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TAX matters

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Proposed Changes to the Active Asset Test – Will the New Law Catch You Out?

Early last year the government announced that it would be again making changes to the small business CGT concessions. These changes were eventually released in the form of the *Tax Laws Amendment (2009 Measures No. 2) Bill 2009* which is currently progressing through parliament.

Although the Bill has some positives in helping increase the access to the concessions for taxpayers, it does have one particular ‘sleeper’ that will adversely affect many taxpayers in the future.

This ‘sleeper’ involves changes to the active asset test. As you may be aware, the active test must be satisfied in order to access the small business CGT concessions.

Broadly, under the existing laws, the active asset test requires only a small portion of the property which is to be disposed of to be used by the taxpayer (and its associated parties) in its business. Thus, for example, where a commercial property containing eight offices is sold and only one of them is used by the taxpayer in its business, with the other seven being leased to non-associated parties the active asset

test is satisfied because the renting out of the property is not part of the use in the taxpayer’s business.

Under the new active asset test, non-business use by the taxpayer (other than use for personal enjoyment) will be taken into account in determining whether the active asset test is satisfied. Where the main use of the relevant asset (eg greater than 50%) is to lease to non-associated parties, the active asset test will no longer be satisfied. This will mean that the commercial property in the above example will not satisfy the active asset test and therefore the small business CGT concessions will not be available.

Is it too late? Not yet. This change will only apply to disposals occurring after Royal Assent is received. Unfortunately no one knows when Royal Assent will be given. Because the Bill has progressed through parliament with little to no change, all indications are that Royal Assent will be given sooner rather than later.

What to do? For those taxpayers who are affected by this change it would be wise to take advantage of the concessions immediately. This is important given that the new active asset test will effectively

act retrospectively once it is enacted. In particular, those taxpayers who for the last say five years would have passed the existing active asset test may no longer pass this test under the new changes. This would lead to the small business concessions no longer being available.

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IMPORTANT: The articles in this newsletter are in summary form and should not be relied on as a substitute for detailed advice.

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