PCG 2019/5 - 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 Guideline

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 Guideline is about

1. Section 118-195[1] disregards capital gains and capital losses made from certain CGT events that happen in relation to a dwelling that was a deceased person's main residence and not being used to produce assessable income just before they died[2], or was acquired by the deceased before 20 September 1985.

2. If you dispose[3] of an ownership interest in a dwelling that passed to **you** as an individual beneficiary or as 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**) has the discretion to extend the two year period.[4]

3. Generally, we will allow a longer period where the dwelling could not be sold and settled 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.

4. This Guideline 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.

5. This Guideline also outlines the factors we will consider when deciding whether to exercise the discretion to extend the two year period.

6. You may be entitled to a partial exemption for any capital gain or loss made from the disposal of your ownership interest in a dwelling if section 118-195 does not apply.[5] This Guideline applies equally in relation to the Commissioner's discretion to extend the two year period for partial exemptions.

Date of effect

7. This Guideline applies both before and after its date of issue.

Safe harbour – compliance approach

8. If your circumstances satisfy the conditions listed in paragraph 11 of this Guideline, you can manage your tax affairs as if we had allowed you a period longer than two years.

9. 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 18 months. We will not seek to determine whether or not we would have actually exercised the discretion.

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

Safe harbour – conditions

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

- during the first two years after the deceased's death, more than 12 months was spent addressing one or more of the circumstances described in paragraph 12 of this Guideline

[1] All references in this Guideline are to the *Income Tax Assessment Act 1997*.
[2] For dwellings acquired on or after 20 September 1985. In some cases, the use of a dwelling to produce assessable income can be disregarded (see sections 118-145 and 118-190).
[3] This Guideline applies where the relevant CGT event is a disposal. Subsection 118-195(2) lists other CGT events where a capital gain or loss may be disregarded and the Commissioner can allow a longer period within which your ownership interest in the dwelling ends following the deceased's passing.
[4] If the disposal of the ownership interest results in a capital loss, 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.
[5] Section 118-200.

- 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 12 months of the dwelling being listed for sale
- if any of the circumstances described in paragraph 13 of this Guideline were applicable, they 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 18 months.

Circumstances that took more than 12 months to resolve

12. One or more of the following circumstances must have taken more than 12 months to address:

- 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.

Circumstances that cannot be material to delays in disposal

13. In order to qualify for the safe harbour, none of the following circumstances can have been material to the delay in disposing of your interest:

- 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.

Extending the two year period – exercising the Commissioner's discretion

14. In considering whether to extend the two year period, we weigh up all of the factors (both favourable and adverse) having regard to the facts and circumstances of the case.

15. Factors that would weigh in favour of the Commissioner allowing a longer period include those listed in paragraph 12 of this Guideline. The absence of some or all of those favourable factors does not necessarily preclude us from allowing a longer period.

16. Factors that would weigh against the Commissioner allowing a longer period include those listed in paragraph 13 of this Guideline.

17. 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.

18. 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.

19. 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.

Examples

20. Examples 1 to 8 illustrate how the safe harbour can apply in various situations and how the Commissioner would approach exercising the discretion.

Example 1 – safe harbour – life interest

21. *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.*

22. *Mrs Bishop continued to live in the dwelling until she died on 18 April 2017.*

23. *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 July 2017 and settlement occurred on 14 August 2017.*

24. *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

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

26. *On the basis the dwelling would still be sold and settled 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. Bevan was not given any right to occupy the house under Ms Evans' will.*

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

28. *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

29. *Mr Wong lived in a dwelling that was his main residence until he died on 1 January 2016. Mr Wong acquired the dwelling before 20 September 1985.*

30. *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.*

31. *The dwelling was listed for sale on 26 June 2017 and actively managed until eventually sold. Settlement occurred on 17 January 2018.*

32. *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

33. *Mrs Papageorgiou lived in her main residence until 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.*

34. *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.*

35. *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.*

36. *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

37. *Mr Hawke acquired a dwelling before 20 September 1985, which was his main residence until he died on 3 October 2013. 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.*

38. *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.*

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

40. *The children could rely on the safe harbour because the delay in disposing of the property was due 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 and no more than an additional 18 months was required.*

Example 6 – no safe harbour – inactivity

41. *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.*

42. *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.*

43. *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.*

44. *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 legal personal representative a factor for discretion

45. *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.*

46. *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.*

47. *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 only short.*

Example 8 – safe harbour – complexity of deceased estate

48. *Mr and Mrs Harrison acquired their main residence after 20 September 1985. Mr Harrison died in July 2008 and Mrs Harrison became the sole owner of the property. Mrs Harrison died on 29 February 2016 and was survived by her two daughters, Jane and Sally. The daughters were unsure whether Mrs Harrison had a will.*

49. *Jane moved into the property without Sally's knowledge soon after Mrs Harrison died. Sally wanted to sell the property and sought Jane's agreement to sell. No agreement was reached and Jane became increasingly obstructive.*

50. *During January 2017, Sally engaged solicitors in an attempt to resolve the issue. A number of court actions followed. During this period Jane made two unsuccessful attempts to have the title transferred into her name solely. Letters of administration were also issued to Sally and subsequently revoked during this period. In early 2018, Jane sought to obtain finance to acquire Sally's interest in the property, but was unable to do so.*

51. *In October 2018, on the basis that Mrs Harrison had no will, the Supreme Court ruled that the property be sold. Jane was evicted and the property was sold, with settlement occurring on 14 May 2019.*

52. *Because the delay in disposing of the property was caused by the complexity of the estate (including uncertainty about the will and the multiple legal proceedings) and the property was listed and sold as soon as practicable after those issues were resolved, the sisters could rely on the safe harbour.*

Further considerations

53. Where your circumstances fall outside of the safe harbour but you want the Commissioner to consider exercising the discretion, you should write to us and request a private ruling.

54. Where the safe harbour is not available **and** the Commissioner's discretion is not exercised, your capital gain will be calculated on the basis that the dwelling was acquired for its market value as at the date of the deceased's death.[6]

Commissioner of Taxation
27 June 2019

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[6] Items 3 and 4 of the table in subsection 128-15(4).

References

Previous draft:

Previously released in draft format as PCG 2018/D6

ATOlaw topics	Income tax ~~ Capital gains tax ~~ Deceased estates
Legislative references	ITAA 1997 ITAA 1997 118-145 ITAA 1997 118-190 ITAA 1997 118-195 ITAA 1997 118-195(2) ITAA 1997 118-200
ATO reference	1-BJKWU58
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