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## The Commissioner's discretion to extend the two year period to dispose of dwellings acquired from a deceased estate

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### **Relying on this draft Guideline**

This Practical Compliance Guideline is a draft for consultation purposes only. When the final Guideline issues, it will have the following preamble:

*This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.*

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### **What this draft Guideline is about**

1. Section 118-195<sup>1</sup> disregards certain capital gains and capital losses arising from a CGT event happening to a dwelling that was a deceased person's main residence and not being used to produce assessable income just before they died or was acquired by the deceased before 20 September 1985.<sup>2</sup>
2. If you dispose of an interest in a dwelling that passed to **you** as an individual beneficiary or the trustee of the deceased's estate within two years of the deceased's death, any capital gain or loss you make on the disposal is disregarded. The Commissioner (**we**) can allow a longer period.<sup>3</sup>
3. This draft Guideline outlines the factors we will consider when deciding whether to exercise the discretion to allow a longer period.
4. This draft Guideline also outlines a safe harbour compliance approach that allows you to manage your tax affairs as if we had exercised the discretion to allow you a longer period.

### **Date of effect**

5. When finalised, this draft Guideline is proposed to apply both before and after its date of issue.

### **Extending the two year period**

6. Generally, we will allow a longer period where the dwelling could not be sold within two years of the deceased's death due to reasons beyond your control that existed for a significant portion of the first two years.
7. In each case, we weigh up all of the factors (both favourable and adverse) in the context of the facts and circumstances of the case. The absence of some or all of the favourable factors does not necessarily mean that we will not allow a longer period.
8. How much weight we give to each factor will depend upon the circumstances of each particular case. The circumstances that caused the delay in disposing of the ownership interest are more important than the length of the delay. The amount of any potential capital gain or loss is not relevant to whether the discretion is exercised.
9. We will not allow a longer period for even a very short delay beyond two years if there are no relevant circumstances present. Likewise, a lengthy delay will not prevent us from allowing a longer period where relevant circumstances caused the delay and persisted for the overwhelming majority of the total period.

### **Safe harbour – compliance approach**

10. If your circumstances are consistent with the conditions listed in paragraph 13 of this draft Guideline, you can manage your tax affairs as if we had allowed you a period longer than two years.

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<sup>1</sup> All references in this draft Guideline are to the *Income Tax Assessment Act 1997*.

<sup>2</sup> Section 118-200 provides a partial exemption for some dwellings that do not qualify for the full exemption in section 118-195. This draft Guideline applies equally to the Commissioner's discretion to extend the two year period in section 118-200.

<sup>3</sup> If the disposal of the ownership interest results in a capital loss being calculated, you may prefer not to request the exercise of the discretion so that the capital loss is available to reduce a capital gain realised in the same or later year.

11. If you choose to use this safe harbour and are subsequently chosen for an ATO compliance check, we will seek to ensure that you satisfy the relevant conditions including checking that the additional period is no longer than 12 months. We will not seek to determine whether or not we would have actually exercised the discretion.

12. You should maintain all records necessary to support your claim that you are eligible for the safe harbour.

### **Safe harbour – conditions**

13. To qualify for the safe harbour, you must satisfy all of the following conditions:

- during the first two years after the interest in the dwelling passed to you, more than 12 months was spent addressing one or more of the circumstances described in paragraph 14 of this draft Guideline as factors favourable to the exercise of the discretion
- the dwelling was listed for sale as soon as practically possible after those circumstances were resolved (and the sale was actively managed to completion)
- the sale completed (settled) within six months of the dwelling being listed for sale
- the circumstances described in paragraph 15 of this draft Guideline as factors adverse to the exercise of the discretion were immaterial to the delay in disposing of your interest, and
- the longer period for which you would otherwise need the discretion to be exercised is no more than 12 months.

### **Factors favourable to the exercise of the Commissioner’s discretion**

14. The following is a non-exhaustive list of factors which would weigh in favour of allowing a longer period:

- the ownership of the dwelling, or the will, is challenged
- a life or other equitable interest given in the will delays the disposal of the dwelling
- the complexity of the deceased estate delays the completion of administration of the estate, or
- settlement of the contract of sale of the dwelling is delayed or falls through for reasons outside of your control.

