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Small Business Restructure Capital Gains Tax Relief

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Generally if you transfer the assets of a business to another business – for example from a Company to a family Trust this transfer is deemed to be a sale of the Assets of the business and so subject to Capital Gains Tax. One way that you can avoid paying tax is to use the Small Business Rollover provisions.

Subdivision 328-G contains rules allowing businesses to restructure their business holdings, without triggering CGT.

s 328-430 sets out when a rollover is available key requirements are; (bold letters correspond to ss a-e in s 328-430)

A *"the transaction is, or is a part of, a genuine restructure of an ongoing *business…"*[1]

Generally this means you will need to be re-structuring for a genuine reason and be better off operating as a trust which is part of the definition of what is considered a genuine re-structure[2] in some cases you may restructure and then sell. In other words you only re-structured to minimise tax on the sale of the business, this is not what this section is designed for. Section 328-435 contains a safe harbour provision to increase certainty.

…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…

*(b) those significant assets continue to be *active assets…"*[3]

[1] *Income Tax Assessment Act* 1997 Cth s 328-430(1)(a)
[2] *EM Tax and Superannuation Laws Amendment (2015 Measures No. #) Bill,* Cth, 2015 [1.6]
[3] *Income Tax Assessment Act* 1997 Cth s 328-435

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B It and its associated entities must be Small Business Entities; Most of the Small Business CGT concessions have a turnover cap of $2 million but for this section *Small Business* has the definition given by s 328-110 allowing a turnover of $10m[4]

To use this rollover relief you will Need to have less than $10mil in the previous year[5] or the aggregated turnover this year is likely to be under $10mil[6] this is not just the turnover of the business in question, it also includes the turnover of any affiliate. S328-130(1) defines an affiliate as "*An individual or a company is an affiliate of yours if the individual or company acts, or could reasonably be expected to act, in accordance with your directions or wishes, or in concert with you, in relation to the affairs of the *business of the individual or company.*"[7]

The definition is that the current year turnover was less than $10 million[8] or the current year is "*likely to be less than $10 million*"[9] This does leave some leeway to forecast turnover of under $10 million for the current year so even if you are just over this turnover in the past year.

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…"[10]

In other words lets say you were moving from a company to a family trust and before the re-structure there are three owners with 1 share each so 1/3 each. If you moved the business into a into a trust where then the same owners would have to be the primary beneficiaries. s 328-440 contains special rules for discretionary trusts and allows that if after the transaction takes effect the asset is included in a discretionary family trust[11] so it is worth reviewing this section if you are looking at re-structuring using a trust.

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[4] *Income Tax Assessment Act* 1997 Cth s 328-110(1) (b)
[5] *Income Tax Assessment Act* 1997 Cth s 328-110(1)(b)(i)
[6] *Income Tax Assessment Act* 1997 Cth s 328-110(1)(b)(ii)
[7] *Income Tax Assessment Act* 1997 Cth s 328-130(1)
[8] *Income Tax Assessment Act* 1997 Cth s 328-110(1)(b)(i)
[9] *Income Tax Assessment Act* 1997 Cth s 328-110(1)(b)(ii)
[10] *Income Tax Assessment Act* 1997 Cth s 328-430(1)(c)
[11] *Income Tax Assessment Act* 1997 Cth s 328(a)(ii)

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D To use this section the Asset(s) in question will also need to be *CGT assets*[12] that are Active Assets. S152-40 defines an Active Asset to be in general terms to be used in the business of the taxpayer.

E Both the initial business structure and the re-structured business structure need to be Australian Tax Residents.

As long as you meet the requirements above then you can use the CGT Rollover Relief provisions in 328G to do your restructure rollover and not pay any Capital Gains Tax. Please be careful these rules are quite technical and this is just a general overview, if you want to check if your situation would fit within these rules please get in contact.

[12] *Income Tax Assessment Act* 1997 Cth s 108-5