TAXATION INSTITUTE OF AUSTRALIA

1 March 2005

The Post-Implementation Review CGT
The Board of Taxation
C/- The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sirs

Small Business CGT Post Implementation Review

Thank you for the opportunity to provide our comments in relation to the quality and effectiveness of the Small Business CGT Concessions. In particular, we understand that the criteria upon which the Board will measure the quality and effectiveness of the Small Business CGT Concessions will have regard to the extent to which the Legislation:

- gives effect to the Government's policy intent, with compliance and administration costs commensurate with those foreshadowed in the Regulation Impact Statement for the measure;
- is expressed in a clear, simple, comprehensible and workable manner;
- avoids unintended consequences of a substantive nature;
- takes account of actual taxpayer's circumstances and commercial practices;
- is consistent with other Tax Legislation; and
- provides certainty.

Overall, Division 152 of the Income Tax Assessment Act 1997 (the 1997 Act) is a significant step forward when compared to its predecessor provisions in Division 117, 118 and 123 of the Income Tax Assessment Act 1936 (the 1936 Act). From that point of view, the various attempts by Government, the ATO and the Treasury to bring the concessions to their current state are to be commended.

However, the Government's policy intent is difficult to determine from the words of the Legislation and, as a whole we could not state that the Legislation was simple in its application or avoided any unintended consequences of a substantive nature. We point out that this comment should not be interpreted as a failure or criticism of any section of Government, Treasury or the ATO as we concede; striking a balance between providing concessions that assist genuine small businesses and preventing abuse of the concessions is difficult.

For the Taxwise™ Professional

Confusing and Unclear Policy

We consider that the key issue with Division 152 is defining who the Government intends to benefit. An overall comment that could be made in relation to Division 152 is that the policy behind the provision of the concessions is confusing. Before any attempt is made to amend the legislation, we consider that further analysis and consideration is needed to clearly define the Government's policy intent regarding who should benefit under the Small Business CGT Concessions.

We submit that only after the policy of the concessions is defined in detail should the concepts contained within Division 152 be refined and amended to ensure that as far as reasonably practical, all unintended consequences of a substantive nature are eliminated.

By detailed policy, we mean that a fundamental decision needs to be made as to what is a small business. In theory, we consider that it shouldn't matter how a business is structured and how many layers of structuring should exist if fundamentally, the structure is used to operate a small business. Further, ideally, the concessions should apply equally across all structures provided that structure operates a small business.

We would respectively suggest that a Small Business has the following characteristics:

- It has a small number of family groups that control it. We use the phrase *family group* because it is typical that a husband and wife will own shares in the business in varying proportions but still be considered to be a single family group. It is also typical that a combination of a Controlling Individual or a Trust controlled by an individual, or other entity that is controlled by a small number of individuals within the same family will have a stake in a business.

  We do not consider that narrowing the concessions to circumstances where only a single individual or two individuals hold the entity that operates the business is properly identifying what is a Small Business. If, for example, three unrelated family groups combine to operate a business, it does not mean that it is not "small". ***Consequently, we would respectfully submit that the basis of the concessions should centre on control by family groups rather than individuals.***

- The business tends to have goodwill and other business assets that are less than a threshold amount, currently $5m. We respectfully suggest that $5 million is not currently a proper reflection of asset values in businesses. This is partially a reflection of the fact that the threshold has not been indexed and that property values and the sharemarket have increased significantly within the last six years since the concessions were introduced. Many Small Businesses and their controllers tend to own the real estate from which the business is operated. Consequently, a potential alternative may be to carve out from the $5 million threshold the value of property that is used to operate the business from. A separate test for property value may be appropriate

- Typically, the land from which the business is operated is the foundation upon which many Small Business Operators fund their retirement from. The view is that if the business fails, at least the property can be rented out. This should be reflected in the way the concession operate.

