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Draft Taxation Determination

Income tax: can a company that carries on a business in a general sense as described in TR 2019/1 but whose only activity is renting out an investment property claim the CGT small business concessions in relation to that investment property?

❶ Relying on this draft Determination

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if the draft Determination turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

Ruling

1. No. A company that carries on a business in a general sense as described in Taxation Ruling TR 2019/1 *Income tax: when does a company carry on a business?* but whose only activity is renting out an investment property cannot claim the capital gains tax (CGT) small business concessions in Division 152 of the *Income Tax Assessment Act 1997*¹ (ITAA 1997) in relation to that investment property.

Example: property investment company

2. *InveproCo is a company incorporated in Australia. InveproCo owns a commercial property, which it has rented to third parties at market rates on normal commercial terms since its inception. InveproCo provides no other services in relation to the property and conducts no other activities. InveproCo has produced a profit in each of the income years it has rented out the property. InveproCo is engaged in ongoing activities that have a purpose and prospect of profit, including letting out the property.*

3. *In this situation, the company has derived rental income from the leasing of a property. Accordingly, the company carries on a business in a general sense described in TR 2019/1. However, the main (only) use of the property is to derive rent and it is therefore excluded from being an active asset under paragraph 152-40(4)(e) regardless of whether the activities constitute the carrying on of a business in a general sense. Therefore, the investment property would not satisfy the active asset test in section 152-35 and InveproCo would not meet the requirement in paragraph 152-10(1)(d) to be eligible for the CGT small business concessions in Division 152 in relation to the disposal of the investment property.*

¹ All further legislative references in this draft Determination are to the ITAA 1997 unless otherwise indicated.

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Date of effect

4. 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 (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation

5 April 2019

Appendix 1 – Explanation

① ***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.***

5. For the CGT small business concessions in Division 152 to apply to reduce or disregard a capital gain, the relevant CGT asset must satisfy the active asset test in section 152-35. The active asset test requires the relevant CGT asset to be an active asset for a total of at least:

- half of the period² the asset is owned for 15 years or less, or
- 7.5 years during the period³ if the asset is owned for more than 15 years.

6. A CGT asset is an active asset of an entity at a given time if, at that time, the entity owns it and:

- it is used (or held ready for use) in the course of carrying on a business by that entity, an affiliate or a connected entity (paragraph 152-40(1)(a)), or
- it is an intangible asset that is inherently connected with a business that is carried on by that entity, an affiliate, or a connected entity (paragraph 152-40(1)(b)).

7. Certain assets are, however, excluded from being active assets under subsection 152-40(4).

Main use to derive rent

8. While a company may be considered to be carrying on a business under TR 2019/1 where its investment property is used to derive rent, the question of whether the investment property is an active asset under section 152-40 and satisfies the active asset test in section 152-35 is a separate consideration for the purposes of the CGT small business concessions in Division 152.

9. Paragraph 152-40(4)(e) excludes, among other things, assets whose main use is to derive rent (unless such use was only temporary). Such assets are excluded even if they are used in the course of carrying on a business.

² Subsection 152-35(2).

³ Subsection 152-35(2).

Appendix 2 – Your comments

10. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

11. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments
- be published on the ATO website at ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 10 May 2019
Contact officer: Renee George
Email address: Renee.George@ato.gov.au
Telephone: (07) 4753 7974

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; TD 2006/78; TR 2017/D7

Legislative references:

- ITAA 1997
- ITAA 1997 Div 152

- ITAA 1997 152-10(1)(d)
- ITAA 1997 152-35
- ITAA 1997 152-35(2)
- ITAA 1997 152-40
- ITAA 1997 152-40(1)(a)
- ITAA 1997 152-40(1)(b)
- ITAA 1997 152-40(4)
- ITAA 1997 152-40(4)(e)

ATO references

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