LCG 2016/3 - Small Business Restructure Roll-over: genuine restructure of an ongoing business and related matters

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Law Companion Guideline

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Small Business Restructure Roll-over: genuine restructure of an ongoing business and related matters

Relying on this Guideline

This Guideline is a public ruling for the purposes of the *Taxation Administration Act 1953*.

This Guideline describes how the Commissioner will apply the law as amended by the Tax Laws Amendment (Small Business Restructure Roll-over) Act 2016 to entities that rely on the Guideline in good faith.

If you rely on this Guideline in good faith, you will not have to pay any underpaid tax, penalties or interest in respect of matters covered by the Guideline if it does not correctly state how a relevant provision applies to you.

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What this Guideline is about

1. This Guideline explains the meaning of the term '*genuine restructure of an ongoing business'* in Subdivision 328-G of the *Income Tax Assessment Act 1997* (ITAA 1997).[1]

2. It discusses the features that indicate that a restructure falls within the scope of that term (see Examples 1 to 4 and 8), and those features that indicate that the restructure falls outside (see Examples 5 to 7).

2A. The requirements for the small business restructure rollover (SBRR) to apply include a 'safe harbour' rule. This is an alternative way to satisfy the '*genuine restructure of an ongoing business*' condition. A small business will be taken to satisfy the condition where, among other things, there is no change in the ultimate economic ownership of any of the significant assets of the business for three years following the roll-over.[1A] This Guideline illustrates what could constitute a significant asset of a business and explains the impact where there is a change in the ultimate economic ownership within three years (see Example 9).

2B. This Guideline also canvasses the interaction with Part IVA (see Example 10) and the availability of the SBRR for transfers of active assets and not ownership interests generally (see Example 11).

2C. The SBRR includes an alternative test to satisfy the ultimate economic ownership requirement. This Guideline illustrates situations where a transaction will not have the effect of changing the ultimate economic ownership of an asset, as a result of the alternative test (see Examples 12 and 13).

Date of effect

3. This Guideline applies to transfers that occur on or after 1 July 2016 which involve:

- a balancing adjustment event for a depreciating asset
- trading stock or a revenue asset, or
- a capital gains tax (CGT) event in respect of a CGT asset (that is not a depreciating asset, trading stock or a revenue asset).

Genuine restructure

4. The SBRR can apply to transactions that are, or are part of, a 'genuine restructure of an ongoing business'.[2]

5. Whether a transaction is or is part of a 'genuine restructure of an ongoing business' is a question of fact that is determined having regard to all of the circumstances surrounding the restructure.

6. A 'genuine restructure of an ongoing business' is one that could be reasonably expected to deliver benefits to small business owners in respect of their efficient conduct of the business. It can encompass a restructure of the way in which business assets are held where that structure is likely to have been adopted had the business owners obtained appropriate professional advice when setting up the business. However, it is a composite

[1] Unless otherwise indicated, all legislative references in this Guideline are to the *Income Tax Assessment Act 1997*.

[1A] Section 328-435.

[2] Paragraph 328-430(1)(a). The remaining paragraphs in subsection 328-430(1) set out further requirements for the SBRR to apply, including that the asset being transferred is an active asset, that the ultimate economic ownership of the asset does not materially change, and that the parties to the transaction both meet a residency requirement and choose for the SBRR to apply.

phrase emphasising that the SBRR is *not* available to small business owners who are restructuring in the course of winding down or realising their ownership interests.

7. The following features indicate that a transaction is, or is part of, a 'genuine restructure of an ongoing business':

- It is a bona fide commercial arrangement undertaken in a real and honest sense to
  - facilitate growth, innovation and diversification
  - adapt to changed conditions, or
  - reduce administrative burdens, compliance costs and/or cash flow impediments.
- It is authentically restructuring the way in which the business is conducted as opposed to a 'divestment' or preliminary step to facilitate the economic realisation of assets.
- The economic ownership of the business and its restructured assets is maintained.
- The small business owners continue to operate the business through a different legal structure. For example, there is:
  - continued use of the transferred assets as active assets of the business
  - continuity of employment of key personnel, and
  - continuity of production, supplies, sales or services.
- It results in a structure likely to have been adopted had the small business owners obtained appropriate professional advice when setting up the business.

8. The Commissioner acknowledges that tax considerations are factors that can be taken into account under a genuine small business restructure. For example, a sole trader subject to the highest marginal rate moving to a company structure to access the lower corporate tax rate.