### **Factors adverse to the exercise of the Commissioner’s discretion**

15. The following is a non-exhaustive list of factors which would weigh against allowing a longer period:

- waiting for the property market to pick up before selling the dwelling
- delay due to refurbishment of the house to improve the sale price
- inconvenience on the part of the trustee or beneficiary to organise the sale of the house, or
- unexplained periods of inactivity by the executor in attending to the administration of the estate.

### **Other factors**

16. Other factors that may be relevant to the exercise of the Commissioner's discretion (but are not relevant for the safe harbour) include but are not limited to:

- the sensitivity of your personal circumstances and/or of other surviving relatives of the deceased
- the degree of difficulty in locating all beneficiaries required to prove the will
- any period the dwelling was used to produce assessable income, and
- the length of time you held the ownership interest in the dwelling.

### **Examples**

17. The following examples illustrate how the safe harbour can apply in various situations.

#### **Example 1 – safe harbour – life interest**

18. *Mr Bishop acquired a dwelling before 20 September 1985. He died on 22 March 2014 and his will gave a life tenancy to his wife. Title to the property remained in the estate of Mr Bishop. Mr Bishop's two adult children from a previous marriage are the beneficiaries of his estate.*

19. *Mrs Bishop continued to live in the dwelling until she died on 18 November 2016.*

20. *The trustee had the property cleaned and placed on the market as soon as practically possible after Mrs Bishop died. A contract for the sale of the property was signed on 11 February 2017 and settlement occurred on 14 March 2017.*

21. *Because the delay in disposing of the property was caused by the life tenancy (circumstances described as a favourable factor), and the property was marketed and sold as soon as was practical after the death of Mrs Bishop, the trustee could rely on the safe harbour (provided no materially adverse factors were present).*

#### **Example 2 – no safe harbour – family member residing in dwelling**

22. *Ms Evans lived with Bevan (her son and full-time carer) in her main residence when she died on 1 September 2013. The dwelling was acquired after 20 September 1985 and was not being used to produce assessable income.*

23. *On the basis the dwelling would still be sold within a two year period, the trustee of the estate allowed Bevan to continue to live in the dwelling until he found full-time employment.*

24. *In June 2016, Bevan obtained full-time employment and moved out of the dwelling. The trustee then sold the dwelling.*

25. *Because the delay in selling the dwelling was not caused by any of the circumstances described as favourable factors, the trustee cannot rely on the safe harbour. The decision to allow Bevan to reside in the dwelling was a matter of choice within the control of the trustee.*

### **Example 3 – no safe harbour – storm damage and renovations**

26. *Mr Wong lived in a dwelling that was his main residence when he died on 1 January 2016. Mr Wong acquired the dwelling before 20 September 1985.*
27. *On 14 July 2016, a severe storm damaged the dwelling, which required repairs before it could be advertised for sale. As well as completing repairs, the trustee also engaged builders to undertake other significant renovations to improve the value of the dwelling before sale. Work was completed on 18 May 2017.*
28. *The dwelling was listed for sale on 26 June 2017 and actively managed until eventually sold. Settlement occurred on 17 January 2018.*
29. *Although the storm damage was outside of the control of the trustee, and the property was sold shortly after the two year period, the trustee cannot rely on the safe harbour because the most significant factor in delaying the sale was the decision to renovate the dwelling, which was entirely within the control of the trustee.*

### **Example 4 – no safe harbour – subdivision of land**

30. *Mrs Papageorgiou lived in her main residence when she died on 1 June 2015. Mrs Papageorgiou acquired the dwelling after 20 September 1985. It was not being used to produce assessable income when she died.*
31. *The beneficiaries of Mrs Papageorgiou's estate (her four adult children) decided to subdivide the property to increase the sale price. A plan was submitted to Council on 30 November 2015. On 1 July 2016, the Council advised that the plan was not approved.*
32. *The beneficiaries appealed the decision on 22 July 2016, and attended a hearing on 12 October 2016. On 28 February 2017, the Tribunal advised that a new subdivision application should be lodged with the Council. A new application was submitted to the Council on 24 March 2017, but by 1 June 2017 the Council had not made a decision.*
33. *While the resolution of the subdivision application is beyond the control of the beneficiaries, they cannot rely on the safe harbour because the delay is due to the decision to subdivide, which is not necessary for the resolution of the estate or the disposal of the dwelling.*

