

2 December 2015

Division Head  
Law Design Practice  
The Treasury  
Langton Crescent  
**CANBERRA ACT 2600**

Dear Sir/Madam,

## **SMALL BUSINESS RESTRUCTURE ROLLOVERS**

We appreciate the opportunity to provide comments on the Exposure Draft – “Tax and Superannuation Laws Amendment (2015 Measures No. 6) Bill 2015: Small business restructure rollovers”.

### **PROPOSED NEW MEASURES & INITIATIVES**

We welcome and strongly encourage any attempt to make it easier for small business to change the legal structure through which they operate, with a view to reducing the burden of compliance and regulatory costs to do so.

We believe that small business owners should not be disadvantaged as a result of the structure they have chosen to operate their business from. Over time, personal circumstances, business conditions and legislation, all change, and it is important for a small business to be able to adapt to changed conditions, without fear or consequence of triggering a capital gains tax exposure.

We believe the proposed reforms outlined in the Exposure Draft have the potential to significantly improve flexibility and access to the restructure rollovers and assist both taxpayers and advisors alike. In addition to the existing CGT rollovers often used by small business entities (Subdivisions 124-A and 124-B, Division 615, and Subdivision 152-E), the proposed small business restructure rollover will facilitate greater flexibility for business owners.

### **FURTHER MEASURES & CONSIDERATIONS REQUIRED**

However, we believe that further measures are required to allow simplicity in changing business structure to occur as foreshadowed in the Budget, without inadvertently compromising access (and ease) to capital gains tax concessions, otherwise available to a business owner.

We outline below 2 particular circumstances requiring further consideration for inclusion in the proposed changes to the legislation:

1. Extend the definition of an eligible CGT asset in the proposed subsection 328-430(1)(c) to include the shares in an SBE company and units in an SBE unit trust, possibly introducing an “active asset test” (refer below for further detail); and
2. Allow for continuation of the ownership period under the small business 15-year CGT concession for SBEs restructuring under the new small business restructure rollovers.



## **EXTENDING THE DEFINITION OF ELIGIBLE CGT ASSET**

It is important to extend the definition of an eligible CGT asset in the proposed subsection 328-430(1)(c) to include the shares in an SBE company and units in an SBE unit trust.

The existing CGT rollovers in Subdivisions 124-A and 124-B apply to CGT assets in general, whilst the definition of an eligible CGT asset in the proposed legislation refers to an asset of a business carried on by an SBE. This narrow interpretation would significantly restrict the available options for SBE, which can be illustrated by an example.

### Example:

One of the common reasons for a business restructure is asset protection, which could for example involve a transfer of the individually owned shares in a trading company or units in a trading unit trust to a discretionary trust, controlled by the individual taxpayer. Even though there is no change of the underlying beneficial ownership or, using the Exposure Draft's terminology, the ultimate economic ownership (i.e. the trust is a defined "family trust" and the beneficiaries are the individual taxpayer and their family), under the current rules this restructure triggers a CGT liability, with no relief or deferral available.

This transaction is consistent with a transfer of business assets from a company to a trust, whilst retaining the ultimate economic ownership in accordance with the proposed subsection 328-440 (3). Since this initiative seeks to achieve tax-neutral consequences for owners of small business entities that restructure their businesses without changing the underlying beneficial ownership of the assets, it would be prudent to clarify and confirm the inclusion of shares and units in an SBE in the definition of a eligible CGT asset. This could, for example, be achieved by introducing an "active asset test", similar to the small business CGT concessions in Division 152.

## **CONTINUITY OF OWNERSHIP PERIOD & SMALL BUSINESS CGT CONCESSION – 15 YEAR EXEMPTION**

There is an anomaly that continues to exist in relation to the period of time an owner, is considered to "own" a business when a restructure is implemented; the outcome being that the required period of continuity to access one of the most significant small business CGT concessions, is "broken". The concession is that of the 15- year exemption.

It is also important to review the broader environment within which private businesses operate and understand the rationale in recent years, of many small businesses deciding to restructure. Since the release of Taxation Ruling TR 2010/3 and Practice Statement PS LA 2010/4, many small businesses operating from a trust structure started considering a change to a corporate structure, due to the complexities involved in the management of Unpaid Present Entitlements ("UPE") retained for working capital purposes.

In many cases this restructure can be achieved in a tax-neutral way utilising for example Subdivision 124-A rollover, however the biggest impediments to the restructure is a loss of future access to the small business 15-year CGT concession, or more precisely, results in a "re-set" of the continuity of business ownership period.

This anomaly extends to other business restructure scenarios, including the proposed small business restructure rollover, effectively presenting SBEs wishing to restructure with a choice between today's benefits of the restructure and future access to a CGT-free capital gain.

In our experience, many small businesses decide to continue with their outdated and inappropriate legal structures in order to avoid a "re-set" of the business ownership continuity affecting the 15-year retirement exemption.

This is in spite of there being no change of the ultimate economic ownership. The “re-set” of the business ownership continuity is also inconsistent with the ability to transfer a pre-CGT status of an asset from the original owner to the transferee, under the proposed small business restructure rollover – section 328-435.

Considering the objectives of the proposed legislation to help small businesses to restructure without incurring a CGT liability, we believe that this opportunity should be used to address the above anomaly and allow for continuation of the ownership period under the small business 15-year CGT concession for SMEs restructuring under the new small business restructure rollovers.

We thank you for considering our submission and would welcome the opportunity to discuss any aspect of this submission with you.

Yours sincerely,

**KOUSTAS & CO PTY LTD**