- We would not recommend using a level of turnover or taxable income as a measure for determining a small business given high turnover small profit margin businesses. Turnover would not be a proper reflection of the net profit of the business. Taxable income is not necessarily a reflection of the net profit a business earns. Further, the net profit of a business may fluctuate from year to year.

We would find it difficult accepting that any one factor is determinative of what is a Small Business. We recognise that at some point, a distinction needs to be made between a Small Business and other businesses. This, we would submit is a matter for Government to determine.

However, wherever that definition of a Small Business is drawn, we would respectfully recommend that the treatment of taxpayers ought to be the same, irrespective of what structure they choose to operate their businesses from.

2. How the Legislation Currently Appears to Benefit Small Businesses

2.1 Shareholder and business must both have a net asset value of less than $5 million.

Division 152 applies to businesses held by any entity that has a net value of less than $5 million and, broadly, where the individual owners hold particular assets including their equity in the entity that do not exceed $5 million. We consider this policy intent is described in Section 152-15 of the Maximum Net Asset Value Test. In particular, the test requires the taxpayer to look at the taxpayer's assets as well as the value of the assets connected with the taxpayer. It is acknowledged that double counting is avoided.

For example, assume there are two equal shareholders, Mr & Mrs A that own a company that operates a business. If the company sold the business, the company would be the taxpayer for the purpose of Section 152-15. Consequently, the Maximum Net Asset Value Test would only be satisfied if the company's assets were worth less than $5 million and, broadly, the net value of the CGT assets of its controllers are worth than less $5 million. This overall policy theme is consistent across trusts, partnerships and sole traders that operate a business.

The operation of the Maximum Net Asset Value Test has not been stated as specifically as we have just described in any of the Government press releases, the Explanatory Memorandum or any ATO publications on the subject.

From a practitioner's point of view, shareholders of the company cannot understand why the Small Business CGT Provisions do not apply to them where their individual assets (including their equity in the business entity) are worth less than $5 million but the business operated by the company is worth more than $5 million.

For example, assume there are two equal and arm's length shareholders of a company that operates a business that has a net asset value of $6 million. Assume for the purposes of this example that the only assets each individual shareholder owns are the shares in the company.

Under subsection 152-15(a) each shareholder has a net asset value of $6 million. This is because they are required to count 100% of the value of the company they are deemed to control in determining the net value of assets they hold. To prevent double counting, paragraph 152-20(2)(a) the value of their shares in the company are excluded.

In this example, neither the company nor the shareholders have access to the concessions.

We point out that the meaning of an entity that is connected with a shareholder includes entities that a shareholder controls. Control is set to a 40% interest in dividend, capital and voting rights (see Section 152-30).

2.2 There can only be a maximum of two controllers within the one entity

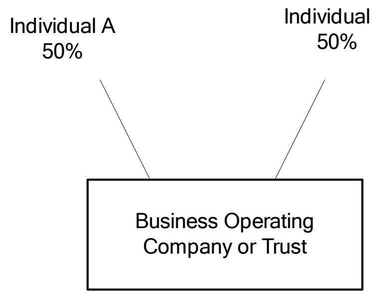
Assume there are two independent family groups that hold one company in equal shares. Mr & Mrs A's combined shareholding is 50%. Mr B holds the remaining 50% of the shares in the company in his own right.

To be a Controlling Individual for the purpose of the concessions in 152-55, the individual has to hold legal and equitable title to shares that carry the rights to at least 50% of the Dividend Voting and Capital Rights in the Company. In our example, Mr and Mrs A do not have access to any of the concessions as neither of them are a controlling individual.

However, in practice, Mrs A is often the silent partner in the operation of the business and Mr A is actually the co controller with Mr B.

This issue becomes more confusing if Mr B say wants to introduce a relative into the business such as his spouse or his son. If Mr B issues further shares to his son such that he no longer owns 50% of the shares in the company, none of the shareholders will attract the concessions even though the business is operated effectively by two family groups. We can't see a policy reason for this outcome.

