

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.

UPDATE 22 | Eichmann Decision

The Full Federal Court has overturned the Federal Court's Eichmann Decision.

Eichmann Decision

In *FCT v Eichmann [2019] FCA 2155* the Federal Court had decided against Mr Eichmann and set a very high bar for qualifying as an active asset for the small business CGT concessions, which we covered in ep 259.

The verdict was appealed and passed on to the Full Federal Court. The Full Federal Court overturned the decision of the Federal Court. And so lowered the bar again to qualify.

In this episode Andrew Henshaw of Velocity Legal in Melbourne will walk you through the details.

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.

Eichmann Decision

On 18 September 2020, the Full Federal Court handed down the third instalment of the Eichmann saga concerning the active asset test under the small business CGT concessions (*Eichmann v Commissioner of Taxation [2020] FCAFC 155*).

The Eichmann Saga Trilogy

At the start there was hope. The Administrative Appeals Tribunal determined in *Eichmann v FCT [2019] AATA 16* that land that was used to store tools and materials used in a business was an 'active asset' under the small business CGT concessions.

Then in the second instalment (*FCT v Eichmann [2019] FCA 2155*), the Federal Court reversed the AAT's decision, and arguably shifted the goal posts by reading additional requirements in to the active asset test (i.e. the 'direct functional relevance test'). A win for the ATO.

But finally, in the third instalment (*Eichmann v Commissioner of Taxation [2020] FCAFC 155*), the Full Federal Court quashed the Federal Court's decision, linking the active asset test to the words of the legislation.

Full Federal Court

The Full Federal Court made three important observations:

1 – Private Rulings and Disputes

The private rulings system is not always an apt mechanism to address disputes concerning facts, and even issues of characterisation of those facts. The fact that this dispute stemmed from a private ruling made things a lot more difficult.

2 – Use Is Enough

It is sufficient if the asset is used at some point in the course of the carrying on of an identified business. The legislation uses the word 'used', and there is no need to read in more than what is there, for example that the asset must be 'integral' or have a 'direct functional relevance'.

3 – Broad Interpretation

The small business CGT concessions in Div 152 should be construed beneficially. In favour of the tax payer. Rather than restrictively. The aim is to help small business – focus on that.

This point may have wide reaching implications for other aspects of the concessions. Take the definition of 'in connection' with retirement for the 15-year exemption as an example.

Conclusion

The good news for taxpayers is that the concept of 'integral use' has ultimately been rejected. Each case will continue to turn on its own specific facts. But it is still unclear how much of a land must be used to qualify as active. Does it need to be 100% or predominate use? Does it need to be more than 50%? Or is even 10% enough?

MORE

[The Eichmann Case](#)

[Retirement Villages](#)

[SMSF Trustee Discretion](#)

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.