




ATO Interpretative Decision

ATO ID 2010/217

Income Tax

CGT small business concessions: retirement exemption - contribution to complying superannuation fund - transfer of real property

FOI status: may be released

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Issue

If an individual chooses the retirement exemption in Subdivision 152-D of the *Income Tax Assessment Act 1997* (ITAA 1997), can the contribution required under paragraph 152-305(1)(b) of the ITAA 1997 be made by transferring real property to a complying superannuation fund instead of money if the transfer satisfies the relevant provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA)?

Decision

Yes. If an individual chooses the retirement exemption in Subdivision 152-D of the ITAA 1997, the contribution required under paragraph 152-305(1)(b) of the ITAA 1997 can be made by transferring real property to a complying superannuation fund if the transfer satisfies the relevant provisions of the SISA.

Facts

An individual taxpayer, aged less than 55, made a capital gain from the sale of an active asset. The individual is considering choosing the small business retirement exemption to disregard the capital gain.

The individual proposes to use the capital proceeds to pay out a mortgage on real property before making an in specie transfer of the real property, instead of paying cash, to their self managed superannuation fund.

Reasons for Decision

Under subsection 152-305(1) of the ITAA 1997 an individual can choose the retirement exemption and disregard all or part of a capital gain if:

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the basic conditions in Subdivision 152-A of the ITAA 1997 are satisfied; and

- if the individual was under 55 just before they made the choice, they contribute an amount equal to the asset's CGT exempt amount to a complying superannuation fund or an RSA.

The question arises as to whether the requirement in paragraph 152-305(1)(b) of the ITAA 1997 can be satisfied by the transfer of real property from the individual to a complying superannuation fund.

Generally speaking, a superannuation contribution can be made in a number of ways including by transferring an asset to the superannuation provider (an in specie contribution: refer section 285-5 of the ITAA 1997, and paragraphs 4, 10, 18-25, and 151 of Taxation Ruling TR 2010/1).

A superannuation provider may breach section 66 of the SISA when an asset is acquired from a related party of the fund, such as a member (refer SMSFR 2010/1). Subsection 66(2) of the SISA does however provide an exception to the prohibition relating to the acquisition by a superannuation fund of assets from related parties where the asset is 'business real property' (as defined in subsection 66(5) of the SISA) and other conditions are satisfied.

Accordingly, it is considered that a transfer of real property to a complying superannuation fund can satisfy the requirement in paragraph 152-305(1)(b) of the ITAA 1997 to contribute an amount if the transfer of the real property satisfies the relevant provisions of the SISA.

Note: where a company or trust chooses the retirement exemption and a CGT concession stakeholder is under 55 just before a payment is made in relation to them, there is a similar requirement for the company or trust to contribute the payment to a complying superannuation fund or an RSA (paragraph 152-325(7)(a) of the ITAA 1997). The view expressed above that a transfer of real property to a complying superannuation fund can satisfy the requirement to make a contribution also applies to the requirement to make a contribution under paragraph 152-325(7)(a) of the ITAA 1997.

Date of decision: 25 October 2010

Year of income: Year ended 30 June 2011

Legislative References:

Income Tax Assessment Act 1997

Subdivision 152-A
Subdivision 152-D
subsection 152-305(1)
paragraph 152-305(1)(b)
paragraph 152-325(7)(a)
section 285-5

Superannuation Industry (Supervision) Act 1993

section 66
subsection 66(2)
subsection 66(5)

Related Public Rulings (including Determinations)

Self Managed Superannuation Fund Ruling SMSFR 2010/1
Taxation Ruling TR 2010/1

Keywords

Basic conditions for relief
Capital gains tax
CGT capital proceeds
CGT choice
CGT small business relief
Complying superannuation funds
Small business retirement exemption
In-specie contributions

Self managed superannuation funds
SMSF acquisition of asset

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