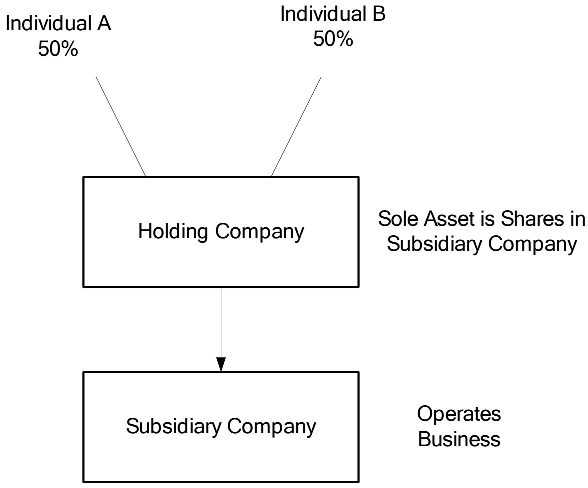
Consequently, the only type of structure contemplated by the concessions is a simple structure that can be summarised in the following diagram:



What often happens is that a key employee will want to become an equity holder of a business. If a third shareholder is introduced in to the business structure, then neither Individual A, Individual B nor the employee can obtain the concessions? This operates as a disincentive to bring employees or other capital providers into the business. Again, we cannot see a reason for limiting the concessions to two individual structures.

2.3 Single Tiered Structure

The other policy matter that is implied in the Legislation is that a small business can only comprise of a simple single tiered structure. For example, assume the following structure:



As the diagram represents, the sole asset held by the Holding Company are shares in the Subsidiary Company. The Subsidiary Company is the entity that operates the business.

Leaving the Maximum Net Asset Test aside, the definition of Active Asset in Section 152-40 precludes Individual A and B from accessing the concession where they sell their shares in the Holding Company. The reason is due to the fact that the Holding Company does not pass the requirement of holding 80% or more of its assets as Active Assets. Shares in Companies and Trusts are specifically excluded from the definition of Active Asset in paragraph 152-40(4)(b) unless the majority of the Holding Company's assets are used in carrying on a business.

A sale of the shares in the Subsidiary Company by the Holding Company will also not attract the concessions on the basis that the Holding Company does not satisfy the basic condition for relief in paragraph 152-10(2)(a) as the Holding Company is not a Controlling Individual.

We point out that the current version of the Small Business CGT Concessions was part of the Ralph reform measures. The Press Release that pre-dated the rewrite of the original concessions was not specific as to what a Small Business was. Consequently, the Institute's view is that a broad general statement that the Government is seeking to assist Small Business and Small Business Operators is insufficient.

Based on the above, we consider that the fundamental foundation of any change to the Legislation should be based on very clear detailed policy objectives. We respectfully suggest to the Board that statistical data should be collated to determine the types and disposition of operating structures for businesses that have a net worth of under a specified threshold.

3. $5 Million Net Asset Threshold

Currently, the Legislation specifies a $5 million Maximum Net Asset Threshold. For the reasons stated above, we consider the threshold ought to be indexed or at least revised to reflect the current acceptable understanding of how small a Small Business needs to be before they should have access to these concessions.

Further, the threshold is a fixed amount which does not contain any provision for shading out. As a result, this hardline approach does encourage costly/artificial manoeuvring to ensure taxpayers fall within the concession. Consideration should be given to applying a shade out where asset's values start exceeding the threshold.

4. Important Significant Business Assets are excluded from the Concessions

The proceeds on disposal of items of intellectual property and in-house software are not brought to tax under the CGT provisions. Rather, they are taxed as the disposal of depreciating assets under the capital allowance provisions of Division 40 of the 1997 Act. These are often critical business assets having been developed by the vendor, with no taxation relief upon disposal, where the policy behind the CGT concessions would suggest that there should be such relief.

