

28 February 2018

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

Reference:
2018/ID: AH

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Dear Sir or Madam,

TREASURY CONSULTATION: IMPROVING THE INTEGRITY OF THE SMALL BUSINESS CGT CONCESSIONS

1. We refer to the Exposure Draft released on 8 February 2018 (*Treasury Laws Amendment (Measures for a later sitting) Bill 2018: improving the small business CGT concessions*) (**Proposed Legislation**).
2. We thank you for the opportunity to provide our views on the Proposed Legislation.
3. The purpose of the Proposed Legislation is to implement a series of 'integrity measures' that were first announced on the release of the 2017-18 budget (released 9 May 2017) (**Budget Announcement**).
4. Velocity Legal considers that:
 - 4.1 the Proposed Legislation goes further than mere 'integrity measures';
 - 4.2 the Proposed Legislation has retrospective application; and
 - 4.3 many of the changes could not have been anticipated based on the Budget Announcement. For this reason, it is inappropriate for the majority of the proposed changes to have any retrospective application.
5. Our more detailed comments regarding the Proposed Legislation are set out below.

DETAILED COMMENTS

6. Subsection 152-10(2) inserts four new conditions (paragraph 152-10(2)(a), paragraph 152-10(2)(b), paragraph 152-10(2)(c), paragraph 152-10(2)(d)).¹ We make specific comments regarding each condition as follows.

PARAGRAPH 152-10(2)(a) – MODIFIED ACTIVE ASSET TEST

7. Our comments regarding paragraph 152-10(2)(a) are as follows:

¹ Existing paragraph 152-10(2)(a) is now paragraph 152-10(2)(e). We make no further comment regarding paragraph 152-10(2)(e) as it effectively replicates the existing paragraph 152-10(2)(a).

- 7.1 the purpose of paragraph 152-10(2)(a) is to generally disregard financial instruments and cash, and to look through companies and trusts that the object entity holds shares or units in;
- 7.2 we consider that paragraph 152-10(2)(a) is retrospective for the following reasons:
- (a) the Proposed Legislation will apply from 1 July 2017, however, paragraph 152-10(2)(a) could not have been anticipated from the Budget Announcement;
 - (b) because the active asset test itself is 'backwards looking' (i.e. it considers the status of the asset over its life), the application of paragraph 152-10(2)(a) could potentially go back much earlier than 1 July 2017.
- 7.3 we consider that it is unnecessary to require a second test based on certain assumptions. We suggest that a simpler approach to implement this measure would be to amend section 152-40 itself.

PARAGRAPH 152-10(2)(b) – TAXPAYER CARRYING ON A BUSINESS JUST BEFORE THE CGT EVENT

8. We consider that paragraph 152-10(2)(b) implements the stated intention of the Budget Announcement. That is, it has been possible for a taxpayer to qualify for the small business CGT concessions on the sale of a CGT asset by becoming a 'small business entity' after the sale of some other CGT asset that is unrelated to the small business entity. We consider that paragraph 152-10(2)(b) sufficiently addresses this issue.

PARAGRAPH 152-10(2)(c) – OBJECT ENTITY IS CARRYING ON A BUSINESS JUST BEFORE THE CGT EVENT

9. Our comments regarding paragraph 152-10(2)(c) are as follows:
- 9.1 the purpose of paragraph 152-10(2)(c) is to prevent access to the small business CGT concessions unless the object entity is carrying on a business just before the CGT event;
- 9.2 we consider that paragraph 152-10(2)(a) is retrospective, as the Proposed Legislation will apply from 1 July 2017, however, paragraph 152-10(2)(c) could not have been anticipated from the Budget Announcement; and
- 9.3 we do not consider that paragraph 152-10(2)(c) is necessary. In particular, we consider that it will unfairly restrict access to the concessions in certain circumstances by importing a 'going concern' type test (for example, where a business has ceased, however the object entity owns other assets that were used in the business, or on the winding up of an entity).

PARAGRAPH 152-10(2)(d) – OBJECT ENTITY IS AN SBE OR PASSES MNAV TEST

10. Our comments regarding paragraph 152-10(2)(d) are as follows:
- 10.1 the purpose of paragraph 152-10(2)(d) is to prevent access to the small business CGT concessions unless the object entity is either a 'small business entity' or passes the 'maximum net asset value test';
- 10.2 although paragraph 152-10(2)(d) ensures that the small business CGT concessions cannot be 'inappropriately' accessed (e.g. a taxpayer who is a small business entity cannot access the small business CGT concessions on the sale of a 30% stake in a company worth \$100M), we consider that paragraph 152-10(2)(d) goes much further than necessary;

- 10.3 paragraph 152-10(2)(d) effectively means that the shareholders in a relatively small business cannot access the concessions on the sale of their shares (e.g. a \$9 million company with three equal shareholders). We do not consider this change to be merely an integrity measure.
- 10.4 we consider that the policy objective underlying paragraph 152-10(2)(d) could be achieved by the integrity measure merely restricting access to the small business CGT concessions where an entity qualifies as a small business entity, unless the asset being sold is an asset of the small business entity (rather than an unrelated asset).

11. We thank you for the opportunity to provide our views on the Proposed Legislation.
Please contact Andrew Henshaw to discuss further, if required.

Yours sincerely,



ANDREW HENSHAW
DIRECTOR