TD 2007/14 - Income tax: capital gains: small business concessions: what 'liabilities' are included in the calculation of the 'net value of the CGT assets' of an entity in the context of subsection 152-20(1) of the Income Tax Assessment Act 1997?

This ruling is being reviewed as a result of a recent court/tribunal decision. Refer to Decision Impact Statement: Commissioner of Taxation v Byrne Hotels Qld Pty Ltd (Published 9 August 2012).

This document has changed over time. This is a consolidated version of the ruling which was published on *9 May 2007*

Taxation Determination

Income tax: capital gains: small business concessions: what 'liabilities' are included in the calculation of the 'net value of the CGT assets' of an entity in the context of subsection 152-20(1) of the *Income Tax Assessment Act 1997*?

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Ruling

1. The term 'liabilities' in the context of subsection 152-20(1) of the *Income Tax Assessment Act 1997*[1] has its ordinary meaning. 'Liabilities' extend to legally enforceable debts due for payment and to presently existing obligations to pay either a sum certain or ascertainable sums. It does not extend to contingent liabilities, future obligations or expectancies.

[1] All legislative references are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

Example 1

2. *Cool Tool Pty Ltd is selling its business. The assets and liabilities of the company are as follows:*

Assets:	***$***	***$***
Plant and machinery	*1,500,000*	
Freehold premises	*3,500,000*	*5,000,000*
Liabilities:		
Mortgage (secured over the premises)	*2,000,000*	
Provision for leave of employees	*500,000*	
Unbilled expenses (business consultant)	*200,000*	
Provision for rebates	*200,000*	
Provision for possible damages payout	*100,000*	*3,000,000*
Net assets:		*2,000,000*

3. *The net value of the CGT assets of the company is calculated as follows:*

Assets:	***$***	***$***
Plant and machinery	*1,500,000*	
Freehold premises	*3,500,000*	*5,000,000*
Liabilities:		
Mortgage (secured over the premises)	*2,000,000*	*2,000,000*
Net value of CGT assets:		*3,000,000*

4. *The following items are not taken into account in working out the net value of the CGT assets of Cool Tool Pty Ltd because they are contingent liabilities, future obligations or expectancies:*

- *provision for possible damages payout;*
- *provision for leave of employees;*
- *unbilled expenses (business consultant); and*
- *provision for rebates.*

(Note: for CGT events happening in the 2006-07 income year or later income years the law has been amended to allow certain provisions to be taken into account in determining the net value of the CGT assets of an entity. See paragraph 25 of this Determination for more information.)

Example 2

5. *Pretty in Pink Pty Ltd is selling its clothing business. The assets and liabilities of the company are as follows:*

Assets:	***$***	***$***
Fixtures and fittings	*300,000*	
Freehold premises in Parramatta	*3,500,000*	
Freehold premises in Penrith	*2,500,000*	*6,300,000*
Liabilities:		
Bank overdraft	*600,000*	
Mortgage (secured over Parramatta premises)	*500,000*	
Bill of exchange for Penrith premises	*400,000*	*1,500,000*
Net value of CGT assets:		*4,800,000*

6. *The fixtures and fittings may be depreciating assets and the gains from them may be treated as income rather than capital gains but they are still CGT assets. Hence, they are included in the calculation of the net value of CGT assets of Pretty in Pink Pty Ltd.*

7. *The bank overdraft is taken into account in working out the net value of the CGT assets of Pretty in Pink Pty Ltd because it is a general liability that relates to all the assets of the company.*

Example 3

8. *Cassandra operates a dancing school. Five years ago, Fancy Foot Pty Ltd, which is wholly owned by Cassandra, bought a dancing studio where she conducts the dancing school. Fancy Foot Pty Ltd has no other CGT assets. The studio has a current market value of $5 million with $0.5 million of the loan used to purchase the studio still outstanding.*

9. *Last year, Wanadance Pty Ltd, also wholly owned by Cassandra, bought a warehouse to store dancing costumes and stage materials. Wanadance Pty Ltd has no other CGT assets. The market value of the warehouse subsequently fell, and is now $2 million. $2.8 million of the loan to purchase the warehouse is still outstanding.*

10. *Cassandra has accepted a leading role in a Broadway show overseas. A contract has been entered into to sell both the studio and the warehouse.*

11. *Both Fancy Foot Pty Ltd and Wanadance Pty Ltd are connected with Cassandra for the purposes of small business concessions. Cassandra has no small business CGT affiliates. She has other CGT assets, which have a net value of $1 million.*

12. *The net value of Cassandra's CGT assets is calculated as follows:*

Net value of CGT assets of Cassandra	*$1.0m*
Net value of CGT assets of Fancy Foot Pty Ltd – Studio: ($5m less $0.5m)	*$4.5m*
Net value of CGT assets of Wanadance Pty Ltd – Warehouse: ($2m less $2.8m)	*nil*
Total net value of CGT assets:	*$5.5m*

13. *Cassandra will not qualify for the small business CGT concessions because she does not satisfy the $5 million maximum net asset test. Note that the $0.8 million excess liability in respect of Wanadance Pty Ltd's CGT asset (the warehouse) cannot be offset against the value of Cassandra's assets or Fancy Foot Pty Ltd's CGT asset (the studio).*

(Note: for CGT events happening in the 2006-07 income year or later income years the law has been amended to allow a negative net value. See paragraph 25 of this Determination for more information. Therefore in this example if the CGT event happened in the 2006-07 income year or a later income year, the net value of the CGT assets of Wanadance Pty Ltd would be negative $0.8 million which could then be offset against the net value of the CGT assets of the other entities, giving a total net value of CGT assets of $4.7 million and allowing Cassandra to satisfy the net asset test.)

