



A GOOD NEWS ITEM: ATO GIVES CLARITY ON THE SAFE HARBOUR RULE UNDER 328G

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In an election year, the historical announcement by the then Treasurer (Hon. JB Hockey, MP) on 12 May 2015 that “new businesses create new jobs. That is why we will ... [allow] ... business owners to ... receive tax relief when restructuring their existing business” is perhaps a timely reminder.

The above statement, heralding the introduction of Subdiv 328-G of the ITAA 1997, being the Small Business Restructure Roll-Over relief, has been followed by many (arguably expected) limitations overlaid on what was otherwise pitched as a deliberately generous regime.

This said, in recent times the ATO has been active in providing context to its view of the way in which the rules operate.

In addition to the 2 ATO law companion guidelines (namely, Law Companion Guideline 2016/2 and Law Companion Guideline 2016/3 (“LCG 2016/3”)) there have also been a series of private rulings published, for example:

- Authorisation Number: 1051401566911, which relates to the transfer of units in a unit trust from a company to a trust, and confirms no tax consequences (including under Div 7A) due to the application of the Subdiv 328-G roll-over;
- Authorisation Number: 1051286776633, which relates to the tax exempt transfer of assets from a company to a wholly owned subsidiary company;
- Authorisation Number: 1051386393245, which relates to the tax exempt transferring of a client base of an individual and company to a trust;
- Authorisation Number: 1051386604629, which relates to the transfer of pre-CGT land from an individual taxpayer to a new discretionary trust and confirms that the pre-CGT status of the land is maintained following the transfer; and
- Authorisation Number: 1051401067097, which relates to the transfer of shares held by an individual in a company to a newly settled discretionary trust, whereby access to the relief under Subdiv 328-G was denied.

There is now also clarity from the ATO in relation to the application of the “safe harbour rule” in Private Ruling Authorisation Number 7920126593966 (“Ruling”).

BACKGROUND

Briefly the factual matrix in the Ruling (relevantly) was as follows:

- A, B and C are brothers and, in partnership, are owners of a grazing property known as “XYZ”, in equal shares as tenants in common.



- XYZ was acquired before September 1985 and is a pre-CGT asset.
- The partnership carries on a grazing business on the XYZ property.
- The aggregated turnover of the partnership between A, B and C as well as their associates will be under \$10 million in the relevant financial year.
- It is proposed to transfer the XYZ property and grazing business owned by the partnership into a newly established trust structure (“New Trust”).
- A family trust election will be made in favour of A in relation to the New Trust.

The ATO confirmed that the rollover under s 328-430 of the ITAA 1997 was satisfied, allowing the transfer of the pre-CGT property into the New Trust, retaining its pre-CGT status.

“GENUINE” TEST AND THE SAFE HARBOUR RULE

One key issue to date under Subdiv 328-G that has been the subject of some uncertainty relates to the requirement under s 328-430 that the proposed “transaction is, or is part of, a genuine restructure of an ongoing business”.

In particular, if when relying on the safe harbour rule in s 328-435 of the ITAA 1997, is it also a requirement that the proposed restructure satisfy the definition of a “genuine restructure”.

Relevantly, s 328-435 confirms that for the purposes of s 328-430(1)(a), a transaction is deemed to be a genuine restructure of an ongoing business if, in the 3-year period after the transaction takes effect:

- there is no change in ultimate economic ownership of any of the significant assets of the business that were transferred under the transaction; and
- those significant assets continue to be active assets; and
- there is no significant or material use of those significant assets for private purposes.

Thus, on a plain reading of the legislation, it would appear that s 328-430(1)(a) is automatically satisfied if the conditions in s 328-435 are satisfied.

Furthermore, the Explanatory Memorandum (“EM”) to Subdiv 328-G confirmed that a small business “will be taken to satisfy the requirement” in s 328-430(1)(a) if the abovementioned 3 conditions are met.

Thus, as explained in the EM, it is only if a small business does not satisfy the requirements of the safe harbour rule that it need demonstrate that the transaction is otherwise a genuine one.

ATO VIEW

The ATO confirms the above conclusions, specifically quoting LCG 2016/3, that where the safe harbour rule is met:

- it is not necessary to consider whether the arrangement would otherwise be a transaction that is deemed to be a



genuine restructure of an ongoing business under s 328-430(1)(a); and

- there is no limit or expansion to what would otherwise be considered a transaction that is a genuine restructure of an ongoing business within the ordinary meaning of the phrase.

Thus, in the factual matrix of the Ruling, the decision by the taxpayer to rely on the safe harbour rule removed the need to consider any aspects of the arrangement, even those that might have gone to whether it was otherwise a genuine arrangement.

The successful reliance is however subject to the taxpayer meeting the 3 conditions in s 328-435 throughout the 3-year period after the transaction takes effect. If this occurs, then the requirement under s 328-430(1)(a) is deemed to be satisfied at the time of the transaction.

2 ONGOING ISSUES

In addition to the potential “clawback” of relief for any failure to meet the 3 conditions in s 328-435 throughout the 3-year period after the transaction takes effect, there are 2 key aspects that will need to be borne in mind in analogous situations to those set out in the Ruling.

First, the New Trust (and any trustee company) will show a date of establishment well after 1985.

Thus, anyone reviewing the New Trust and its assets may, arguably with justification, conclude, that its assets are all post-CGT assets. An error resulting in potentially devastating consequences for the taxpayer, and perhaps in turn the advisers who made the incorrect assumption.

In theory, the prospect of such an oversight should be remote.

In practice, we are aware of the identical error being made pursuant to historical rollovers under Subdiv 122-A of the ITAA 1997 (where the company transferee was registered in the 2000’s, and yet was in fact a pre-CGT company for tax purposes).

Second, the Ruling is expressly stated to be subject to the general anti-avoidance provisions under Part IVA of the ITAA 1997. The manner in which Part IVA could be said to apply in a situation where the safe harbour rule is satisfied is perhaps difficult to conceptualise.

This said, given the number of private ruling applications apparently made in relation to the appropriate interpretation of Subdiv 328-G more generally, then arguably the conservative approach, at least in the short term, appears to be that a private ruling should be obtained before seeking to rely on Subdiv 328-G.