9. However, this is not without limits. There are concerns where the restructure is contrived or unduly tax driven in the sense that it achieves a tax outcome that does not reflect the economic reality or creates an outcome that would, but for the SBRR, ordinarily attract other integrity measures in the law. For example, a restructure directed at eliminating an impending or existing tax liability, would indicate that a restructure is not a 'genuine restructure of an ongoing business'.

10. Other factors which tend to indicate that a restructure is not a 'genuine restructure of an ongoing business' include:

- where the restructure is a preliminary step to facilitate the economic realisation of assets, or takes place in the course of a winding down to transfer wealth between generations
- where the restructure effects an extraction of wealth from the assets of the business (including accumulated profits) for personal investment or consumption or otherwise designed for use outside of the business
- where artificial losses are created or there is a bringing forward of their recognition
- the restructure effects a permanent non-recognition of gain or the creation of artificial timing advantages, and/or

- there are other tax outcomes that do not reflect economic reality.

11. The SBRR contemplates restructures to or from more than one entity. Accordingly, there may be circumstances where not all business assets that are necessary for the continued operation of an 'ongoing business' are transferred. For example, small business owners may decide to transfer plant and equipment to a new entity, but leave real property in the original entity. On its own, this is not a factor that is inconsistent with the conclusion that a restructure is a 'genuine restructure of an ongoing business'.

12. [Omitted.][3]

13. [Omitted.]

14. [Omitted.]

15. [Omitted.]

16. [Omitted.]

Examples – What is a 'genuine restructure of an ongoing business'

Example 1: Asset protection

Facts

17. Mark has been operating a small bookkeeping business and has branched out into financial planning after receiving his financial planning licence. Mark's business has grown significantly and his financial advice arm now generates much larger profits.

18. After being sued by a client for negligent financial advice, Mark has decided he is not prepared to conduct his business on his own account.

19. Mark transfers his active assets used to carry on his financial planning business into a discretionary family trust. He and his wife are the beneficiaries and Mark is the primary individual specified in the family trust election in force in respect of the trust. For asset protection purposes, a corporate trustee is appointed and the trust contracts with clients. Mark does not personally provide guarantees or indemnities. Mark has also caused the trustee to employ other staff to service the larger client base. The trustee pays Mark and the other employees a salary commensurate to the services they provide to the business.

20. Mark and the trustee of the discretionary family trust choose to apply the SBRR.

Relevant considerations

21. Mark is transferring assets from the original entity (himself) to quarantine his business from his personal assets. This is a benefit to Mark in terms of his ability to grow the riskier operations and enhance its profits.

22. The evidence available supports Mark's claim of asset protection. Mark's asset protection strategy and commitment to expand his business is comprehensive and effective.

Conclusion

23. Mark has achieved benefits to the ongoing efficient conduct of his small business. The restructure is a response to his business needs, facilitates further growth and is not unduly tax-driven. The economic ownership of the business is maintained. Accordingly the 'genuine restructure of an ongoing business' condition is satisfied.

[3] [Omitted.]

Example 2: Maintaining essential employees

Facts

24. Adrian carries on a business with his two siblings in a discretionary family trust. They are all beneficiaries of the trust and the family trust election specifies Adrian as the primary individual. The family business has several highly skilled, long-standing and trusted employees.

25. The family transfers the active assets to a company owned by Adrian and his two siblings. Sometime later, the company issues shares to those essential employees (who are not members of the 'family group[4]') with vesting conditions attached to provide incentives for their ongoing involvement in the business.

Relevant considerations

25A. Where Adrian causes the company to issue shares to employees inside a three year period, Adrian cannot access the safe harbour rule in section 328-435. Accordingly, Adrian must consider whether this restructure is a 'genuine restructure of an ongoing business' under the ordinary meaning.

26. There is commercial advantage in restructuring to be able to provide incentives to essential employees.

27. Subsequent admission of employees as equity participants into the business is undertaken to enhance business performance and enable it to adapt to changed conditions in order to increase productivity and profit.

28. The company's conduct after the transfer of assets is appropriately taken into account when considering the genuineness of the restructure. Here, even if the issue of new shares to the employees after the time of asset transfer is not insignificant, there is no additional tax advantage to an existing shareholder, nor access to the worth of the shares.

Conclusion

29. Adrian and his siblings have achieved benefits to the ongoing efficient conduct of the business. The restructure is authentic in the way it changes the operation of the business going forward while maintaining continuity of use of the assets and of key personnel. Accordingly, this is a genuine restructure of an ongoing business.

