



TD 2006/66W - Income tax: capital gains: small business concessions: is the rollover of an eligible termination payment from a discretionary trust to a superannuation fund, in relation to an employee who is also a beneficiary of the trust, a 'distribution of income or capital' under subsection 152-55(3) of the Income Tax Assessment Act 1997 for the purposes of the controlling individual test?

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 This document has changed over time. This is a consolidated version of the ruling which was published on *19 December 2012*



Notice of Withdrawal

Taxation Determination

Income tax: capital gains - small business concessions - is the rollover of an eligible termination payment from a discretionary trust to a superannuation fund, in relation to an employee who is also a beneficiary of the trust, a 'distribution of income or capital' under subsection 152-55(3) of the *Income Tax Assessment Act 1997* for the purposes of the controlling individual test?

Taxation Determination TD 2006/66 is withdrawn with effect from today.

An overview of TD 2006/66

1. TD 2006/66 states that a rollover of an eligible termination payment (ETP) from a discretionary trust to a superannuation fund, in relation to an employee who is also a beneficiary of the trust, is not a 'distribution of income or capital' under subsection 152-55(3) of the *Income Tax Assessment Act 1997* (ITAA 1997) for the purposes of the controlling individual test.
2. The Determination notes the term 'distribution of income or capital' is not defined and considers it appropriate to adopt a similar approach to that in Schedule 2F to the *Income Tax Assessment Act 1936* concerning trust losses. That is, for a payment to be considered to be a distribution of income or capital to a person, it must be received in the person's capacity as a beneficiary of the trust. As the rollover of an ETP to the superannuation fund is made in respect of the employee in consequence of the termination of their employment rather than in their capacity as a beneficiary of the trust, the Determination concludes that such a rollover is not a distribution of income or capital for the purposes of the controlling individual test.

Why TD 2006/66 is being withdrawn

3. The concept of ETPs, including the ability to rollover an ETP to a superannuation fund, was removed from 1 July 2007 by *Tax Laws Amendment (Simplified Superannuation) Act 2007* as a result of the Simplified Superannuation reforms. Consistent

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with this, *Superannuation Legislation Amendment (Simplification) Act 2007* removed references to rolling over an ETP in Subdivision 152-D of the ITAA 1997 (the retirement exemption) for CGT events happening in the 2007-08 income year and later income years. Instead, to qualify for the retirement exemption, if a CGT concession stakeholder is under 55 years of age, a company or trust must make the required payment in relation to them by contributing it on their behalf to a complying superannuation fund. Such a contribution is treated as a personal contribution and not an employer contribution.

4. As the Taxation Determination specifically addresses the question of whether the rollover of an ETP is a distribution of income or capital and the ETP concept has been removed from the superannuation legislation and the retirement exemption provisions, the Determination is accordingly withdrawn. It can be noted that it is a separate question as to whether a contribution a trust makes to a complying superannuation fund in relation to a CGT concession stakeholder as required under the amended retirement exemption provisions is a distribution of income or capital.

Commissioner of Taxation

19 December 2012

ATO references

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Income Tax~~Capital Gains Tax~~small business relief - 'controlling individual test'
Income Tax~~Capital Gains Tax~~small business relief - retirement exemption
Income Tax~~Assessable income~~eligible termination payments