

# TAX TALKS

Australia's Tax News Podcast - The Podcast for Australian Tax Professionals

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## 74 | Passively Held Assets

Passively held assets can still qualify for the small business CGT concession. They may if used in the business of a related entity.

### Passively Held Assets

Let's say you own the building of your business. But for asset protection purposes you put the building into a separate legal entity.

That is what many advisers will tell you. Keep the business separate from your other assets. So that if the business goes under, you don't lose everything you own.

Can the small business CGT concessions still apply to that building even though the legal owner doesn't use it in a business?

### **s152-10 (1A) ITAA97**

The small business CGT concessions are to benefit the owner of an active CGT asset. Active as in actively used or being held ready for use in carrying on a business.

But what if the owner of the asset doesn't use the asset in its business? Will the building still qualify for the small business CGT concessions?

The short answer is Yes, it may.

Where one entity owns an asset but another entity uses the asset in its business, the entity who owns the CGT asset will be able to access the small business CGT concessions via the \$2 million aggregated turnover test (the small business entity test).

This option comes through 152-10 (1A) cross-referenced from s152-10 (1) (c) (iv). The owner may claim the concessions where that asset is used in a business by the owner's affiliate, or an entity connected with the owner.

### **Effect**

The major effect of this provision is that it is not necessary for the owner to be a small business entity itself. Rather, the owner's affiliates or connected entities who carry on a business in relation to the CGT asset must be a small business entity.

When owners of a CGT asset that is used in the business of the owners' affiliates or connected entities satisfy subs 152-10(1A), they are potentially able to access the small business CGT concessions as long as the entity using the asset satisfies the aggregated turnover test.

### **Caveat**

However, this comes with an important caveat. The changes to s152-10 completely changed the game for shares in companies and interests in fixed trusts. If these are part of the set up, then there are additional conditions. So to keep things simple, let's assume that no companies or unit trusts, ie shares or units, are part of the set-up.

### **Div 328**

This change in itself would not assist an owner whose asset was being used by their spouse or a company or trust wholly owned or controlled by the taxpayer's spouse, in circumstances where the spouse is not an affiliate of the taxpayer.

However, combined with the operation of s 152-47 and subs 328-110 to 328-125 it will deliver that result.

### **Partnership**

The provision also allow partners who own a CGT asset that is used in a partnership business to access the small business CGT concessions via the \$2m aggregated turnover test in circumstances where the CGT asset is not an "asset of the partnership" or an "interest in an asset of the partnership". See subs 152-10(1)(c)(iv) and subs 152-10(1B) for more details.

The key to this change is that it is no longer necessary for the taxpayer owning the asset to be a small business entity. Rather, the partnership which carries on business in relation to the CGT asset must be a small business entity.

### **MORE**

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[The 4 Small Business CGT Concessions](#)

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