

FAQ: Small Business CGT Concessions and Super

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Darren Wynen is our specialist responding to this months FAQ

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Q1. Can the retirement exemption be chosen by someone aged over 75?

A1. Yes, provided the remaining eligibility criteria for the retirement exemption are satisfied. It is not a precondition to obtaining the retirement exemption that the CGT concession stakeholder is below a certain age. Similarly, no such precondition exists for individuals seeking to apply the retirement exemption.

WARNING – Amounts contributed to superannuation under the retirement exemption are subject to the acceptance rules in Reg 7.04 of the SIS Regs 1994. This means, for example, that a retirement exemption amount cannot be accepted for a member aged over 75.

Q2. Is a property wholly leased to an unrelated party an 'active asset'?

A2. No, the property will not qualify as an active asset because the definition of an active asset excludes an asset whose main use is to derive rent. Refer also to TD 2019/D4.

Q3. An entity applied the small business rollover under Subdivision 152-E. Can the 15-year exemption apply after the two-year period expires?

A3. No, the 15-year exemption cannot be applied in these circumstances. A failure to acquire a replacement asset or incur replacement asset expenditure within the two-year replacement period results in CGT event J5 arising. In these circumstances, the retirement exemption can apply if the conditions are met (but not the 15-year exemption).

Q4. Can an SMSF apply the concessions to a factory leased to a related party?

A4. No, the fund cannot apply the concessions to a capital gain because the asset is not used by a 'connected entity' or 'affiliate'. The ATO view is that the members cannot control a fund in the manner required for it to be a 'connected entity'. For similar reasons, the related party cannot be an affiliate of the fund. Refer to TD 2006/68.



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Q5. Is the turnover requirement for a small business \$2 million or \$10 million?

A5. \$2 million. From 1 July 2016, businesses with a turnover of less than \$10 million can access certain concessions which were previously only available to business entities with a turnover of less than \$2 million. However, Division 152 was amended to retain the current aggregated turnover threshold of \$2 million for the purposes of the small business CGT concessions.

Q6. Can the CGT cap apply to the sale of a pre-CGT asset?

A6. Potentially the 15-year exemption, but not the retirement exemption. That is, S.292-100(5) of the ITAA 1997 states that the CGT cap extends to capital proceeds from the disposal of assets that would have qualified for the CGT exemption in Subdivision 152-B but for the asset being a pre-CGT asset.

Q7. An asset was purchased in 2004 by an individual. Is it compulsory to apply the general 50% CGT discount for an asset held for longer than 12 months?

A7. Yes, unless the 15-year exemption applies. Unlike the 50% active asset reduction, the individual is compelled to apply the 50% general CGT discount in these circumstances. Note that if the asset was acquired before 11.45am on 21 September 1999, the individual could have chosen the indexation method to determine the capital gain.

Q8. An individual aged 60 sold an active asset for \$2m and in the 2019 income year and applied the 15-year exemption. How much can be contributed to superannuation?

A8. It depends on the client's exact situation. By way of example, however, your client could:

- ▶ Subject to the individual's total superannuation balance and other eligibility conditions being met make non-concessional contributions in the 2019 income year (e.g., \$300,000);
- ▶ Make concessional contributions in both years up to the \$25,000 cap; and
- ▶ Delay making the CGT cap amount contribution to the 2020 income year (but contribute by the due date of the 2019 tax return) to obtain the benefit of the indexation of the CGT cap. Assuming no prior use of the CGT cap, up to \$1.515 million could be counted against the cap in the 2020 income year.



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