



***TD 2006/65 - Income tax: capital gains: small business concessions: can a share in a company or an interest in a trust qualify as an active asset under subsection 152-40(3) of the Income Tax Assessment Act 1997 if the company or trust owns interests in another entity that satisfies the '80% test'?***

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 This document has changed over time. This is a consolidated version of the ruling which was published on *29 October 2008*



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## Taxation Determination

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Income tax: capital gains: small business concessions: can a share in a company or an interest in a trust qualify as an active asset under subsection 152-40(3) of the *Income Tax Assessment Act 1997* if the company or trust owns interests in another entity that satisfies the '80% test'?

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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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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 Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

### Ruling

1. Yes. A share in a company or an interest in a trust can qualify as an active asset under subsection 152-40(3) of the *Income Tax Assessment Act 1997* (ITAA 1997) if the company or trust owns interests in another entity that satisfies the '80% test' in paragraph 152-40(3)(b) of the ITAA 1997. The '80% test' operates successively at each level in a chain of entities to determine the active asset status of the underlying interests.

### Example 1

2. Ben owns all the shares in Holding Co which, in turn, owns all the shares in Operating Co (both are resident companies). The only assets of Holding Co are the shares in Operating Co and all of Operating Co's assets are active assets.

3. As Operating Co satisfies the 80% test, the shares owned by Holding Co in Operating Co are active assets. As those shares are the only assets owned by Holding Co, Holding Co also satisfies the 80% test and therefore the shares owned by Ben in Holding Co are also active assets.

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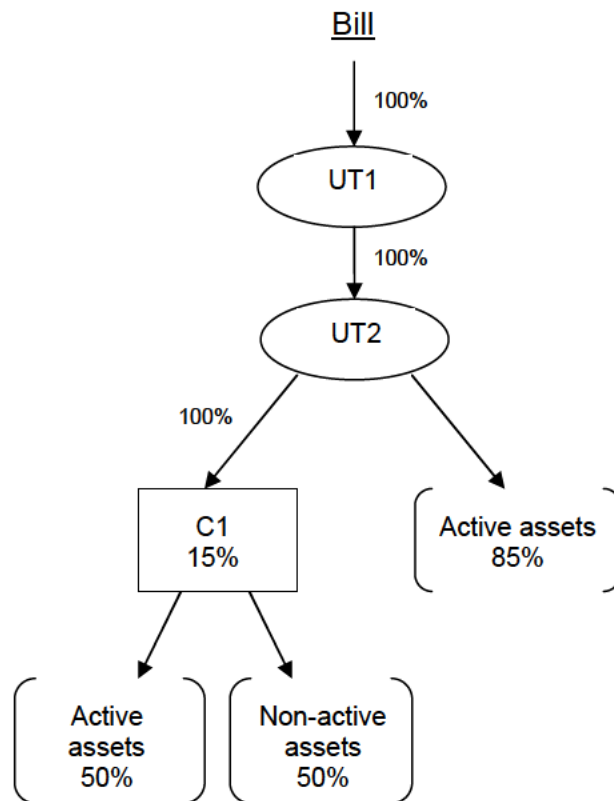
**Note 1**

4. The small business concessions may apply if Ben sold his shares in Holding Co. Further, Operating Co has a significant individual (Ben) and the additional basic condition in paragraph 152-10(2)(b) of the ITAA 1997 is satisfied. Therefore, if Holding Co sold its shares in Operating Co and made a capital gain, the concessions may apply if other conditions are satisfied.

**Example 2**

5. Bill owns all the units in a unit trust (UT1). UT1 owns all the units in another unit trust (UT2). UT2 owns all the shares in a private company (C1). All of UT2's other assets are active assets. The market value of the C1 shares is 15% of the market value of all the assets owned by UT2.

6. C1 owns an active asset, the market value of which is 50% of the market value of all C1's assets. All entities are Australian residents.



7. The operation of the '80% test' is set out in the following table:

| <b>Asset</b> | <b>Analysis</b>   | <b>80% test</b>     | <b>Active asset</b> |
|--------------|---|---------------------|---------------------|
| Shares in C1 | The market value of C1's active assets is only 50% of the market value of all its assets. | Not satisfied (50%) | No                  |
| Units in UT2 | The market value of UT2's active assets is 85% of the market value of all its assets.     | Satisfied (85%)     | Yes                 |
| Units in UT1 | All of UT1's assets, being the units in UT2, are active assets.                           | Satisfied (100%)    | Yes                 |

8. The shares in C1 are not active assets of UT2 because C1 does not satisfy the '80% test'. The market value of C1's active assets is only 50% of the market value of all its assets.

9. The units in UT2 are active assets of UT1 because UT2 satisfies the '80% test'. Although UT2's shares in C1 are not active assets, the market value of UT2's active assets is 85% of the market value of all its assets.

10. The units in UT1 are active assets of Bill because UT1 satisfies the '80% test'. All of UT1's assets, being the units in UT2, are active assets.

#### **Note 2**

11. The small business concessions may apply if Bill sold his units in UT1. Further, UT2 has a significant individual (Bill) and the additional basic condition in paragraph 152-10(2)(b) of the ITAA 1997 is satisfied. Therefore, if UT1 sold its units in UT2 and made a capital gain, the concessions may apply if other conditions are satisfied.

#### **Date of effect**

12. 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

13. The '80% test' is a numerical calculation that determines whether a company or trust owns sufficient active assets to allow active asset status to effectively flow through to the underlying interests.

14. Under the '80% test' a share in a company or an interest in a trust is an active asset at a given time if:

- the company is an Australian resident at that time or the trust is a resident trust for capital gains tax (CGT) purposes for the income year in which that time occurs; and
- the total of:
  - the market values of the active assets of the company or trust;
  - the market value of any financial instruments of the company or trust that are inherently connected with a business that the company or trust carries on; and
  - any cash of the company or trust that is inherently connected with such a business.

is 80% or more of the market value of all the assets of the company or trust (subsection 152-40(3) of the ITAA 1997).

15. If an entity owns a share in a company or interest in a trust that is an active asset because the company or trust satisfies the '80% test', the share or interest is included in that entity's '80% test' calculation to determine if the underlying interests in the entity are themselves active assets.

16. As the active asset test requires a CGT asset to be an active asset for at least half a particular period (generally the ownership period), the '80% test' must also be satisfied for that same period for a share in a company or interest in a trust to satisfy the active asset test.

### Note 3

17. 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 7.3 of the Board's report.

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## References

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*Previous draft:*

TD 2006/D25

- CGT small business relief

*Related Rulings/Determinations:*

TR 2006/10

*Legislative references:*

- ITAA 1997 152-10(2)(b)
- ITAA 1997 152-40(3)
- ITAA 1997 152-40(3)(b)
- TAA 1953

*Subject references:*

- active asset
- active asset test
- basic condition for relief
- capital gains tax
- CGT events

*Other references*

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

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