Example 3: Raising new capital

Facts

30. Melvin and Jenny operate a 'mobile app development' business in partnership and need new capital to fund a major expansion into new ventures.

31. A local investor, Steve, has expressed interest in making a capital contribution in return for an equity stake into the business, if suitable terms can be reached.

32. Melvin and Jenny transfer their active assets to a newly incorporated company where they each own shares in the same proportions as their interests in the partnership assets (50:50). If the SBRR is available, the business assets will be transferred from the partnership in a tax free manner.

[4] Section 272-90 of Schedule 2F to the *Income Tax Assessment Act 1936* (ITAA 1936).

Relevant considerations

33. Operating a business through a company more readily allows Melvin and Jenny to attract the necessary investors needed to raise cash and facilitate growth of the business.

34. The potential new investment from Steve is not part of the restructure and will represent a fresh source of capital for the entity post restructure. On these facts the restructure is not a mechanism by which Melvin and Jenny are realising their interest in the business, which they continue to operate.

Conclusion

35. Restructuring in this manner provides benefits to Melvin and Jenny in their ongoing efficient conduct of the business. Melvin and Jenny are undertaking the arrangement to facilitate growth of the business, and not as a preliminary step in divesting the business to Steve. Accordingly, this is a 'genuine restructure of an ongoing business'.

36. However, the Commissioner will be concerned if Steve's capital contribution is used to facilitate a divestment of the business, as this would be inconsistent with it being a 'genuine restructure of an ongoing business'.

Example 4: Simplifying your affairs

Facts

37. Trent, a cabinet maker, runs a business in a complicated legal structure where the active assets are held in a company and a trustee of a discretionary trust is the sole shareholder of the company.

38. Trent is the sole director of the company and also the primary individual specified in the family trust election in respect of the trust. When Trent established his business, his accountant thought this structure was suitable for Trent's current and future circumstances.

39. However, Trent has no family members and he finds his yearly accountant fees are significant relative to his modest income.

40. Given the type of work Trent does, and his client base, he provides personal guarantees for all his work.

41. The active assets held by the company are transferred to Trent and the SBRR is claimed. The trust vests in the manner contemplated by its deed, and the company is wound up.

Relevant considerations

42. The asset protection features of Trent's existing structure are minimal given Trent's practice and the commercial need to provide personal guarantees. Any benefits it offers can be seen to be outweighed by the costs and administrative complexity involved in dealing with his business affairs.

43. Trent has no family and a modest income. The legal structure he has is not fit for his purposes and there are many disadvantages to running his business through such a complex structure.

Conclusion

44. Trent has achieved significant benefits to the ongoing efficient conduct of his business. On the evidence, the restructure has relieved Trent from additional outlays, and

administrative and compliance burdens in running his business, and is a 'genuine restructure of an ongoing business'.

Examples – What is *not* a 'genuine restructure of an ongoing business'

Example 5: Disposal of a business

Facts

45. Willing buyers are prepared to purchase a business carried on by You Beaut Pty Ltd. However, the buyers do not want to purchase the company shares because they are concerned about undisclosed liabilities.

46. Ben Silverfox is the sole shareholder of You Beaut Pty Ltd. He causes it to transfer its active assets to himself. You Beaut Pty Ltd and Ben assert this transaction is a 'genuine restructure of an ongoing business'.

47. After 12 months have passed, Ben disposes of the assets to the buyers. Ben claims the general 50% CGT discount, which would not have been available to You Beaut Pty Ltd had it disposed of the assets directly to the buyers.

Relevant considerations

48. Ben disposes of the assets inside a three year period after the roll-over transaction takes place. Accordingly, Ben cannot access the safe harbour rule in section 328-435. Therefore, whether this restructure is a 'genuine restructure of an ongoing business' under the ordinary meaning of that expression must be considered.

49. Ben has no expectation of continuing to run his business on an ongoing basis after the transfer.

50. The restructure is not undertaken to enhance business efficiency in terms of facilitating growth, innovation or diversification. Rather, Ben is attempting to use the relief provided by the SBRR to facilitate the economic realisation of his interest in the business.

51. Ben's conduct before and subsequent to the transfer of assets forms part of the evidence taken into account when considering the genuineness of the restructure.

Conclusion

52. The SBRR is not available to You Beaut Pty Ltd and Ben as these circumstances do not exhibit the hallmarks of a 'genuine restructure of an ongoing business'. This arrangement is undertaken as a preliminary step in the economic realisation of Ben's business.

