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AUSTRALIAN TAX ADVISER

2306 : FEBRUARY 2023

The IFX Legal Tax Team

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SECTION 1 – PROFESSIONAL DEVELOPMENTS

CAN RENTAL PROPERTIES BE ACTIVE ASSETS?

In the recent case of [Del Castillo and FCT](#),¹ the AAT found that rental properties were not *active assets* as envisaged by s 152-40 of the ITAA97. This has implications for the CGT small business concessions, which only apply if a capital gain is made from the realisation of a ‘CGT active asset’.

¶6.1 What is a ‘CGT active asset’?

In simple terms, an ‘active asset’ is an asset that is used, or held ready for use, in the course of carrying on a business. The issue considered by the case was the meaning of the phrase ‘carrying on a business’. Specifically, whether an activity of leasing property would meet this condition of ‘carrying on of a business’, thus making the leased property an ‘active asset’.

Traditionally, income has been divided into three types – income from carrying on a *business*, income from *personal exertion* and income from *property*. It is beyond the scope of this article to analyse each of these categories, but this distinction would suggest that income from *property* was different from income derived from carrying on a *business*. By extension then, a taxpayer that derived income from leasing *property* could not also be said to be deriving the same income from carrying on a *business*: the conclusion being that property from which rental income was derived could not be an ‘active asset’ for CGT purposes.

¶6.2 Taxation Ruling TR 2019/1

The categorisation of income into these three categories was somewhat muddled by the release of Taxation Ruling [TR 2019/1](#), which dealt with the meaning of the term ‘base rate entity’. Readers will be aware that the term ‘base rate entity’ was applied to companies that were eligible for the lower tax rate (or base rate) of 25%. While not directly relevant to the CGT concessions, that Ruling appeared to suggest that the activity of renting real estate might be construed as the carrying on of a business for the purposes of accessing the base rate. Specifically, the Ruling explored the meaning of the phrase ‘carrying on a business’ as it related to the conditions outlined in s 23 of the *Income Tax Rates Act 1986*.

Simply put, to access the base rate, companies needed have an aggregated annual turnover of less than \$50m **and** have more than 20% of their assessable income being derived from carrying on a business (in other words, no more than 80% of income could be attributable to ‘base rate entity passive income’ (BREPI)).

By way of explanation, BREPI includes:

- dividends plus any franking credits
- royalties
- rent

¹ [2022] AATA 4233