



8 December 2021

Ms Danijela Jablanovic
Individuals and Intermediaries
Australian Taxation Office

By email to: Danijela.jablanovic@ato.gov.au

Dear Danijela,

Review - PCG 2019/5 The Commissioner's discretion to extend the two-year period to dispose of dwellings acquired from a deceased estate

The Institute of Public Accountants welcomes the opportunity to provide a submission to the Australian Taxation Office's (ATO's) consultation on Practical Compliance Guideline 2019/5 (the **Guidelines**). We appreciate the ongoing consultation in driving improvements in the administration of tax laws. We make this submission on behalf of our members and in the broader public interest. This submission responds to some of the ATO's consultation questions.

Section 118-195 of the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) allows a trustee or beneficiary of a deceased estate to disregard the capital gain or loss from an inherited dwelling in certain circumstances, including where the ownership interest ends within two years of the deceased's death. The Commissioner has been given a discretion under section 118-195 of the ITAA to extend this period in certain circumstances. The Guidelines provide a safe harbour for taxpayers to self-assess if the discretion has been exercised for an additional period of no more than 18 months.

It's a valuable administrative concession to extend the 2-year time limit and having guidance on how this discretion will be administered is important in setting the goal posts right, to avail yourself of the safe harbour. As with any discretion, we fully appreciate that it is a balancing act and only under certain conditions will taxpayers be able to use the administrative concession, and this is in order to safeguard against inappropriate use of the safe harbour.



In principle we consider the 18-month timeframe to be appropriate, and that requests for further time should be submitted to the ATO for review, and this is to maintain the integrity of the safe harbour and administration of the discretion more generally.

Deceased estates are events that generally occur infrequently and challenge practitioners due to unfamiliarity with estate administration. Since publishing PCG 2019/5 in June 2019, discretion requests have reduced, which confirms the reduction in the compliance burden associated with seeking guidance on the Commissioner's discretion. One can therefore assume that taxpayers have been confident enough to self-assess their entitlement to the discretion, as a result of the existence of the guidance. The guidance does try to emulate the most common scenarios that can occur under estate administration and those that can delay the disposal of dwellings acquired under a deceased estate. It is understandable that every scenario cannot be covered, but in the main, the examples provided are broad enough to be used to self-assess most situations where the discretion could be relied upon.

The one exception however, is in example 7 "*no safe harbour of legal personal representative a factor for discussion*". In this scenario, serious personal circumstances including illness of the legal personal representatives (LPRs) are not covered by the safe harbour in the guidelines.

"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."

In this scenario, an application for the discretion is required. Consideration to including such circumstances within the safe harbour we believe is warranted and hope that this can be accommodated.

Another example which could improve the guidelines is example 1 "*safe harbour - life interest*". The guidelines make it clear that circumstances for an extension include a life or other equitable interest. If example 1 is modified to clearly show a further two years is granted from the time the spouse or other person with an occupancy right ceases to live at the property, this would be useful to confirm the exercise of the discretion under these circumstances. The 18-month extension needs to be modified to accommodate life interests.

Our last point we wish to make is around whether the property needs to be sold before a discretion could be exercised. Practitioners often receive requests to provide advice on a pre-emptive basis, based on facts and circumstances that are relevant at the time. The ATO will generally not exercise the discretion if the relevant



dwelling has not actually been sold. This creates a level of uncertainty particularly when parties are in dispute and need clarity about any potential tax liability that might arise from the sale of the dwelling acquired from a deceased estate. In these circumstances, on the basis that all the relevant conditions are otherwise satisfied and the sale is completed within a specified period, clarity is needed on whether the ATO will provide a pre-emptive decision on the exercise of the discretion on a contingent basis.

If you would like to discuss our comments, please do not hesitate to contact me.

Yours sincerely

Tony Greco
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Institute of Public Accountants

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