Example 6: Succession planning

Facts

53. Nick owns all the shares in Holding Co a company that operates two restaurants, *Fish* and *Chips*. Nick has two sons and is looking to retire.

54. Nick causes the company to transfer the active assets relating to *Fish* restaurant to Gone Fish Inc., a newly incorporated company that he also owns. The SBRR is claimed.

55. Sometime later, but within three years, Nick retires and disposes of the shares in the Holding Co (which now holds the active assets of *Chips* only) to his first son and the shares in the new company to his other son, so that each of them can run their own restaurants separately. Nick cedes control to his sons as a result of his plan to retire.

Relevant consideration

56. Because Nick retires and disposed of his companies within the three-year period after the transfer of the active assets, he cannot use the safe harbour rule.[4A] Therefore, whether this restructure is a 'genuine restructure of an ongoing business' must still be considered.

57. Nick is breaking up the business to enable a tax-effective inter-generational transfer of wealth. He has no expectation of running his business going forward.

58. Nick's conduct subsequent to the transfer of assets forms part of the evidence that is taken into account when considering the genuineness of the restructure.

Conclusion

59. The SBRR is *not* available to Holding Co and Gone Fish Inc., as the restructure is undertaken in the course of Nick winding down and facilitating an inter-generational transfer of wealth as opposed to a bona fide restructure of an ongoing business.

Example 7: Extraction of wealth from the business assets

Facts

60. Peterson Pauper is a successful business that has been operating through a trust (the Peterson Trust) since its commencement.

61. Each year, the trustee of the Peterson Trust has made its corporate beneficiary, Peterson Pty Ltd, presently entitled to the income of the Peterson Trust.

62. However, none of Peterson Pty Ltd's entitlements have been paid. Instead, the associated funds relating to the unpaid present entitlements (UPEs) have been retained for use in the Peterson Trust.

63. Patricia, the controller of the group, causes the Peterson Trust to satisfy Peterson Pty Ltd's UPEs with the transfer of its active assets to Peterson Pty Ltd. It is assumed that the *ultimate economic ownership* requirement is satisfied. In effect, the business is transferred to Peterson Pty Ltd, and the SBRR is claimed.

64. Peterson Pty Ltd in turn transfers those active assets to a newly established trust, the Patricia Family Trust, and the SBRR is claimed again. The Patricia Family Trust subsequently seeks to dispose of those assets, and transfer any related proceeds to Patricia as a capital distribution.

Relevant considerations

65. The restructure of the business is undertaken as 'back-to-back' transfers. There is no real business benefit from undertaking the arrangement in this way.

66. There is no reasonable expectation that Patricia will continue to run the small business in the different legal structure.

67. The arrangement results in a legal structure that largely replicates the original structure, but has the effect of extinguishing the UPEs on foot. This assists Patricia to divest the business in a manner that involves the extraction of accumulated profits accrued in the corporate tax environment without 'top up' tax ever being paid (that is, the difference between Patricia's marginal tax rate and the corporate rate).

[4A] See section 328-435.

Conclusion

68. There is no bona fide commercial arrangement undertaken with respect to the efficient operation of the business going forward. The series of transactions involving the transfer of assets effectively from the Peterson Trust to the Patricia Family Trust replicates the original structure and eliminates existing and impending tax liabilities. Furthermore, the Patricia Family Trust has divested the business. The arrangement is not undertaken to authentically restructure the way in which the business is conducted, but rather as a preliminary step to facilitate the economic realisation of assets. There are no commercial advantages outside of the undue tax considerations of this restructure.

69. In these circumstances, the application of the SBRR will be denied.

70. Where the safe harbour rule is met, the application of Part IVA would still need to be considered.[5]

Example 8: Variation on Example 7 – 'genuine restructure of an ongoing business'

Facts

71. Altering the facts from Example 7, Patricia instead causes the Peterson Trust to transfer all the active assets of the business to Peterson Pty Ltd in satisfaction of the UPEs, and continues carrying on the business in the company without further asset transfers.

72. Immediately after the transfer, the trustee winds up the Peterson Trust, and the SBRR is claimed.

Relevant considerations

73. The restructure results in a new legal structure that does not replicate the original structure. It changes the way in which assets used in Patricia's ongoing business are held.

74. The reduction in compliance costs derived by simplifying the business structure relieves the administrative burden of tracking all the UPEs on foot.

75. The available evidence indicates that the restructure is not directed at eliminating impending tax liabilities or extracting accumulated profits for personal consumption.

