


***TD 2006/D28 - Income tax: capital gains: small business concessions: does a person who has the power to remove the trustee of a discretionary trust and appoint a new trustee control the trust for the purposes of subparagraph 152-30(2)(c)(ii) of the Income Tax Assessment Act 1997 ?***

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This document has been finalised by TD 2006/67.



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## Draft Taxation Determination

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Income tax: capital gains: small business concessions: does a person who has the power to remove the trustee of a discretionary trust and appoint a new trustee control the trust for the purposes of subparagraph 152-30(2)(c)(ii) of the *Income Tax Assessment Act 1997*?

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This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes. You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### Ruling

1. Yes. A person who has the power to remove the trustee of a discretionary trust and appoint a new trustee controls the trust for the purposes of subparagraph 152-30(2)(c)(ii) of the *Income Tax Assessment Act 1997* (ITAA 1997). This is only relevant if subsection 152-30(4) of the ITAA 1997 does not apply.

### Example 1

2. *Discretionary Trust (DT) makes distributions of 25% each to beneficiaries B1, B2, B3 and B4 in each of the last four years. None of the beneficiaries are small business CGT affiliates of each other. The terms of the trust deed specifies that the appointor has the power to remove any trustee and appoint a new trustee.*

3. *As there is no beneficiary (together with any small business CGT affiliate) who has received a distribution of at least 40% of the total distribution, none of the beneficiaries will control DT under subsection 152-30(5) of the ITAA 1997. As none of the beneficiaries control the trust, subsection 152-30(4) of the ITAA 1997 will not apply.*

4. *As the terms of the trust permit the appointor to remove and appoint trustees, the appointor controls the trust under subparagraph 152-30(2)(c)(ii) of the ITAA 1997.*

## **Example 2**

5. *Discretionary Trust (DT) makes distributions of 25% each to beneficiaries B1, B2, B3 and B4 in one of the last four years. B1 and B2 are small business CGT affiliates of each other. The trust deed specifies that the appointor has the power to remove any trustee and appoint a new trustee.*

6. *As B1 and B2 are small business CGT affiliates and together they received a distribution of 50% of the total distribution from DT, they each control DT for the purposes of subsection 152-30(5) of the ITAA 1997.*

7. *Where a beneficiary controls the trust for the purposes of 152-30(5) of the ITAA 1997 and that beneficiary is not a small business CGT affiliate of the trustee, or of a person who has the power to determine how the trustee exercises the power to make payments of income or capital, subsection 152-30(4) of the ITAA 1997 precludes subparagraph 152-30(2)(c)(ii) of the ITAA 1997 from applying.*

8. *Even though the terms of the trust permit the appointor to remove and appoint trustees, the appointor does not control the trust under subparagraph 152-30(2)(c)(ii) of the ITAA 1997.*

## **Date of effect**

9. 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.

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**Commissioner of Taxation**

14 June 2006

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## **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**

10. To qualify for the small business capital gains tax (CGT) concessions a taxpayer must, among other things, satisfy the \$5 million net asset test in section 152-15 of the ITAA 1997. As part of this test, the taxpayer must include in their net asset calculation the net value of the CGT assets of any entities connected with them. Under paragraph 152-30(1)(a) of the ITAA 1997, an entity is connected with another entity if either entity controls the other entity.

11. Under paragraph 152-30(2)(c) of the ITAA 1997 an entity may control a discretionary trust if the entity, its small business CGT affiliates, or all of them together:

- is/are the trustee or trustees of the discretionary trust (other than the Public Trustee of a state or territory); or
- has/have the power to determine how the trustee or trustees exercise the power to make any payment of income or capital to or for the benefit of beneficiaries of the trust.

12. However, an entity may control a discretionary trust in this way only if certain beneficiaries do not control the trust (subsection 152-30(4) of the ITAA 1997). If a beneficiary of a discretionary trust controls the trust under subsection 152-30(5) of the ITAA 1997 and the beneficiary is not a small business CGT affiliate of the trustee, or of a person who has the power to determine how the trustee exercises the power to make payments of income or capital, the trustee or that other person will not control the discretionary trust.

13. On the other hand, if there is no beneficiary who controls the trust under subsection 152-30(5) of the ITAA 1997 or, if all the beneficiaries who control the trust are small business CGT affiliates of the trustee, or of a person who has the power to determine how the trustee exercises the power to make payments of income or capital, subsection 152-30(4) of the ITAA 1997 will not apply and the trustee or that other person will control the trust under paragraph 152-30(2)(c) of the ITAA 1997.

14. Where the trust deed specifies that the appointor of a trust has the power to remove any trustee and appoint a new trustee, it is considered that the appointor has effective power to determine the manner in which the trustee exercises their power to make distributions.

15. In such situations, the appointor controls the discretionary trust and the appointor and the discretionary trust are connected with each other under paragraph 152-30(1)(a) of the ITAA 1997.

### **Note**

16. As noted in the Treasurer's Press Release No. 38 of 2006 (9 May 2006), the Board of Taxation's report on its Post-Implementation Review of the small business CGT concessions contains a number of administrative recommendations. This Draft Taxation Determination is part of the Commissioner's response to Recommendation 6.4 of the Board's report.

## Appendix 2 – Your comments

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17. 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

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*Previous draft:*

Not previously issued as a draft

*Subject references:*

- basic conditions for relief
- capital gains
- capital gains tax
- CGT small business relief
- connected entity
- controlling individual
- controlling individual test
- small business relief

*Legislative references:*

- ITAA 1997 152-15
- ITAA 1997 152-30(1)(a)
- ITAA 1997 152-30(2)(c)
- ITAA 1997 152-30(2)(c)(ii)
- ITAA 1997 152-30(4)
- ITAA 1997 152-30(5)

*Other references*

- Treasurer's Press Release No. 38 of 2006

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ATO references

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Income Tax ~~ Capital Gains Tax ~~ small business relief - basic conditions for relief