

Good morning,

I am aware that the period for submissions on the post-implementation review of the small business CGT concessions has closed however I raised an issue at the meeting of the Losses and CGT subcommittee of the NTLG earlier this week which John Burge of Treasury suggest I draw to your attention. The issue I raised follows.

1. Small business rollover

Is a taxpayer, which satisfies the conditions under subdivision 152-E, able to choose to apply the small business roll-over to only part of the capital gain?

For example, the Brown Family Trust has a \$100,000 capital gain on the sale of goodwill. This capital gain is reduced to \$25,000 under Division 115 and subdivision 152-C. The trust wishes to obtain the roll-over relief under subdivision 152-E but only in respect of \$20,000 of the capital gain. This is because one of the five main beneficiaries is moving on and it is agreed her share of the gain will be paid to her and not reinvested in any replacement asset. The trust purchases a replacement asset for \$25,000. Is the trust able to choose to obtain the roll-over in respect of \$20,000 only of the \$25,000 capital gain?

Section 152-405(1) provides that a taxpayer may choose to obtain the roll-over relief, it is not compulsory. Section 152-405(3) provides that the capital gain is disregarded to the extent that it does not exceed the cost base of the replacement asset. There is no indication that the taxpayer may choose how much of the capital gain is to be disregarded. Further, S.152-415 also simply states that so much of the capital gain that does not exceed the total of the first and second elements of the cost base of the replacement asset is disregarded.

Subdivision 152-E does not seem to specifically address the issue and the wording of S.152-405(3) and S.152-415 do not seem to allow the taxpayer to choose to disregard only part of the capital gain where the cost of the asset is equal to or greater than the amount of the capital gain. However, there does not appear to be any logical reason why a taxpayer could not choose the amount to be disregarded as a taxpayer can under subdivision 152-D. There does not appear to be any risk to the revenue.

ATO view

At the meeting the ATO indicated that it agreed with my view that the provisions do not allow a taxpayer to choose to disregard only part of the gain.

Review

I understand that this issue is not part of the current review and so I am bringing it to your attention as there does not seem to be any logical reason why such a choice should be denied to taxpayers. If the appropriate amendment was made there should be no loss to the revenue, in fact there would be a gain to the revenue as in the above example one fifth of the gain would be taxable rather than the whole gain being disregarded.

Please do not hesitate to contact me (03 9862 7716 or robw@ntaa.com.au) should you wish me to provide further information or if you have any queries.

Yours sincerely,

Robert Warnock
Legal Counsel
National Tax and Accountants' Association
Level 14
499 St. Kilda Road
Melbourne 3144
03 9862 7777