Conclusion

76. This variation delivers a benefit to Patricia in respect of the ongoing efficient conduct of her business. The restructure is not a preliminary step to facilitate the realisation of assets and Patricia has been relieved of the administrative and compliance burden involved in running the business through the original structure to focus on improving the business operations. This restructure satisfies the 'genuine restructure of an ongoing business' condition.

Genuine restructure – the safe harbour rule

77. The SBRR contains a safe harbour rule.[6] This rule provides an alternative way to meet the 'genuine restructure of an ongoing business' condition. It is satisfied if there is no

[5] The safe-harbour only operates to treat the restructure as being genuine for the purposes of paragraph 328-430(1)(a) and does not impact any consideration of the purpose and effect of the restructure for other tax purposes.

[6] See section 328-435.

change in ultimate economic ownership of any of the significant assets of the business, other than trading stock. Those assets must continue to be active assets of the business.[7] Ownership interests in the business are not active assets of the business (see Example 11). Further, there must not be significant or material use of those significant assets for private purposes.

78. Where the safe harbour rule is satisfied, it is not necessary to consider whether the arrangement would otherwise be a 'genuine restructure of an ongoing business' under paragraph 328-430(1)(a).

79. The safe harbour rule does not limit or expand what would otherwise be considered a 'genuine restructure of an ongoing business' within its ordinary meaning.

80. The safe harbour rule only operates to treat the restructure as being genuine for the purposes of paragraph 328-430(1)(a) and does not affect how the purpose and effect of the restructure is considered for other tax purposes.

81. The general anti-avoidance rule in Part IVA of ITAA 1936 (Part IVA) is a provision of last resort and can still apply in appropriate cases to restructures notwithstanding that the safe harbour rule is satisfied (see Example 10).

82. The application of Part IVA to cancel the tax benefit to any particular arrangement depends on a careful weighing of all the relevant facts and surrounding circumstances of each case. Given the wide range of potential circumstances, it is not possible to state definitively when Part IVA will apply to a particular arrangement.

Example 9: significant assets in three year period

Facts

83. Esther is a sole trader and carries on a retail business selling baby products from a bricks-and-mortar shop in an inner city suburb.

84. Esther transfers her business including her shop to a company, where she is the sole director and sole shareholder. The shop is significant in terms of its value relative to the rest of her business assets and its contribution to the business carried on.

85. Twelve months after the transfer, Esther finalises her matrimonial property settlement and transfers the real estate to her former partner. She begins operating her retail business online.

Relevant considerations

86. Whether an asset is significant is a question of fact. In this example, Esther's shop is significant because of its value and because the retail business has been operated from the shop's strategic locations.

Conclusion

87. By transferring the shop to her former partner in under three years from the restructure, Esther cannot rely on the safe harbour rule. Esther instead has to consider whether the restructure was a 'genuine restructure of an ongoing business'.

[7] See paragraph 328-430(1)(d).

Example 10: Anti-avoidance rules may have application

Facts

88. Leor operates his small business as a sole trader. Samuel approaches Leor, wishing to acquire his business. One of Samuel's sons is married to Leor's sister.

89. Leor and Samuel enter into an agreement to sell the business.

90. Leor transfers the active assets relating to his business to a newly established discretionary trust where Leor is one of the beneficiaries.

91. To satisfy the 'genuine restructure of an ongoing business' condition, the trustee relies on the 'safe harbour rule' where no significant assets, apart from trading stock, are disposed of, or used for private purposes, for a three year period.

92. To satisfy the 'ultimate economic ownership test', the trustee relies on the 'alternative ultimate economic test' where the family trust election is made specifying Leor's sister is the primary individual.

93. The SBRR is claimed.

94. After the transfer, Samuel starts managing and expanding the business where its service, managements and personnel change materially. The trustee distributes its trust income and capital to Samuel and his family.

Relevant considerations

95. Although all the requirements for the SBRR to apply might be met, the arrangement is contrived and is undertaken as a step in the economic realisation of Leor's business, as well as wealth transfer to Samuel's family members.

Conclusion

96. The anti-avoidance rules would need to be carefully considered for their application to the arrangement.

Examples – Requirements other than 'genuine restructure of an ongoing business'

Example 11: Active assets

Facts

97. Di provides accommodation services for young travellers in an inner-Melbourne suburb. She operates the business through a company, Fair Dinkum Backpackers Co, of which she is the sole director and shareholder.

