



***TD 2006/68 - Income tax: capital gains: small business concessions: can trustees or members of a complying superannuation fund 'control' the superannuation fund in the way described in section 328-125 of the Income Tax Assessment Act 1997?***

 This cover sheet is provided for information only. It does not form part of *TD 2006/68 - Income tax: capital gains: small business concessions: can trustees or members of a complying superannuation fund 'control' the superannuation fund in the way described in section 328-125 of the Income Tax Assessment Act 1997?*

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



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## Taxation Determination

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Income tax: capital gains: small business  
concessions: can trustees or members of a complying  
superannuation fund 'control' the superannuation fund  
in the way described in section 328-125 of the *Income  
Tax Assessment Act 1997*?

**❶ This publication provides you with the following level of protection:**

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

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

**[Note:** This is a consolidated version of this document. Refer to the Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

### Ruling

1. No. Neither the trustees nor the members of a complying superannuation fund control the fund in the way described in section 328-125 of the *Income Tax Assessment Act 1997* (ITAA 1997).
2. The members of a complying superannuation fund do not beneficially own, or have the right to acquire beneficial ownership of, interests carrying the right to distributions of income or capital. Further, a complying superannuation fund does not distribute income or capital as such, but rather pays benefits in the form of pensions or lump sums on the occurrence of certain events, such as retirement, death while in employment or the attainment of a stated age.
3. Similarly, the trustee of a complying superannuation fund does not beneficially own, or have the right to acquire beneficial ownership of, interests in the fund carrying the right to receive distributions of income or capital.

# TD 2006/68

## **Example**

4. *Brooks Co carries on business. Jack and Jill each own 50% of the shares in Brooks Co. Jack and Jill are also the only members and the trustees of a complying superannuation fund. The fund owns business premises which are leased to Brooks Co for use in the company's business.*

5. *Jack and Jill, either as trustees or members of the fund, do not control the fund. Although Jack and Jill control Brooks Co, Brooks Co and the complying superannuation fund are not connected for the purpose of section 328-125 of the ITAA 1997. Accordingly, the business premises are not an active asset of the fund and the small business concessions are not available in relation to any capital gain on a sale of the premises.*

6. *On the other hand, if Brooks Co sells the business, the assets of the superannuation fund, including the business premises, are not included in Brooks Co's maximum net asset value test because Brooks Co is not connected with the superannuation fund.*

## **Date of effect**

7. This Determination applies to years commencing both before and after its date of issue. However, the Determination does 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 and 76 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**

15 November 2006

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## Appendix 1 – Explanation

**❶** *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

8. Under subsection 328-125(1) of the ITAA 1997, an entity is 'connected with' another entity if either entity controls the other entity in the way described in section 328-125 of the ITAA 1997 or both entities are controlled in that way by the same third entity.

9. Under paragraph 328-125(2)(a) of the ITAA 1997, an entity controls another entity, that is not a discretionary trust, if it or its affiliates, or all of them together beneficially own, or have the right to acquire the beneficial ownership of, interests in the other entity that carry between them the right to receive at least 40% of any distribution of income or capital by the other entity.

10. Neither the trustees nor the members of a complying superannuation fund beneficially own, or have the right to acquire beneficial ownership of, the required interests in the fund and therefore neither control the fund under paragraph 328-125(2)(a) of the ITAA 1997. The fund is not connected with the members or trustees under paragraph 328-125(1)(a) of the ITAA 1997.

11. Accordingly, a complying superannuation fund is not connected with another entity under paragraph 328-125(1)(b) of the ITAA 1997 even if the fund's members or trustees control the other entity.

12. It should be noted that neither the members nor the trustees of a complying superannuation fund are affiliates of the fund under subsection 328-130(1) of the ITAA 1997 (see Taxation Determination TD 2006/79). Accordingly, a complying superannuation fund does not control another entity under subsection 328-125(2) of the ITAA 1997 (via aggregation of its affiliates' interests) even if the fund's members or trustees control the other entity and therefore the fund is also not connected with the other entity under paragraph 328-125(1)(a) of the ITAA 1997.

### **Small business concessions**

13. For the small business concessions to apply in relation to business real property owned by a complying superannuation fund and used in the related entity's business, the active asset test in section 152-35 of the ITAA 1997 must be satisfied. Since the fund is not connected with the related entity under section 328-125 of the ITAA 1997, the property is not an active asset of the fund and the small business concessions will not be available to the trustees.

14. Likewise the assets of a complying superannuation fund, including any business real property which is used in a related entity's business, are not included in the related entity's maximum net asset value test in section 152-15 of the ITAA 1997 even if the members or trustees of the fund control the related entity.

### **Note**

15. 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 12.3 of the Board's report.

## References

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*Previous draft:*

TD 2006/D29

*Related Rulings/Determinations:*

TR 2006/10; TD 2006/79

*Subject references:*

- active asset
- active asset test
- CGT small business relief
- complying superannuation funds
- connected entity
- maximum net value asset test

*Legislative references:*

- ITAA 1997 152-15
- ITAA 1997 152-35
- ITAA 1997 328-125
- ITAA 1997 328-125(1)
- ITAA 1997 328-125(1)(a)
- ITAA 1997 328-125(1)(b)
- ITAA 1997 328-125(2)
- ITAA 1997 328-125(2)(a)
- ITAA 1997 328-130
- TAA 1953

*Other references*

- Treasurer's Press Release No. 38 of 2006 (9 May 2006)

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ATO references

NO: 2006/8994

ISSN: 1038-8982

ATOLaw topic: Income Tax ~~ Capital Gains Tax ~~ small business relief - basic conditions for relief

Income Tax ~~ Capital Gains Tax ~~ small business relief - 'active asset test'

Income Tax ~~ Capital Gains Tax ~~ small business relief - 'maximum net asset value test'