Specific Technical Issues Regarding Division 152

Other specific technical issues regarding Division 152 may be summarised as follows:
Subdivision 152 – B: The 15 Year Exemption

1. Practically, the 15 year exemption does not generally apply to Controllers of Discretionary Trusts that operate Small Businesses. This is because, many discretionary trusts will, at least once in that 15 year period distribute more than 50% of the income and capital of the trust to another trust or to a corporate beneficiary.

   As such, there will not be a controlling individual for a 15 year period.

   (See section 152-110 and the definition of *Controlling Individual* in section 152-55)

2. The 15 Year retirement concession only applies in relation to controlling individuals that retire or are permanently incapacitated. Query whether the meaning of permanent incapacity or retirement contemplates the death of the controlling individual. Even if it did, the taxpayer that is seeking access to the concession is the executor/trustee of the deceased estate. The executor or trustee of the deceased estate is not a controlling individual as the do not hold their interest legally and beneficially.

   This is significant because for the period of time between the death of the controlling individual and the time the business is sold by the estate, there is no controlling individual. Therefore, the requirements of sections 152-105 and 152-110 are not satisfied.

Consequently, we consider that clear direction should be given in relation to whether the concession is intended to apply sales of businesses that arise as a result of the death of the controlling individual.

3. The requirement that there must be a controlling individual for a 15 year period does not take into account restructures that may have taken place over the life of the business. For example where a sole trader has rolled the business into a wholly owned company and taken advantage of Rollover Relief under Division 122 during that 15 year period.

4. Definitional Issues

4.1 "The Connected With" Definition contained in Section 152-30

4.1.1 Control is set at 40% with a discretion of the Commissioner to treat someone that has a less than 50% interest as not being a Controller. This is unrealistic and control ought to be set at 50%.

4.1.2 The definition itself is vague and difficult to follow. The experience of our members would indicate that significant compliance costs and advice costs can be incurred by taxpayers in the interpretation of this definition.

4.1.3 The previous version of the definition and the current version of the definition having regard to the amendments announced by Senator Coonan can have inconsistent applications in relation to property owning entities and associated entities.

Assume that a small business has a trust ("property trust") that holds the land and buildings through which the business is operated from. Another trust ("operating trust") actually operates the business. Both trusts are family discretionary trusts and are beneficiaries of each other.

This is a typical arrangement for asset protection reasons. The commercial and business risks are in an entity that is separated from the entity that holds the real estate.

Under the current definition, the property entity will not be connected to the operating entity unless the operating entity has distributed income or capital to the property entity in any of the 4 income years preceding the CGT event. The impact of this issue is felt when the property trust wants to sell the real estate. The land and buildings would be an active asset under paragraph 152-40(1)(c) if they are used in a business operated by a small business CGT affiliate or a connected entity.

The predecessor definition of *connected entity* nevertheless would have included the land and buildings of the property trust within the concessions as the property trust was a beneficiary of the operating trust.

We note that the above outcome may be intended as there was a transitional period in respect of the introduction of the amendments. However this is not evident in Senator Coonan's announcement nor is it evident within the Explanatory Memorandum to *Taxation Laws Amendment (Other Measures No.1) Bill 2004*.

Even so, as the property trust and the operating trust typically have common controllers, we would submit that there is a reasonable argument that the two trusts are small business CGT affiliates as there is a reasonable expectation that the two trusts would act in concert with one another. Alternatively the operating entity could distribute nominal amounts of capital to the property trust to retain its status as a connected entity.

Consequently, if it were the intention to exclude the assets of property trust from the concessions, the attempt to do so does not appear to be fully considered.

We consider that the definition itself does not reflect a clear policy objective regarding who should and who should not gain access to the Small Business CGT Concessions.

4.2 Active Asset Definition contained in Section 152-35 and 152-40

4.2.1 Not clear whether Bank Accounts are Active Assets. A bank account is generally considered to be a financial instrument. This is relevant for several reasons.

