

TAX TALKS

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

The following information is only of a general nature and should not be taken as professional advice.

259 | The Eichmann Case

The Eichmann case asked two important questions. And changed the active asset test forever.

The Eichmann Case – Federal Court

What exactly does it mean for an asset to be used in the course of carrying on a business? This is the question the Eichmann case brought before the courts. From a private ruling all the way to the Full Federal Court.

In this episode, Andrew Henshaw of Velocity Legal in Sydney will give you the back story about the Eichmann case. Here is what we learned. But please listen in as Andrew explains all this much better than we ever could.

To listen while you drive, walk or work, just access the episode through a free podcast app on your mobile phone.

The Eichmann Case

The big question in the Eichmann case – *Commissioner of Taxation v Eichmann [2019] FCA 2155* – was whether a parcel of land qualified as an active asset per s152-35 ITAA97. What exactly does it mean for an asset to be used in the course of carrying on a business?

The reason why this is important is because an asset can only receive the small business CGT concessions, if it passes the active asset test.

Active Asset Test

To satisfy the active asset test, the CGT asset must be an 'active asset' for either 7.5 years or at least half of the taxpayer's ownership period (whichever lower).

So if you bought a CGT asset 6 years ago, it would need to be 'active' for at least three years.

Active Asset

So the asset doesn't need to be an active asset for the entire time. It just needs to be an asset for half of the ownership period or 7.5 years.

And it is active per ss152-40(1)(a) ITAA97, whenever you as the owner use it or hold it ready for use in the course of carrying on a business.

Inactive Asset

But here is a really important thing. An inactive asset can still pass the active asset test. It doesn't matter whether an asset is active just before the CGT event or not. The operation might have ceased a long time ago. The asset might have been inactive for years.

All that matters is that the asset was active for the prescribed period – so either 7.5 years or 50% of the ownership period, whatever is shorter.

This is particularly relevant for real property. The owner might have retired 20 years ago ago rented out the shop since then. As long as the shop was an active asset for at least 7.5 years, it still qualifies as an active asset, even when sold 20 years later.

But timing wasn't an issue in the Eichmann case. There was no dispute around dates. The question wasn't how long the asset had been active. But whether the asset had ever been active at all.

Used

The question the Eichmann case battled with was whether the land had ever been sufficiently 'used' within the meaning of s152-40(1)(a).

The court had to decide what 'used in connection with carrying on a business' actually means. What does 'use' mean? What proportion of the land needs to be 'used' to still qualify as active – 10%, 51%, 100%? And what does 'in connection with carrying on a business' mean? How strong does the connection need to be?

These questions are particularly relevant for land – for two reasons. Land is usually a very valuable asset with a considerable capital gain. And land as such is not private or business – it all depends on how you use it.

Private Ruling

Where shall we start? We could start with the private ruling that Mr Eichmann applied for and then objected against. But let's go back even further.

The Eichmann family trust had started a construction business last century. It did building, bricklaying and paving. In 1999, Mr Eichmann and his wife bought vacant land adjacent to their family home. There were two sheds for tools, equipment and materials and the rest of the space was used to store bricks and work vehicles, but no business signage on the land.

Mr Eichmann and his wife sold the land in 2016 – probably with a substantial capital gain and hence a large looming tax bill. And so Mr Eichmann sought a private ruling to seek confirmation that the land was an 'active asset' for the small business CGT concessions.

The Commissioner ruled that it wasn't. And so Mr Eichmann objected and went to the AAT aka Administrative Appeal Tribunal.

AAT Decision

And won.

The AAT held that the land was used in the course of carrying on the Eichmann family business and hence was an active asset. They argued that the ordinary meaning of the word 'use' includes a 'wide range of activities', and is not limited to activities that are 'integral' to the business.

The Commissioner appealed and went to the Federal Court to get an answer to two questions.

1 – What is the proportion of the asset that needs to be 'used' to still qualify as active? Is it enough if it is just a tiny percentage? Does it mean the majority of the asset as in 51%? Or all as in 100%?

2 – What is the adequate level of connection of that ‘use’ to the business in question?

1 – Proportion of Asset In Use

The Federal Court determined that the ‘whole, or predominantly the whole’ of the asset must be ‘used’ in the course of carrying on a business. In other words, where land is held and only a small percentage of that land is ‘used’, the land will not be sufficiently ‘used’.

But it didn’t explore the concept of ‘predominantly’, but one would assume that this means at least 51%.

2 – Connection Between Land and Business

The Federal Court determined that the phrase ‘used in the course of carrying on a business’ required something more than using an asset ‘in relation’ to the business. It stated:

In order for a use to be in the course of carrying on a business, the use must have a direct functional relevance to the carrying on of the normal day-to-day activities of the business which are directed to the gaining or production of assessable income. In that sense the use must be a constituent part or component of the day-to-day business activities, and may in that way be described as integral to the carrying on of the business.

But this raises further questions. What does ‘direction functional relevance’ or ‘constituent part or component of the day-to-day business activities’ mean? It seems to open a can of worms rather than put the matter to rest.

At best, the Federal Court seems to introduce new concepts that are at odds with the plain meaning of the words in s152-40(1)(a).

But what does all this mean for Mr Eichmann? It means that his vacant block doesn’t qualify as an active asset. In other words, he lost. But the matter is now before the Full Federal Court.

Looking Ahead

And what does all this mean for you?

For land to be an active asset – and hence satisfy the active asset test – you need to demonstrate that the land is predominantly and directly used in the ordinary course of carrying on the business activities that produce assessable income.

For now. Let’s see what the Full Federal Court decides.

MORE

[Tech Stack](#)

[Find a Niche and They Will Come](#)

[Retirement Villages](#)

Disclaimer: *Tax Talks does not provide financial or tax advice. All information on Tax Talks is of a general nature only and might no longer be up to date or correct. You should seek professional accredited tax and financial advice when considering whether the information is suitable to your or your client’s circumstances.*

The information above is for general information only and should not be taken as constituting professional advice from Tax Talks. We are not a financial, legal or tax adviser. You should consider seeking independent legal, financial, taxation or other advice to check how the above information relates to your unique circumstances.