





# **Tax Laws Amendment (Small Business Restructure Roll-over) Act 2016**

**No. 18, 2016**

**An Act to amend the law relating to taxation, and  
for related purposes**

Note: An electronic version of this Act is available on The Legislation Register  
(<http://www.legislation.gov.au/>)



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## **An Act to amend the law relating to taxation, and for related purposes**

*[Assented to 8 March 2016]*

The Parliament of Australia enacts:

### **1 Short title**

This Act may be cited as the *Tax Laws Amendment (Small Business Restructure Roll-over) Act 2016*.

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## 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provisions</b>	<b>Commencement</b>	<b>Date/Details</b>
1. The whole of this Act	The first 1 January, 1 April, 1 July or 1 October to occur after the day this Act receives the Royal Assent.	1 April 2016

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

## 3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Small business restructure roll-overs**

### **Part 1—Main amendment**

#### *Income Tax Assessment Act 1997*

#### **1 At the end of Division 328**

Add:

#### **Subdivision 328-G—Restructures of small businesses**

#### **Guide to Subdivision 328-G**

#### **328-420 What this Subdivision is about**

<p>There are tax-neutral consequences for a small business entity that restructures the ownership of the assets of the business, without changing the ultimate economic ownership of the assets.</p>
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#### **Table of sections**

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328-425 Object of this Subdivision

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## Schedule 1 Small business restructure roll-overs

### Part 1 Main amendment

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328-465	New membership interests as consideration for transfer of assets
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## Object of this Subdivision

### 328-425 Object of this Subdivision

The object of this Subdivision is to facilitate flexibility for owners of small business entities to restructure their businesses, and the way their business assets are held, while disregarding tax gains and losses that would otherwise arise.

## Requirements for a roll-over under this Subdivision

### 328-430 When a roll-over is available

- (1) A roll-over under this Subdivision is available in relation to an asset that, under a transaction, an entity (the *transferor*) transfers to one or more other entities (*transferees*) if:
  - (a) the transaction is, or is a part of, a genuine restructure of an ongoing \*business; and
  - (b) each party to the transfer is an entity to which any one or more of the following applies:
    - (i) it is a \*small business entity for the income year during which the transfer occurred;
    - (ii) it has an \*affiliate that is a small business entity for that income year;
    - (iii) it is \*connected with an entity that is a small business entity for that income year;
    - (iv) it is a partner in a partnership that is a small business entity for that income year; and
  - (c) the transaction does not have the effect of materially changing:
    - (i) which individual has, or which individuals have, the ultimate economic ownership of the asset; and
    - (ii) if there is more than one such individual—each such individual's share of that ultimate economic ownership; and

- (d) the asset is a \*CGT asset (other than a \*depreciating asset) that is, at the time the transfer takes effect:
  - (i) if subparagraph (b)(i) applies—an \*active asset; or
  - (ii) if subparagraph (b)(ii) or (iii) applies—an active asset in relation to which subsection 152-10(1A) is satisfied in that income year; or
  - (iii) if subparagraph (b)(iv) applies—an active asset and an interest in an asset of the partnership referred to in that subparagraph; and
- (e) the transferor and each transferee meet the residency requirement in section 328-445 for an entity; and
- (f) the transferor and each transferee choose to apply a roll-over under this Subdivision in relation to the assets transferred under the transaction.

Note: The roll-over of a depreciating asset transferred in the restructuring of a small business is addressed in item 8 of the table in subsection 40-340(1).

- (2) However, a roll-over under this Subdivision is not available if the transferor, or any transferee, is either an \*exempt entity or a \*complying superannuation entity.

### **328-435 Genuine restructures—safe harbour rule**

For the purposes of paragraph 328-430(1)(a) (but without limiting that paragraph), a transaction is, or is a part of, a genuine restructure of an ongoing \*business if, in the 3 year period after the transaction takes effect:

- (a) there is no change in ultimate economic ownership of any of the significant assets of the business (other than \*trading stock) that were transferred under the transaction; and
- (b) those significant assets continue to be \*active assets; and
- (c) there is no significant or material use of those significant assets for private purposes.

