

***TD 2021/2 - Income tax: can 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 claim the capital gains tax small business concessions in relation to that investment property?***

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! There is a Compendium for this document: [TD 2021/2EC](#) .



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Status: **legally binding**

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## Taxation Determination

Income tax: can 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 claim the capital gains tax small business concessions in relation to that investment property?

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### **📌 Relying on this Determination**

This publication (excluding appendix) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Determination applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Determination. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Determination.

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### **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*<sup>1</sup> in relation to that investment property. This is because an asset whose main use is to derive rent (unless such use was only temporary) is subject to an exclusion from those concessions<sup>2</sup>, even if it is used in the course of carrying on a business.

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<sup>1</sup> All legislative references in this Determination are to the *Income Tax Assessment Act 1997* unless otherwise indicated.

<sup>2</sup> Paragraph 152-40(4)(e).

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Status: **legally binding**

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**Example – property investment company**

2. *InveproCo is a company incorporated in Australia. InveproCo owns a commercial property, which it has rented to unrelated 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, namely letting out the property.*

3. *In this situation, the company has derived rental income from the leasing of a property to an unrelated third party. 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.*

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**Date of effect**

4. This Determination applies 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*).

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**Commissioner of Taxation**

24 February 2021

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Status: **not legally binding**

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## Appendix – Explanation

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**❶** *This Explanation 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.*

5. For the CGT small business concessions to apply, one of the conditions that must be satisfied is that the relevant CGT asset satisfies the active asset test in section 152-35.
6. The active asset test requires the relevant CGT asset to be an active asset of yours for at least<sup>3</sup>:
- half of the relevant period<sup>4</sup>, if you owned the asset for 15 years or less, or
  - 7.5 years during the relevant period.
7. A CGT asset is an active asset at a given time if, at that time, you own it and it is:
- used (or held ready for use) in the course of carrying on a business by you, your affiliate or an entity connected with you<sup>5</sup>, or
  - an intangible asset that is inherently connected with a business that is carried on by you, your affiliate, or an entity connected with you.<sup>6</sup>
8. Certain assets are, however, specifically excluded from being active assets under subsection 152-40(4).

### Main use to derive rent

9. 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.
10. 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.
11. Taxation Determination TD 2006/78 *Income tax: capital gains: are there any circumstances in which the premises used in a business of providing accommodation for reward may satisfy the active asset test in section 152-35 of the Income Tax Assessment Act 1997 notwithstanding the exclusion in paragraph 152-40(4)(e) of the Income Tax Assessment Act 1997 for assets whose main use is to derive rent?* provides examples of when the Commissioner considers property is for the main use of deriving rent.

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<sup>3</sup> Subsection 152-35(1).

<sup>4</sup> The relevant period described in subsection 152-35(2) is the time between when you acquired the asset and the earlier of either the CGT event or the cessation of the business (if the business ceased to be carried on in the 12 months before the CGT event or any longer period the Commissioner allows).

<sup>5</sup> Paragraph 152-40(1)(a).

<sup>6</sup> Paragraph 152-40(1)(b).

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Status: **not legally binding**

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## References

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*Previous draft:*

Previously released in draft form as  
TD 2019/D4

*Related Rulings/Determinations:*

TD 2006/78; TR 2006/10; TR 2017/D7;  
TR 2019/1

*Legislative references:*

- ITAA 1997 Div 152
- ITAA 1997 152-10(1)(d)

- ITAA 1997 152-35
- ITAA 1997 152-35(1)
- 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)
- TAA 1953

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ATO references

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