TD 2005/13W - Income tax: capital gains: if there is a change in the majority underlying interests in an asset owned by an entity, does the entity's ownership of the asset start from the change in majority underlying interests for the purpose of applying the tests in paragraphs 152-110(1)(b) and (c) of the Income Tax Assessment Act 1997?

Notice of Withdrawal

Taxation Determination

Income tax: capital gains: if there is a change in the majority underlying interests in an asset owned by an entity, does the entity's ownership of the asset start from the change in majority underlying interests for the purpose of applying the tests in paragraphs 152-110(1)(b) and (c) of the *Income Tax Assessment Act 1997*?

Taxation Determination TD 2005/13 is withdrawn with effect from today.

An overview of TD 2005/13

1. Paragraphs 152-110(1)(b) and (c) of the *Income Tax Assessment Act 1997* (ITAA 1997) set out some of the conditions that a company or trust must satisfy to disregard a capital gain under the small business 15-year exemption in Subdivision 152-B of the ITAA 1997. In particular, an entity must have continuously owned the CGT asset for the 15-year period ending just before the CGT event (paragraph 152-110(1)(b) of the ITAA 1997). As well, at all times during the whole period for which the entity owned the asset, the entity must have had a controlling individual (paragraph 152-110(1)(c) of the ITAA 1997).

2. Under section 149-30 of the ITAA 1997 an asset of a non-public entity stops being a pre-CGT asset if the majority underlying interests in the asset are 'not had' by ultimate owners who had those interests immediately before 20 September 1985. Instead the entity is taken to have acquired the asset when the change in majority underlying interests occurred. However, the operation of section 149-30 does not change the entity's actual period of ownership of the asset. The entity has still owned the asset from the time it originally acquired it. As such, the entity's ownership of the asset prior to the change in majority underlying interests is relevant in determining whether the entity has met the tests in paragraphs 152-110(1)(b) and (c) of the ITAA 1997.

Why TD 2005/13 is being withdrawn

3. In response to Tax Issues Entry System (TIES) issue number 0009-2009, *Tax Laws Amendment (2009 Measures No. 4) Act 2009* enacted subsection 152-110(1A) of the ITAA 1997, with application to payments made by entities to CGT concession stakeholders on or after 18 September 2009.

4. Where an asset stops being a pre-CGT asset under Division 149 of the ITAA 1997, subsection 149-30(1A) of the ITAA 1997 deems the entity to have acquired the asset at the time of the change in majority underlying interests. However, subsection 152-110(1A) of the ITAA 1997 provides that for the purposes of paragraphs 152-110(1)(b) and (c) of the ITAA 1997, subsection 149-30(1A) of the ITAA 1997 is disregarded. Therefore, as there is no deemed acquisition of the asset by the entity at a time different to its actual acquisition, no question arises of whether there is a relevant ownership period different to the entity's actual ownership of the asset. Accordingly, for the purposes of paragraphs 152-110(1)(b) and (c) of the ITAA 1997, the ownership period of the CGT asset starts from the time the entity originally acquired the asset.

5. As the issues dealt with by TD 2005/13 have now been addressed legislatively (in a manner consistent with TD 2005/13), TD 2005/13 is withdrawn.

Note

6. As noted below, an earlier change in the law altered some of the conditions for the 15 year exemption but did not affect the view set out in TD 2005/13.

7. For CGT events happening in the 2006-07 income year or later income years, *Tax Laws Amendment (2006 Measures No. 7) Act 2007* replaced the 50% controlling individual test with a 20% significant individual test (sections 152-50 to 152-75 of the ITAA 1997). The amendments also changed the period during which an entity was required to have a significant individual for the purpose of the 15 year exemption (paragraph 152-110(1)(c) of the ITAA 1997) from the whole period of ownership of the asset to a period of at least 15 years during which the entity owned the asset.

Commissioner of Taxation
19 December 2012

ATO references

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