Date of effect

14. This Determination applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of the determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
9 May 2007

Appendix 1 – Explanation

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

Explanation

15. One of the basic conditions that must be satisfied to qualify for the small business CGT concessions is the maximum net asset value test in section 152-15. Under this test, the net value of the CGT assets of the taxpayer and certain related entities must not exceed $5 million just before the relevant CGT event.

16. The 'net value of the CGT assets' of an entity is the amount (if any) by which the sum of the market values of those assets exceeds the sum of the liabilities of the entity that are related to the assets (subsection 152-20(1)). (Note: for CGT events happening in the 2006-07 income year or later income years subsection 152-20(1) has been amended in certain respects. See paragraph 25 of this Determination for more information.)

17. The term 'liabilities' is not defined for the purposes of the 'net value of the CGT assets' definition. Accordingly, it has its ordinary meaning reflecting the context in which it is used. *The Macquarie Dictionary,* revised 3rd edition, defines liability to mean: 'an obligation, especially for payment; debt or pecuniary obligation'.

18. In the context of subsection 152-20(1), 'liabilities' extend to legally enforceable debts due for payment and to presently existing obligations to pay either a sum certain or ascertainable sums. The term does not extend to contingent liabilities, future obligations or expectancies.

19. A 'contingent liability' is a liability which will become due only on the occurrence of an event that may or may not happen. An example is a possible obligation to pay damages in future if the judgment in a pending lawsuit is unfavourable.

20. Examples of amounts that are not included in 'liabilities' for the purposes of determining the 'net value of the CGT assets' of an entity include:

- provisions for possible obligation to pay damages in a pending lawsuit;
- provisions for liabilities in respect of an earn-out contract;
- provisions for guarantee of a loan;
- provisions for long service and annual leave entitlements;
- provisions for income and other taxes prior to the liability arising;
- accounting liabilities arising as a result of receiving prepaid income;
- expenses that are not yet due; and
- provisions in general for such things as quantity rebates and the like.

(Note: for CGT events happening in the 2006-07 income year or later income years the law has been amended to allow certain provisions to be taken into account in determining the net value of the CGT assets of an entity. See paragraph 25 of this Determination for more information.)

Liabilities that are related to the assets

21. The 'liabilities of the entity that are related to the assets' in subsection 152-20(1) include liabilities directly related to particular assets that are themselves included in the calculation, for example, a loan to finance the purchase of business premises.

22. The 'liabilities of the entity that are related to the assets' also include liabilities that, although not directly related to one particular asset, are related to the assets of the entity more generally, for example, a bank overdraft or other short term financing facility that provides working capital for the operation of the business.

Lowest net value is nil

23. Subsection 152-20(1) determines the net value of the CGT assets on an entity by entity basis. The liabilities of one entity therefore cannot be taken into account in determining the net value of the CGT assets of another entity. Subsection 152-20(1) refers to an amount (if any) by which one sum exceeds another sum. In other words, it refers to an excess, if there is one. As there cannot be a negative excess, the lowest possible value of the 'net value of the CGT assets' of an entity is nil. (Note: for CGT events happening in the 2006-07 income year or later income years the law has been amended to allow a negative net value. See paragraph 25 of this Determination for more information.)

Note

24. 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 Taxation Determination is part of the Commissioner's response to Recommendation 6.1 of the Board's report.

25. The Board's report also contains a number of legislative recommendations. *Taxation Laws Amendment (2006 Measures No. 7) Act 2007*, which received Royal Assent on 12 April 2007, gives effect to the Board's legislative recommendations accepted by Government. The changes apply to CGT events happening in the 2006-07 income year or later income years. There are two changes relevant to this Determination:

- amended subsection 152-20(1) allows the possibility of a negative net value of the CGT assets of any entity to be calculated; and
- new paragraph 152-20(1)(b) allows provisions for annual leave, provisions for long service leave, provisions for unearned income and provisions for tax liabilities to be taken into account in determining the net value of the CGT assets of an entity but does not affect the meaning of the term 'liabilities' as discussed in this Determination.

Appendix 2 – Alternative views

This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the binding public ruling.

Alternative view: accounting meaning of 'liabilities'

26. An alternative view is that in the context of subsection 152-20(1), 'liabilities' has its accounting meaning.

27. The Commissioner considers the term 'liabilities' should not have its accounting meaning in the context of subsection 152-20(1) as, unlike the thin capitalisation provisions in Division 820, for example, where the term has its accounting meaning (see Taxation Ruling TR 2002/20), there are insufficient contextual factors for that interpretation.

References

Previous draft:

TD 2006/D27

Related Rulings/Determinations:

TR 2002/20; TR 2006/10

Subject references:

- basic conditions for relief
- capital gains tax
- CGT assets
- CGT events
- CGT small business relief
- contingent liabilities
- maximum net asset value test

Legislative references:

- ITAA 1997 152-15
- ITAA 1997 152-20(1)
- ITAA 1997 152-20(1)(b)
- ITAA 1997 Div 820
- TAA 1953
- Taxation Laws Amendment (2006 Measures No. 7) Act 2007

Other references:

- The Macquarie Dictionary, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW
- Treasurer's Press Release No. 38 of 2006

ATO references

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