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BARRISTERS AND SOLICITORS

ACN 103 499 181

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Board of Taxation  
C/- The Treasury  
Langton Crescent  
**CANBERRA ACT 2600**

By email: [taxboard@treasury.gov.au](mailto:taxboard@treasury.gov.au)

Dear Sirs,

## **SUBMISSION FOR SECOND DISCUSSION PAPER ON REVIEW OF DIVISION 7A ITAA 1936**

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We practice in tax law and have acted for a large number of small businesses using trusts.

The ATO's purported and controversial extension of the Division 7A rules to UPEs in Taxation Ruling TR 2010/3 and Practice Statement PSLA 2010/4 has caused considerable anxiety and added unnecessary complexity in an area which is already technically complicated. In the past, small businesses operated through trusts heavily relied on UPEs for funding business growth, working capital needs and investment in business assets. The Board's proposed "tick the box option" for trusts which have UPEs to corporate beneficiaries is therefore a sensible proposal but needs further clarity in relation to the following:

1. There are business assets other than goodwill which should enjoy the CGT discount, as they do under the small business concessions. The small business concessions in Division 152 ITAA 1997 apply to "active assets" as defined in section 152-40 ITAA 1997. This includes, for example, factories and shops used by businesses and intangible business assets such as business licences and franchise rights. The CGT discount should be available to all "active assets" which qualify under the small business CGT concessions and not be confined to goodwill which is only one type of business related asset. This is consistent with promoting the reinvestment of company profits for business related uses.
2. It is unclear what happens if a trust which owes a UPE to a corporate beneficiary lends money to another trust. Logically, so long as the "borrower trust" also "ticks the box", Division 7A should not apply to that loan.
3. The transitional rules should allow trusts with pre-existing UPEs to be able to take advantage of the "tick the box option". This would mean that CGT assets sold by such trusts after the legislation takes effect would not be eligible for the CGT discount

(except in respect of “active assets” as proposed above), but the UPE would not be treated as a loan for Division 7A purposes. Trusts should also have the right to elect backwards to the time when the UPEs arose and then amend returns to eliminate CGT discounts claimed on non-“active assets”. Such retrospective election opportunities have been offered in other contexts, including by allowing family trust elections to be back-dated to the 2005-05 income year or a later income so that franking credits can flow through to trust beneficiaries and trust losses can be claimed (see subsection 272-80(4A) of Schedule 2F of the ITAA 1936).

The ability for trusts to make a retrospective election under the “tick the box option” where they have pre-existing UPEs is a fair, reasonable and pragmatic legislative solution to the problem caused when the ATO changed its views on UPEs in December 2009 (when it released Draft Taxation Ruling TR 2009/D8), 12 years after Division 7A was introduced.

Should you have any queries, please do not hesitate to contact Graeme Halperin of this office.

Yours faithfully,

  
HALPERIN & CO. PTY LTD