First, shares are only active assets if 80% of the market value of the assets held by the company are active assets. Hence, movements in bank accounts and trade debtors affect whether the shareholder will or will not obtain the concessions. The 80% test is measured at the time of the CGT Event. Further, if a shareholder had rolled the capital gain into new shares that were active assets at the time of the rollover, CGT Event J2 would undo the rollover and trigger a capital gain if less than 80% of the assets of the company were active assets.

An identical outcome would apply if the taxpayer were dealing with units in a unit trust instead of shares in a company.

4.2.2 As discussed in paragraph 2.3 of our submission the definition implies that a policy that only single tiered structures will gain the benefit of the concessions.

4.2.3 Trade debts appear to be excluded from the definition of Active Assets as "financial instruments". Notwithstanding that trade debts are integral to a business, a taxpayer could be disadvantaged by making sales shortly before a CGT event thereby converting trading stock into a higher value of trade debt.

4.3 Controlling Individual

4.3.1 Interests of spouses and family members are not taken into account in determining whether an individual is a Controlling Individual.

4.3.2 Legal personal representatives such as Executors, and Trustees of the Controlling Individual's Deceased Estate, and Trustees in Bankruptcy in respect of the Controlling Individual are excluded from the Definition.

4.4 Small Business CGT Affiliate

4.4.1 Children over the age of 18 are not Small Business CGT Affiliates. This discriminates against parent/children businesses.

4.4.2 There is no guidance as to who a person that acts, or could reasonably be expected to act in accordance with your directions or wishes, or in concert with you actually means. The extension of that definition to exclude other partners is equally as vague.

4.5 Net Value of CGT Assets Definition in Section 152-20

4.5.1 The definition reduces the market value of the assets by the "sum of the liabilities that are related to the assets". There is no further description of which liabilities are related to assets. Does the liability have to be secured on the asset? Does the liability have to be incurred to purchase the asset? Does there have to be a tracing in respect of the liabilities at all? Do Trade Creditors get included in the liabilities for the purpose of the net value calculation?

4.5.2 In ATO Interpretive Decision 2004/206, the ATO exclude from the definition of liabilities a number of conventional liabilities that a purchaser will take into account when valuing a business and in respect of which the purchase price will be reduced. This is hardly equitable.

5. CGT Event J2

5.1 CGT Event J2 has a sudden death application if shares were acquired and the shares ceased to be Active Assets because they have a temporary drop in the value of Active Assets so that they fail the 80% test.

5.2 Has an inconsistent application where the Small Business CGT Rollover was previously utilised in respective of the asset caught by CGT Event J2.

5.2.1 There would seem to be a prospect of double taxation arising where the subdivision 152-E small business roll-over is availed of; where there is a subsequent disqualifying use of the replacement asset as a consequence of which CGT event J2 or J3 apply and where there is a subsequent disposal of the replacement asset.

Consider the following example –

An active asset which was acquired of at a cost base of $2,000 is disposed for capital proceeds of $3,000 as a consequence of which there is a prima facie capital gain of $1,000. The vendor taxpayer acquires a new asset at a cost of $5,000 which qualifies for subdivision 152-E roll-over

Section 112-110, broadly, treats the cost base of the replacement asset as being that of the original asset, in the above example of $2,000.
Assume there is a disqualifying event in relation to the replacement asset as a consequence of which CGT event J2 arises. As a consequence, the original deferred capital gain of $1,000 is crystallised.

Assume that immediately following the disqualifying event and the application of CGT event J2, the replacement asset is disposed of for its historical cost of $5,000.

In this event, there are capital proceeds of $5,000 and deducted from those capital proceeds is an amount of $2,000 being the cost base determined in relation to the replacement asset by virtue of Section 112-110. As a consequence, the vendor taxpayer has a taxable capital gain of $3,000.

As a consequence, there is an overall tax on aggregate capital gains of $4,000 whilst there is an economic gain of $1,000.

