



23 February 2018

Senior Adviser
Small Business Entities and Industry Concessions Unit
The Treasury
Langton Crescent
PARKES ACT 2600

Via email: SBCGTintegrity@treasury.gov.au

Dear Sir / Madam

RE: Improving the integrity of the small business CGT concessions

Thank you for the opportunity to provide comments on the exposure draft legislation for the proposed amendments relating to the small business CGT concessions.

By way of background, the Hayes Knight group of accounting firms provide a significant amount of taxation advice to individual taxpayers throughout Australia. We also provide assistance to a large number of other accounting firms around Australia through the support and training services operated by Knowledge Shop.

We wish to make the following comments and observations with respect to the exposure draft legislation.

1. In the 2017-18 Federal Budget the Government indicated that the tax law would be amended to tighten access to the concessions so that they can only be accessed in relation to assets that are used in a small business or which represent an ownership interest in a small business. However, while the Budget indicated that these changes would apply from 1 July 2017, no additional information was made available on what form these changes would take or the specific integrity issues that would be addressed until the exposure draft legislation was released in early February 2018.

A number of taxpayers would have entered into transactions or put business structures in place between 1 July 2017 and February 2018 without any way of anticipating the impact that the proposed changes might have on the tax treatment of the transaction or structure.

Similarly, changes to the way the active asset test is applied effectively operate on a retrospective basis because the test needs to be satisfied over a period of time rather than being tested at a specific point in time (eg, just before the CGT event).

Taxpayers who have structured their business arrangements in light of the existing provisions may be disadvantaged by the retrospective nature of these changes.

Given the significant changes being made to the rules dealing with the sale of company shares or trust interests our view is that consideration should be given to delaying the start date of these amendments.

2. While proposed new subsection 152-10(2) indicates that certain modifications need to be taken into account in determining whether the shares or trust interests would pass the active asset test, it is not clear whether these modifications are also intended to apply in determining whether shares in a company or interests in a trust can be treated as replacement assets when applying the rollover relief in Subdivision 152-E.

3. If changes are to be made to the way the active asset test operates in connection with the sale of company shares or trust interests, then for ease of reference consideration should be given to amending the existing active asset provisions that are already contained in subsection 152-40(3) rather than having separate modifications that are contained within section 152-10.

4. The proposed amendments create a further discrepancy between the use of different business structures. This is because proposed new subparagraph 152-10(2)(c) requires that the object entity be carrying on a business just before the CGT event.

Given the ATO's recent comments in TR 2017/D7 which indicate that the threshold for carrying on a business is lower for companies than it is for trusts, you can end up with the situation where the sale of shares in a company qualifies for the concessions in a situation where the concessions would not be available if the transaction involved the sale of units in a trust, even if all other factors are identical. For example, this could be the case where the entity holds business premises that are leased to a trading entity within the group.

5. Presumably subparagraph 152-10(2)(b) is being inserted to address integrity concerns that arise in situations where a passive investor sells shares in a company or units in a trust and subsequently commences a business before the end of the income year in order to access the concessions on the basis that they are classified as a small business entity for the year.

While requiring the taxpayer to be carrying on a business just before the CGT event may well address this concern to some extent, there would still be an opportunity for the taxpayer to commence a new business just before the CGT event and still gain access to the concessions using the SBE test. The real problem appears to be that there is nothing that requires a connection between the business carried on by the taxpayer and the business activities or assets of the relevant company or trust.

6. The proposed amendments create further discrepancy between the rules that apply when someone is selling shares in a company or interests in a trust compared with the situation where someone is selling business assets directly (eg, property that has been used in a business etc).

For example, when selling business assets there is no need for the asset to be active just before the CGT event occurs. In fact, the concessions can still apply even if the taxpayer and their related entities no longer carry on any business activities at all. There are even special rules in section 152-49 to deal specifically with this situation.

Also, when an entity holds assets that are used in a business that is carried on by a connected entity or affiliate there is scope to access the concessions even if the asset owner does not carry on a business in their own right.

However, the proposed amendments would prevent the sale of company shares or trust interests from qualifying for the concessions unless the entity that owns the asset carries on a business in its own right, despite the fact that most or all of its assets are used in a business carried on by connected entities or affiliates (which could include the taxpayer selling the shares or trust interests).

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Thank you for your consideration of this submission. Should you have any queries then please do not hesitate to contact me on 02 9221 6666 or at Michael.Carruthers@hayesknight.com.au.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Michael Carruthers', with a long horizontal flourish extending to the right.

Michael Carruthers
Tax Director – Knowledge Shop Pty Ltd
On behalf of the Hayes Knight Group