


***TD 2006/D29 - 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 152-30 of the Income Tax Assessment Act 1997 ?***

 This cover sheet is provided for information only. It does not form part of *TD 2006/D29 - 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 152-30 of the Income Tax Assessment Act 1997 ?*

This document has been finalised by TD 2006/68.



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## Draft 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 152-30 of the *Income Tax Assessment Act 1997*?

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

This publication is a draft for public comment. It represents the Commissioner’s preliminary view about the way in which a relevant taxation 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. You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don’t have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### Ruling

1. No. Neither the trustees nor the members of a complying superannuation fund control the fund in the way described in section 152-30 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.

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## **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 152-30 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. When the final Determination is issued, it is proposed to apply 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.

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**Commissioner of Taxation**

14 June 2006

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## **Appendix 1 – Explanation**

**❶** *This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.*

### **Explanation**

8. Under subsection 152-30(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 152-30 or both entities are controlled in that way by the same third entity.

9. Under paragraph 152-30(2)(a) of the ITAA 1997, an entity controls another entity, that is not a discretionary trust, if it or its small business CGT 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 152-30(2)(a) of the ITAA 1997. The fund is not connected with the members or trustees under paragraph 152-30(1)(a) of the ITAA 1997.

11. Accordingly, a complying superannuation fund is not connected with another entity under paragraph 152-30(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 small business CGT affiliates of the fund under paragraph 152-25(1)(b) of the ITAA 1997 (see Taxation Determination TD 2006/D34). Accordingly, a complying superannuation fund does not control another entity under subsection 152-30(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 152-30(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 152-30 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.

# TD 2006/D29

## **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 Draft Taxation Determination is part of the Commissioner's response to Recommendation 12.3 of the Board's report.

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## **Appendix 2 – Your comments**

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16. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date. (Note: The Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

**Due date:** 11 August 2006

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TD 2006/D34

*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 152-25(1)(b)
- ITAA 1997 152-30
- ITAA 1997 152-30(1)
- ITAA 1997 152-30(1)(a)
- ITAA 1997 152-30(1)(b)
- ITAA 1997 152-30(2)
- ITAA 1997 152-30(2)(a)
- ITAA 1997 152-35

*Other references*

- Treasurer's Press Release No. 38 of 2006

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ATO references

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

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