5.2.2 Further, query whether as a matter of policy it is intended that where a taxpayer has adopted the Small Business Roll-Over Concession, the retirement exemption could be used by that taxpayer on a future gain under CGT events J2 or J3 relating to the amount rolled over. The latter concession though will only apply if the taxpayer receives capital proceeds in respect of the CGT event (see section 152-310, and subsection 152-325 (1) in respect of a company or trust)

A deemed capital gain that arises under CGT Event J2 or J3 does not result in the receipt of capital proceeds.

6. Small Business Retirement Exemption

6.1 The relief only applies where there is a controlling individual that is an individual that has legal and beneficial ownership of at least a 50% interest in the income or capital of a trust or at least a 50% interest in the dividend, voting and capital rights in a company. However, once there is a controlling individual, the relief is also available to a small business CGT concession stakeholder. Again, this is a reflection of the implied policy of the legislation to limit the concessions to single tiered structures. There can only be a maximum of two controlling individuals in any one structure.

6.2 The $500,000 threshold is lower than the lump sum RBL limit and ought to be pegged to the lump sum RBL limit. Alternatively, the $500,000 limit should be indexed annually.

6.3 It is not clear whether the actual capital proceeds in respect of the CGT event that gave rise to the entitlement must be contributed to the Superannuation Fund or paid to the Controlling Individual as opposed to substitute assets or assets of equivalent value can be contributed to the Superannuation Fund or paid to the Controlling Individual. This is an issue addressed by the ATO in ATO Interpretive decision 2004/969.

In that Interpretive decision, the facts considered by the Interpretive decision are as follows:

> *An individual taxpayer, aged under 55, made a capital gain from the sale of an active asset. The individual is considering choosing the small business retirement exemption to disregard the capital gain.*
>
> *The individual proposes to use the capital proceeds to pay out a mortgage on real property before making an in-specie transfer of the real property, instead of paying cash, to their self managed superannuation fund*

The ATO considered that the contribution of the property was within the small business CGT retirement exemption. We consider that the ATO's conclusion outcome is not clearly supported by the legislation. Further, the Interpretive Decision does not provide any significant protection if taxpayers apply ATO ID 2004/969 determination to analogous circumstances as it is not legally binding upon the ATO.

While we support the ATO's finding in ATO ID 2004/969 , we consider that legislative support for their conclusion should be expressly made within the legislation.

6.4 Where Companies or Trusts have sold the Active Assets, the concession only applies where the Company or Trust makes an "Eligible Termination Payment". It is not clear why the Controlling Individual or CGT Concession Stakeholder must retire from an office of employment within their own Company or Trust to satisfy the definition of "eligible termination payment" within section 27A of the 1936 Act to attract the concession (See subsection 152-325(1)). Why is it not sufficient for the relevant amount to be contributed to a superannuation fund?

This outcome is especially onerous if the taxpayer intends to apply some of the capital proceeds from the sale of the business towards another business. We can't reconcile the need to retire from an office of employment if the legislation is intended to facilitate the taxpayer to fund the purchase or expansion of their businesses within their own structures.

In the alternative, the taxpayer may prefer to continue to use the vehicle that conducted the business for investment purposes.

6.5 There is some doubt whether Controlling Individuals and CGT Concession Stakeholders over the age of 55, having received the proceeds of the disposal of a business or an ETP, can rollover the Retirement Exemption Payment if they choose to pay the amount directly into Superannuation.

In this circumstance, the amount is automatically counted towards the individual's RBL at the time of payment significantly reducing future superannuation structuring options.

Had the individual been less than 55, in otherwise similar circumstances the amount is not counted toward their RBL at the time it is contributed to the superannuation fund and full superannuation structuring flexibility is retained.

7. Small Business Rollover

7.1 If the rollover does not take place in the year of income the CGT event arises, it is not clear whether the Legislation allows you to exclude the Capital Gain from the CGT event from the taxpayer's Income Tax Return in the year the CGT event arises pending the rollover.