98. Di decides to reorganise the ownership interest in her business by interposing a non-fixed trust between herself and the company. On 1 August 2016, Di transfers all of her shares to the Trustee of a newly-settled discretionary trust, where she is one of the beneficiaries. The family trust election is made with herself as the primary individual.

99. Fair Dinkum Backpackers Co is a 'small business entity'[8] for the 2017 income year. Di is not a small business entity but is connected with Fair Dinkum Backpackers Co.

Relevant considerations

100. Fair Dinkum Backpackers Co is not a party to the transfer. The shares are not active assets of a small business entity.[9]

[8] Within the meaning of section 328-110.

101. Di and the Trustee are parties to the transfer and connected with Fair Dinkum Backpackers Co. However, the transferred shares are not active assets used, or held ready for use, by Fair Dinkum Backpackers Co in the course of carrying on its business, nor are they inherently connected with that business.[10]

Conclusion

102. Consequently, the SBRR is not available and Di would need to consider the capital gains tax position from the disposal of her shares.

Example 12: Alternative ultimate economic ownership test

Facts

103. Victoria and Elizabeth are two unrelated individuals operating a business in partnership.

104. Each of Victoria and Elizabeth is a beneficiary of a different discretionary trust. The trustees of these unrelated trusts have been making income and capital distributions to various other beneficiaries for many years.

105. The partners wish to dissolve the partnership and transfer all of the relevant business assets to a newly-incorporated company Newco. The shares in Newco are held by the trustees of the discretionary trusts.

Relevant considerations

106. The SBRR is restricted to circumstances where there has not been a material change in the ultimate economic ownership of assets as a result of the transfer of the assets.

107. A transfer of assets from or to a discretionary trust will not meet the requirements for ultimate economic ownership on their facts. Where it is not possible to demonstrate that ultimate economic ownership of the assets has been maintained, an alternative ultimate economic ownership test is available.[11]

108. The alternative ultimate economic ownership test provides additional flexibility to small family businesses carried on through non-fixed trusts by allowing them to meet the requirement to maintain proportionate ultimate economic ownership of the transferred assets if the ultimate economic ownership of those assets remains within the family.

109. The alternative test is only available when assets are included in the property of a non-fixed trust that is a family trust[12], that is, a non-fixed trust for which there is a family trust election in force.

110. The transfer of business assets to Newco does not result in the inclusion of assets in the property of either trust. The assets of Newco are not affected by any obligation of either Trustee and these assets are not trust property.

Conclusion

111. The alternative test is not available in respect of the transaction and the SBRR is not available for Victoria and Elizabeth to restructure in this way.

[9] Subparagraph 328-430(1)(d)(i) is not satisfied.
[10] Refer to sub-paragraph 328-430(1)(b)(iii) and requirements in sub-paragraph 328-430(1)(d)(ii). Sub-paragraph 328-430(1)(d)(ii) requires section152-10(1A) to be met in respect of the shares.
[11] Paragraph 328-430(1)(c) and section 328-440.
[12] Refer to requirements in paragraph 328-440(a).

Example 13: Alternative ultimate economic ownership test

Facts

112. Steven operates a business of providing golf instruction and equipment sales through a company structure. Steven and his wife, Vicki are the directors. Steven and Vicki hold 100 ordinary shares in the company. Daniel, their son, holds 100 A class shares while Courtney, their daughter, holds 100 B class shares.

113. Steven and Vicki, in their capacity as directors, may resolve to pay dividends to holders of one class of shares to the exclusion of any other.

114. The company transfers the business' active assets to a trust where he and his family members are beneficiaries. The family trust election is made and Steven is the primary individual specified in the election.

Relevant considerations

115. The SBRR is restricted to circumstances where there has been no material change in the ultimate economic ownership of assets as a result of the transfer of the assets.

116. The transfer of assets to a non-fixed trust means that the proportionate ultimate economic ownership of the assets of the trust has changed materially. However, the alternative ultimate economic ownership test must be considered.[13]

117. To meet this alternative test, every individual who had ultimate economic ownership of the transferred asset before the transfer, and every individual who has ultimate economic ownership of the transferred asset after the transfer, must be members of the family group relating to the family trust.

118. In this example, Steven, Vicki, Daniel and Courtney are all members of Steven's family group.

Conclusion

119. The ultimate economic test in paragraph 328-430(1)(c) is satisfied because of the alternative test in section 328-440.

Commissioner of Taxation
13 July 2016

[13] Paragraph 328-430(1)(c) and section 328-440.

References

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BSL: IND