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## Draft Taxation Determination

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### **Income tax: capital gains: for the ‘net value’ test in subsection 104-230(2) of the *Income Tax Assessment Act 1997* to be satisfied, are the requirements of paragraphs 104-230(2)(a) and 104-230(2)(b) mutually exclusive?**

#### ***Preamble***

*Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office. DTDs should not be relied on; only final Taxation Determinations represent authoritative statements by the Australian Taxation Office.*

1. Yes. To satisfy the ‘net value’ test in subsection 104-230(2) of the *Income Tax Assessment Act 1997*, the requirements of either paragraph 104-230(2)(a) or paragraph 104-230(2)(b) must be met without recourse to the other.
2. Subsection 104-230(2) is satisfied if:
  - (a) the market value of post-CGT property of a company is at least 75% of the net value of the company; or
  - (b) the market value of interests of the company owned through interposed companies or trusts in post-CGT property is at least 75% of the net value of the company; or
  - (c) the market value of post-CGT property of the company is at least 75% of the net value of the company and quite separately, the market value of interests of the company owned through interposed companies or trusts in post-CGT property is at least 75% of the net value of the company.
3. If the requirement in paragraph 104-230(2)(a) is not satisfied, then the requirement in paragraph 104-230(2)(b) must be satisfied for section 104-230 to apply or vice versa.
4. The use of the word ‘or’ between paragraphs 104-230(2)(a) and 104-230(2)(b) supports the view in this draft Taxation Determination that the requirements in subsection 104-230(2) are mutually exclusive. In ordinary parlance, the word ‘or’ is used disjunctively.

**Example**

5. *X acquired all of the shares of A Pty Ltd (a private company manufacturer) before 20 September 1985. X sells those shares after 20 September 1985. At the time of the disposal of the shares, A Pty Ltd owns pre-CGT property, post-CGT property and all the issued shares in B Pty Ltd, another private company. The market value of the property of A Pty Ltd at the date of sale is shown in the table below. The only asset of B Pty Ltd is post-CGT property with a market value of \$2,600,000.*

<i>Assets of A Pty Ltd</i>	<i>Market value (\$1,000s)</i>	<i>Net value %</i>
<i>Pre-CGT property</i>	<i>2,500</i>	<i>22.52%</i>
<i>Post-CGT property</i>	<i>6,000</i>	<i>54.05%</i>
<i>Pre-CGT shares in B Pty Ltd</i>	<i><u>2,600</u></i>	<i><u>23.43%</u></i>
<i>Net value</i>	<i><u>11,100</u></i>	<i><u>100%</u></i>

6. *Paragraph 104-230(2)(a) is not satisfied because the market value of post-CGT property in A Pty Ltd does not equal or exceed 75% of the net value of A Pty Ltd (\$6,000/\$11,100, that is, 54.05%). Paragraph 104-230(2)(b) is also not satisfied because the market value of A Pty Ltd's interests in the post-CGT property of B Pty Ltd does not equal or exceed 75% of the net value of A Pty Ltd (\$2,600/\$11,100, that is, 23.43%).*

7. *In this case, the threshold net value test is not satisfied. This is so even though the market value of post-CGT property in A Pty Ltd and because the market value of A Pty Ltd's interests in the post-CGT property of B Pty Ltd would equal or exceed 75% of the net value of A Pty Ltd [(\$6,000 + \$2,600)/\$11,100, that is, 77.48%] if the requirements in paragraphs 104-230(2)(a) and 104-230(2)(b) were applied cumulatively.*

**Note 1:**

8. Although the requirements in paragraphs 104-230(2)(a) and 104-230(2)(b) are mutually exclusive for the purposes of the ‘net value’ test in subsection 104-230(2), the expression ‘property referred to in subsection [104-230](2)’ in its context in subsection 104-230(6) encompasses both post-CGT property of your company and post-CGT property of all interposed companies or trusts .

**Note 2:**

9. In this draft Taxation Determination:

‘*interposed company*’, in relation to a company (company A), means another company (company B) in which company A owns shares – whether they are pre-CGT shares or post-CGT shares – if company B owns post-CGT property and extends to any company (say, company C) which is an interposed company of an interposed company (for example, company B) if the first mentioned interposed company (company C) owns post-CGT property;

‘*post-CGT property*’ means property (that is not trading stock) acquired on or after 20 September 1985;

‘*pre-CGT property*’ means property acquired before 20 September 1985; and

'pre-CGT shares' means shares acquired before 20 September 1985.

**Note 3:**

10. The views expressed in this draft Taxation Determination in relation to shares in a company apply, adapted as necessary, to an interest in a trust to which section 104-230 applies.

**Your comments**

11. We invite you to comment on this Draft Taxation Determination. We are allowing 4 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

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**Commissioner of Taxation**

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*Previous draft:*

Not previously issued in draft form.

*Related Rulings/Determinations:*

TD 2000/D14; TD 2000/D15; TD 2000/D16; TD 2000/D17; TD 2000/D18; TD 2000/D19;

*Subject references:*

- interest in property
- interest in trust
- interposed company
- net value
- net value test
- private company
- property
- shares
- trust

*Legislative references:*

- ITAA 1997 104-230
- ITAA 1997 104-230(2)
- ITAA 1997 104-230(2)(a)
- ITAA 1997 104-230(2)(b)
- ITAA 1997 104-230(6)

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*ATO references:*

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