

sbn

taxation and commercial

Succession and exit strategies

Andrew Noolan

andrew@sbnlawyers.com.au

SBN Lawyers Pty Ltd

Introduction

- Focus on small business concessions and earn-outs
 - Earn-outs used in selling a business
 - Accessing the concessions - \$6m NAV or \$2m t/o
 - Ensuring you have a significant individual
 - Getting access to the gain on sale

Earn-outs

- Payments based on events that occur after business sale
- Used to:
 - limit downside risk for purchaser
 - provide upside for vendor
- Example of standard earn-out - 50% of next year's profit

Earn-outs

- Understanding of way earn-outs worked prior to TR 2007/D10 – TR 93/15
- Treatment for vendor
 - Separate asset
- Issues for vendor
 - Capital loss on earn-out
 - Capital gain on earn-out

Earn-outs

- Treatment for purchaser
 - Simple additions to cost base
- Solution to vendor's issues
 - The reverse earn-out
 - Practical problems with reverse earn-outs

Earn-outs

- ATO changes the landscape – TR 2007/D10
- Vendor
 - Position unchanged for standard earn-out
 - Position strange on reverse earn-out
- Purchaser
 - Position changed for standard earn-out
 - Purchaser must value created right
 - Position strange for reverse earn-out

Earn-outs

- ATO meeting with professional bodies on 30 April 2008
- Submission made on look-through approach
- Look-through to apply to “standard” earn-out
 - Duration no more than 5 years
 - Expected earn-out payments no more than 50% of the total consideration
 - Based on factors that are sufficiently connected with the relevant asset, business or entity
 - Entitlement to money

Small business CGT concessions

- Why should you care?
 - Vendor maximise after tax funds available
 - Purchaser aware of vendor's cash position
- The concessions
 - 15 year retirement exemption
 - Small business reduction
 - Retirement exemption
 - Active asset rollover

\$6m NAV test and \$2m t/o test

- Conditions to access concessions
 - Meet the \$6m net asset value testOR
 - Meet the \$2m turnover test
- From 1 July 2007 both tests use rules in Division 328

\$6m NAV test and \$2m t/o test

- \$6m test includes net value of CGT assets of
 - You
 - Entities connected with you
 - Your affiliates' assets
 - Entities connected with your affiliates
- Certain assets excluded, including
 - Personal use and enjoyment assets
 - Affiliates' assets unless business connection

\$6m NAV test and \$2m t/o test

- \$2m test includes turnover of
 - You
 - Entities connected with you
 - Your affiliates' assets
 - Entities connected with your affiliates
- Certain amounts excluded, including
 - GST
 - Sales of retail fuel

\$6m NAV test and \$2m t/o test

- Who is connected with you?
 - Company
 - Partnership
 - Unit trust
 - Discretionary trust
- Who is your affiliate?

\$6m NAV test and \$2m t/o test

- How do you avoid being connected
 - 40%
 - Arguments based on affiliate
 - Indirect ownership
- Partnerships as a structure
 - Positive change on 1 July 2006 to NAV test
 - Problem with active assets

Significant individual test

- At least 20% directly or indirectly
- Relevant to:
 - 15 year retirement exemption
 - Retirement exemption
 - Sales of shares or units
- How measured for
 - Companies
 - Unit trust
 - Discretionary trusts

Significant individual test

- CGT concession stakeholders and requirement for spouse to have a participation percentage
- On sale of shares or units by interposed entity also a requirement for 90% test to be met

Getting the gain out

- The 15 year retirement exemption
 - Companies and unit trusts
 - Discretionary trusts
 - Unusual result for interest holders under 55 years
 - Application to pre-CGT gains
 - Interaction with contribution to super rules

Getting the gain out

- The \$500,000 retirement exemption
 - Timing requirement
 - Election to be made in writing
 - Age at time of payment determines who must be paid
 - Interaction with contribution to super rules

Getting the gain out

- The active asset concession
 - Companies
 - Unit trusts
 - Discretionary trusts
 - Timing requirement if capital gain at interest holder level

Getting the gain out

- The active asset rollover
 - 2 year deferral
 - What can be done in two years time?

Questions?

