


TD 2006/D26 - Income tax: capital gains: small business concessions: is the rollover of an eligible termination payment from a discretionary trust to a superannuation fund, in relation to an employee who is also a beneficiary of the trust, a 'distribution of income or capital' under subsection 152-55(3) of the Income Tax Assessment Act 1997 for the purposes of the controlling individual test?

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This document has been finalised by TD 2006/66.



Draft Taxation Determination

Income tax: capital gains: small business concessions: is the rollover of an eligible termination payment from a discretionary trust to a superannuation fund, in relation to an employee who is also a beneficiary of the trust, a 'distribution of income or capital' under subsection 152-55(3) of the *Income Tax Assessment Act 1997* for the purposes of the controlling individual test?

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Ruling

1. No. As the rollover of the eligible termination payment (ETP) is made for the person in their capacity as an employee and not in their capacity as a beneficiary, the amount is not a 'distribution of income or capital' under subsection 152-55(3) of the *Income Tax Assessment Act 1997* (ITAA 1997) for the purposes of the controlling individual test.

Example

2. *Discretionary Trust (DT) rolled over an ETP to a superannuation fund for an employee who is also a beneficiary of the discretionary trust. During the same income year, DT did not make any distribution of income or capital to any of the beneficiaries.*

3. *As the payment of the ETP for the beneficiary was paid in their capacity as an employee and not in their capacity as a beneficiary, it is not considered to be a distribution of income or capital made by DT.*

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4. *As DT made no distributions of income or capital to any of its beneficiaries during the income year, it will not have a controlling individual for the purposes of section 152-55 of the ITAA 1997.*

Date of effect

5. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination.

Commissioner of Taxation

14 June 2006

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

Explanation

6. To qualify for the small business capital gains tax (CGT) concessions a discretionary trust must, among other things, satisfy the controlling individual test in section 152-50 of the ITAA 1997. The controlling individual test requires the entity to have a controlling individual just before the CGT event.

7. The requirement for a discretionary trust is set out in subsection 152-55(3) of the ITAA 1997, which provides:

An individual is a **controlling individual** of a trust (where entities do not have entitlements to all the income and capital of the trust) at a time if, during the income year in which the time occurs:

- (a) the trust made a distribution of income or capital, or both; and...

8. The term 'distribution of income or capital' is not a defined term under section 995-1 of the ITAA 1997 or section 6 of the *Income Tax Assessment Act 1936* (ITAA 1936).

9. Schedule 2F of the ITAA 1936 deals with measures relating to trust losses and other deductions. Section 272-45 in Schedule 2F of the ITAA 1936 states:

A trust distributes income or capital of the trust to a person if it:

- (a) pays or credits the income or capital in the form of money to the person; or
- (b) transfers the income or capital in the form of property to the person; or
- (c) reinvests or otherwise deals with the income or capital on behalf of the person or in accordance with the directions of the person; or
- (d) applies the income or capital for the benefit of the person;

in the person's capacity as a beneficiary of the trust.

10. Given the context of these provisions, it is appropriate to adopt similar reasoning in considering the meaning of the term 'distribution of income or capital' for the purposes of subsection 152-55(3) of the ITAA 1997.

11. For the payment to be considered to be a distribution to the beneficiary, the payment must therefore be received 'in the person's capacity as a beneficiary of the trust'.

12. The rollover of an ETP to the superannuation fund was made for the benefit of the employee in consequence of the termination of their employment rather than in their capacity as the beneficiary of the trust.

13. Therefore, the rollover of an ETP to the superannuation fund is not considered to be a 'distribution of income or capital' to the beneficiary.

Note: If a discretionary trust did not make any other distribution of income or capital during the year in which a CGT event happened, the trust will not have a controlling individual and will not be able to access the small business CGT concessions available under Division 152 of the ITAA 1997.

Appendix 2 – Your comments

14. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date. (Note: The Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

Due date: 11 August 2006

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References

Previous draft:

Not previously issued as a draft

- trust distributions

Subject references:

- basic conditions for relief
- CGT retirement exemption
- CGT small business relief
- CGT trust distributions
- controlling individual
- controlling individual test
- distribution
- eligible termination payments

Legislative references:

- ITAA 1936 6
- ITAA 1936 Sch 2F
- ITAA 1936 Sch 2F 272-45
- ITAA 1997 Div 152
- ITAA 1997 152-50
- ITAA 1997 152-55
- ITAA 1997 152-55(3)
- ITAA 1997 995-1

ATO references

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Income Tax ~~ Capital Gains Tax ~~ small business relief - retirement exemption
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