7.2 The taxpayer must roll the Capital Gain within two years after the last CGT event during the year in which the rollover is chosen. No account is taken of the fact that restrictive covenants in respect of the sale of the business can often last for at least two years, which may restrict the ability to acquire or start up a new business within the two years.

7.3 The Commissioner is provided with discretion to extend the period through which the rollover can take place. There are no clear guidelines in the Legislation as to how that discretion should be exercised and when. Further, there are also no guidelines has to how long the Commissioner should extend the time to acquire replacement asset (see subsection 152-420(3)).

7.4 The cost base of the replacement asset is limited to the cost base of the original asset (see Section 112-110). This can lead to anomalies when the replacement asset is sold and/or when CGT Event J2 applies when the concessions are unwound as discussed above.

8. Earn Outs

8.1 Taxation Ruling TR 93/15 *Capital Gains Tax Consequences of Consideration Comprising a Lump Sum Plus a Right to a Contingent and Unascertainable Amount* considers the taxation consequences of sales of businesses subject to an *Earn Out.*

This arises where the sale price of the business is for example, $1 million plus an additional $500,000 if the net profit of the business exceeds an average of $1.5 million per annum for the next 3 years. Typically, the $500,000 earn out in this example is reduced on a sliding scale if the net profit exceeds $ 1mill but is less than $1.5 million.

Under that type of arrangement, the additional capital proceeds up to a maximum of $500,000 is uncertain as whether it will be received at all or in part. As such the consideration is contingent and unascertainable.

Under TR 93/15, the ATO consider that at the time of the CGT event, the taxpayer receives $1 million plus a chose in action being the promise to pay the additional consideration that is the subject of the contingency. TR 93/15 states that the Taxpayer is required to estimate the market value of the chose in action at the time of the sale.

Any difference between the market value of the chose in action and the amount actually received is included as a capital gain under section 160M(3)(b) of the 1936 Act now rewritten in the 1997 Act as CGT Event C2 (see TR 93/15 paragraphs 18-23).

If the ATO is correct in its treatment, any amount of capital gain that arises when the taxpayer received a payment under the chose in action is not within concessions as it is unlikely that the chose in action is an asset used in a business at the time of the CGT event. The time of the CGT event is when there is a payment in satisfaction of the chose in action.

Division 152 does not take into account any increases in the capital proceeds that arise after the CGT Event save and except 152-420(2) which deals with increases that arise under the deemed market value proceeds rules contained in section 116-45.

We cannot see any reason for excluding earn outs from the concessions. Practically, the exclusion can have the effect of Vendors settling for lower amounts for the sale of their businesses rather than include earn out clauses in the sale contracts. This can disadvantage both Vendor and Purchaser as neither party has the outcome they desire or intend due in part to Division 152.

9. Trusts

9.1 Aside from the comments made above, there are two further key issues regarding the interrelationship between Discretionary trusts and Division 152.

9.2 First, the beneficiary is not placed in the same position as the trust as far as the CGT small business rollover is concerned. Assume that a discretionary trust has derived a capital gain as a result of the disposal of an active asset. The capital gain is distributed to the beneficiary of the trust and the beneficiary wishes to roll the gain into new business assets.

Under the current provisions, the beneficiary is not entitled to rollover relief under section 152-405 as the beneficiary does not satisfy any of the basic conditions. Whereas with a unit trust or a company, the beneficiary could have disposed of their unit or share and accessed the concessions.

9.3 Section 115-225 unwinds the small business 50% reduction and the 50% CGT discount if the trustee of the trust is assessed and pays tax in respect of the capital gain under section 99A. This has the practical effect that all of the gain must be paid out of the trust to preserve the existence of the 50% small business reduction and the 50% CGT discount or the trust must roll all of the gain into new business assets.

This outcome does not apply to companies. They get to retain the small business 50% reduction. We cannot see a reason for treating entities differently.

Should you have any queries, please contact Michael Dirkis, Tax Director on 8223 0111.

Yours faithfully

John de Wijn QC
Vice President