### **328-440 Ultimate economic ownership—discretionary trusts**

For the purposes of paragraph 328-430(1)(c), a transaction does not have the effect of changing the ultimate economic ownership of an asset, or any individual's share of that ultimate economic ownership, if:

- (a) either or both of the following applies:
  - (i) just before the transaction took effect, the asset was included in the property of a \*non-fixed trust that was a \*family trust;
  - (ii) just after the transaction takes effect, the asset is included in the property of a non-fixed trust that is a family trust; and
- (b) every individual who, just before the transfer took effect, had the ultimate economic ownership of the asset was a member of the family group (within the meaning of Schedule 2F to the *Income Tax Assessment Act 1936*) relating to the trust or trusts referred to in paragraph (a); and
- (c) every individual who, just after the transfer takes effect, has the ultimate economic ownership of the asset is a member of that family group.

### **328-445 Residency requirement**

For the purposes of paragraph 328-430(1)(e), the residency requirement for an entity is that:

- (a) if the entity is an individual or a company—the entity is an Australian resident; or
- (b) if the entity is a trust—it is a \*resident trust for CGT purposes; or
- (c) if the entity is a partnership (other than a \*corporate limited partnership)—at least one of the partners is an Australian resident; or
- (d) if the entity is a corporate limited partnership—it is, under section 94T of the *Income Tax Assessment Act 1936*, a resident for the purposes of the \*income tax law.

### **Consequences of a roll-over under this Subdivision**

#### **328-450 Small business transfers not to affect income tax positions**

- (1) Except as provided by this Subdivision, a transfer of an asset has no direct consequences under the \*income tax law if:
  - (a) the transfer occurs under a transaction in relation to which section 328-430 applies; and

- (b) a roll-over under this Subdivision is available under that section in relation to the asset.

Example: If the transfer were a transfer of the asset from a company to a shareholder, it would not be treated as a payment of a dividend under Division 7A of Part III of the *Income Tax Assessment Act 1936*.

- (2) To avoid doubt, this section does not affect the application of the \*income tax law in relation to:
  - (a) anything that happens in relation to the asset that does not directly relate to the transfer; or
  - (b) the ownership of the asset at any time.

### **328-455 Effect of small business restructures on transferred cost of assets**

- (1) The \*income tax law applies to an entity in relation to the transfer of an asset by the entity, or to the entity, as if the transfer takes place for the asset's \*roll-over cost if:
  - (a) the transfer occurs under a transaction in relation to which section 328-430 applies; and
  - (b) a roll-over under this Subdivision is available under that section in relation to the asset.
- (2) The asset's **roll-over cost** is whichever of the following amounts is applicable in relation to the transfer:
  - (a) in relation to the application of subsection (1) to the asset as a \*CGT asset (other than \*trading stock, a \*revenue asset or a \*depreciating asset)—the transferor's \*cost base for the asset just before the transfer takes effect;
  - (b) in relation to the application of subsection (1) to the asset as trading stock—the amount equal to:
    - (i) the \*cost of the item for the transferor; or
    - (ii) if the transferor held the item as trading stock at the start of the income year—the \*value of the item for the transferor then;
  - (c) in relation to the application of subsection (1) to the asset as a revenue asset—the amount that would give rise to the transferor not making a profit or a loss on the transfer.

**328-460 Effect of small business restructures on acquisition times of pre-CGT assets**

For the purposes of applying subsection 328-455(1) to the asset as a \*CGT asset (other than a \*revenue asset) that is a \*pre-CGT asset, a transferee is taken to have \*acquired the asset before 20 September 1985.

**328-465 New membership interests as consideration for transfer of assets**

- (1) If:
- (a) section 328-455 applies in relation to the transfer of an asset under a transaction; and
  - (b) the transaction provides for \*membership interests to be issued; and
  - (c) the membership interests constitute all or part of the consideration provided for the transfer of assets (*transferred assets*) under the transaction;
- then:
- (d) the first element of the membership interests' \*cost base is the sum of:
    - (i) the \*roll-over costs of the transferred assets that are neither \*depreciating assets nor \*pre-CGT assets; and
    - (ii) the \*adjustable values of the transferred assets that are depreciating assets;(less any liabilities that a transferee of any of the transferred assets undertakes to discharge in respect of the transferred assets) divided by the number of membership interests; and
  - (e) the first element of the membership interests' \*reduced cost base is worked out similarly.
- (2) However, if the \*membership interests constituted only a part of the total consideration provided for the transfer of the transferred assets, reduce accordingly the amounts worked out under paragraphs (1)(d) and (e).