### **Example 5 – safe harbour – legal challenges**

34. *Mr Hawke acquired a dwelling before 20 September 1985, which was his main residence until he died on 3 October 2013. Mr Hawke acquired the dwelling before 20 September 1985. Mr Hawke's will stated that the dwelling was to pass (in equal shares) to his two adult children from his first marriage. The will also made separate provisions for both his first and second wives.*
35. *Mr Hawke's second wife, who resided in the dwelling with Mr Hawke at the time of his death, refused to vacate the property so that it could be sold by the children. After six months of failed negotiations, the children obtained a court order requiring Mr Hawke's second wife to vacate the property.*
36. *At the same time, both the first and second wives commenced legal proceedings to challenge the terms of the will. The children received legal advice that they could not dispose of the dwelling until those legal challenges had been resolved. Negotiations took place between all beneficiaries and a settlement was eventually reached, with Supreme Court orders handed down on 21 July 2015. The dwelling was to be disposed of and the proceeds distributed between the beneficiaries in accordance with the order.*

37. *The dwelling was placed on the market on 1 September 2015 and sold, with settlement occurring on 16 November 2015.*

38. *The children could rely on the safe harbour because the delay in disposing of the property was due mainly to legal challenges to the will of the deceased (circumstances described as a favourable factor) provided the children clearly took positive steps to address these circumstances, there were no materially adverse factors adverse and no more than an additional 12 months was required.*

39. *The sensitivities involved in having the deceased's second wife vacate the property may also be a relevant factor in applying the safe harbour (depending on further detail).*

#### **Example 6 – no safe harbour – inactivity**

40. *Ms Kahn lived in her main residence until she died on 6 May 2013. Prior to her passing her spouse moved into the property. Her will stated that the dwelling was to pass in equal shares to her three children.*

41. *After Ms Kahn's death, her spouse continued to live in the property and the children commenced legal proceedings to remove Ms Kahn's spouse from the property. The matter was settled on 8 July 2014.*

42. *After the matter was settled, the property remained vacant for 18 months while the children decided what to do with the property. The property was eventually put on the market in January 2016 and sold, with settlement occurring on 3 April 2016.*

43. *While there was a delay in disposing of the property due to the legal action to remove the deceased's spouse from the property, the children cannot rely on the safe harbour because the dwelling was not listed for sale as soon as practically possible after those circumstances were resolved.*

#### **Example 7 – no safe harbour – serious illness of trustee a factor for discretion**

44. *Mr Hubbard lived in his main residence until he died on 19 September 2014. Mr Hubbard's son, Richard, was the sole executor and beneficiary of Mr Hubbard's will. The house was the estate's only asset.*

45. *Shortly after probate was granted, Richard was diagnosed with a serious illness and spent a large period of time hospitalised. As soon as Richard's health improved, he cleaned out the property and placed the house on the market in January 2017, with settlement occurring on 2 April 2017.*

46. *Because the delay in selling the dwelling was not caused by any of the circumstances described as favourable factors, Richard could not rely on the safe harbour. However, if asked to exercise the discretion, the Commissioner would take into account the fact that Richard's serious illness prevented him from attending to the administration of the estate for a significant period, the fact that he took steps to resolve this as soon as practically possible and the period for which he would need the discretion to be exercised is less than 12 months.*

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**Commissioner of Taxation**

22 August 2018

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## Your comments

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47. You are invited to comment on this draft Guideline. Please forward your comments to the contact officer by the due date or join the conversation on this draft Guideline on the Public Advice and Guidance Community on Let's Talk.

48. A compendium of comments is prepared for the consideration of the relevant Public Advice and Guidance Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments, and
- be published on the ATO website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** 21 September 2018  
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### References

ATOlaw topic(s)	Income tax ~~ Capital gains tax ~~ Deceased estates
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