the exposure draft that a transaction be a “restructure of the business” in order to qualify for the proposed roll-over relief. The Committee considers that both the legislation and the explanatory memorandum (**EM**) need to be clearer as to what constitutes the ‘restructure of the business’. In particular, where assets are transferred to two or more entities as part of a restructure, the legislation and the EM should clarify what a taxpayer needs to demonstrate to show that this amounts to the ‘restructure of the business’. The provision of more meaningful example case studies in the EM may be beneficial to assist taxpayers and the Australian Taxation Office to know what is intended. An example case study of a ‘restructure of the business’ may be a succession planning reorganisation where a founder splits a business into two businesses and continues to carry on both businesses in order to subsequently gift one business to one child and another business to another child. Additionally a comment in the EM on how the concept of a ‘restructure of the business’ may potentially interact with the anti-avoidance provisions in sections 45B and 177E would also provide insight into the operation of the proposed provisions.

Anti-avoidance provisions – Division 7A

As part of a small business restructure, it is likely that a dividend may be paid as part of the restructure. The Committee recommends that the legislation should be drafted to exclude the application of Division 7A where roll-over relief for a small business restructure applies. Such an exclusion currently exists for the small business retirement CGT concession and the Committee submits that it would be beneficial for such an exclusion to be extended to roll-over relief for small business restructures.

We also note that demerger dividend relief (subsections 44(3) and (4) of *the Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) in respect of demerger relief in Division 125 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) also provides a worthwhile model in addressing the potential application of section 44 of the ITAA 1936 when a restructure occurs. Section 109RA of the ITAA 1936 similarly provides that Division 7A of the ITAA 1936 does not apply to a demerger dividend to which section 45B does not apply.

Membership interests with different types of rights

Section 328-445 of the current exposure draft provides for adjustments to the cost base of membership interests in the entity that houses a small business upon the transfer out of its assets to another entity. However, this section does not provide for the situation where the membership interests in the transferor entity, either shares or units, have different classes and/or rights attaching to them. The Committee recommends that the legislation should be drafted to account for this issue.

Change in entity type from discretionary trust to unit trust or vice versa

Neither the exposure draft or the current EM makes it clear that a small business can effect a restructure by moving from being housed by a unit trust to a discretionary trust or vice versa. The Committee understands that it is the case that it is the intention of the proposed legislation that roll-over relief would be available in this situation. The Committee recommends that the legislation or the EM should be drafted to make this clear.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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