**328-470 Membership interests affected by transfers of assets**

If:

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- (a) section 328-455 applies in relation to the transfer of an asset under a transaction; and
- (b) an entity holds, either directly or indirectly:
  - (i) a \*membership interest in the transferor or a transferee; or
  - (ii) a membership interest that was issued as provided for by the transaction;

disregard a \*capital loss from a \*CGT event that arises in relation to the membership interest after the transaction takes effect, except to the extent that the entity can demonstrate that the loss is attributable to a matter other than the transaction.

**328-475 Small business restructures involving assets already subject to small business roll-over**

If:

- (a) section 328-455 applies in relation to the transfer of an asset (the *transferred asset*) of the transferor's business to one or more transferees; and
- (b) the transferor has previously chosen a small business roll-over under Subdivision 152-E for a \*CGT event that happened in relation to a \*CGT asset for which the transferred asset is a replacement asset (within the meaning of sections 104-185, 104-190, 104-197 and 104-198);

sections 104-185, 104-190, 104-197 and 104-198 apply to each transferee (to the extent of the transferee's interest in the asset) as if the transferee, and not the transferor, made that choice.

Note: Sections 104-185, 104-190, 104-197 and 104-198 provide for capital gains to arise under CGT events J2, J5 and J6, after the choice of a small business roll-over under Subdivision 152-E has deferred the making of a capital gain.

## Part 2—Other amendments

### *Income Tax Assessment Act 1997*

#### **2 Subsection 40-340(1) (at the end of the table)**

Add:

- |   |  |  |
|---|--|--|
| 8 | Transfer of asset under a small business restructure roll-over | A roll-over under Subdivision 328-G would be available in relation to the asset if the asset were not a *depreciating asset. |
|---|--|--|

#### **3 Section 122-15 (after note 2)**

Insert:

- Note 3: A roll-over may also be available under Subdivision 328-G (Restructures of small businesses).

#### **4 At the end of section 152-115**

Add:

##### *Restructures of small businesses*

- (3) If section 328-450 or 328-455 applies in relation to the transfer of an asset to you, then paragraphs 152-105(b) and (c) and 152-110(1)(b) and (c) (the 15-year and significant individual rules) apply as if:
- (a) you had acquired the asset when the entity transferring the asset acquired it; or
  - (b) in a case where, for the purposes of applying those paragraphs, the time when that entity acquired the asset was provided for by this subsection—you had acquired the asset at that time.

#### **5 Subsection 328-10(1) (after table item 6A)**

Insert:

- |    |                                  |                               |
|----|----------------------------------|-------------------------------|
| 6B | Restructures of small businesses | Subdivision 328-G of this Act |
|----|----------------------------------|-------------------------------|

#### **6 Paragraph 328-243(1A)(c)**

Omit “item 1, 2 or 3”, substitute “item 1, 2, 3 or 8”.

**7 Subsection 995-1(1)**

Insert:

*roll-over cost* has the meaning given by subsection 328-455(2).

## **Part 3—Application of amendments**

### **8 Application of amendments**

The amendments made by this Schedule apply to:

- (a) the transfer of a depreciating asset if the balancing adjustment event arising from the transfer occurs on or after 1 July 2016; or
- (b) the transfer of trading stock or a revenue asset if the transfer occurs on or after 1 July 2016; or
- (c) the transfer of a CGT asset (other than a depreciating asset, trading stock or a revenue asset) if the CGT event arising from the transfer occurs on or after 1 July 2016.

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*[Minister's second reading speech made in—  
House of Representatives on 4 February 2016  
Senate on 23 February 2016]*

(6/16)

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