



THE TAX INSTITUTE

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Engagement and Support | Individuals and Intermediaries
Australian Taxation Office

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Dear Ms Spencer-Arnell

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

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) as part of the consultation and review of Practical Compliance Guideline PCG 2019/5: *The Commissioner's discretion to extend the two-year period to dispose of dwellings acquired from a deceased estate (PCG)*.

In the development of this submission, we have consulted with our members who specialise in the tax treatment of deceased estates to prepare a considered response which represents the views of the broader membership of The Tax Institute.

Broadly, the PCG has provided a practical and useful guide for taxpayers seeking clarity around the operation and application of s 118-195 of the *Income Tax Assessment Act 1997 (ITAA 1997)*.¹ The PCG is a valuable resource and has enabled the administration of many estates to be undertaken in a more timely and cost effective manner.

However, there are some areas that we consider could be further improved. Our detailed response to the consultation questions is contained in **Appendix A**.

We would be pleased to continue to work with the ATO on the review of the PCG to ensure it continues to achieve its objectives.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix B** for more about The Tax Institute.

¹ All legislative references are to the ITAA 1997 unless indicated otherwise.

If you would like to discuss any of the above, please contact our Senior Advocate, Robyn Jacobson, on (03) 9603 2008.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Peter Godber", with a long horizontal flourish extending to the right.

Peter Godber
President

APPENDIX A

CONSULTATION QUESTIONS

Safe harbour

Is the additional 18 months' timeframe under the safe harbour sufficiently long?

Generally, the provision of an additional 18-month period in which to conclude the sale of a deceased person's dwelling is sufficient time.

However, there are circumstances in which a longer period is warranted. Example 1 of the PCG sets out that — where the deceased's dwelling is occupied by their surviving spouse or someone with a right to occupy the dwelling, such as in the form of a life interest — the trustee can rely on the 18-month safe harbour period.

The Commissioner has a discretion to extend the two-year period in item 1 of column 3 of the table in subsection 118-195(1) of the ITAA 1997. There are often occasions where the life tenancy continues for a period that is longer than 18 months (for example, 10 years) following the death of the property owner. We understand that the Commissioner usually grants up to a further two years from the time the surviving spouse or other person with an occupancy right ceases to live at the property in which to conclude the sale of the deceased person's dwelling.

While this is a sensible approach, it is not sufficient in all cases involving life tenancies. Given this, we would like to see a longer period allowed by the safe harbour in the PCG in cases where:

- the life tenant occupies the property for many years following the death of the property owner; and
- the sale of the property is concluded within a reasonable period of time following the death of the life tenant.

Any other feedback on safe harbour conditions.

Paragraph 11 of the PCG sets out the conditions that must be satisfied to qualify for the safe harbour. One of those conditions is that:

the sale [is] completed (settled) within 12 months of the dwelling being listed for sale

One of the acceptable circumstances in paragraph 12 of the PCG for the safe harbour to apply is that:

settlement of the contract of sale of the dwelling is delayed or falls through for reasons outside of your control

We would like to see the above condition in paragraph 11 updated to clarify that — where the contract of sale of the dwelling falls through for reasons outside of the trustee's control and the property is re-listed for sale — the relevant 12-month period commences from when the dwelling is re-listed for sale not the original listing.

PCG examples

Do examples cover the most common scenarios?

What additional examples (or improvements to existing examples) might be useful?

The PCG is silent on the role of the COVID-19 pandemic in the range of factors that are considered by the Commissioner in determining whether to grant additional time to conclude the sale of the deceased person's dwelling.

Some trustees have experienced significant delays in concluding the sale of the deceased's dwelling because family members have been unable to return, or travel, to Australia, or even travel interstate across domestic borders, to clear out the deceased's property and make it available for sale.

We would like to see recognition in the PCG of the various restrictions due to the COVID-19 pandemic affecting the ability to conclude the sale of the deceased's dwelling within the safe harbour period. This could be done by way of an additional example.

Separately, while acknowledging that waiting for the property market to pick up before selling the dwelling is a circumstance that cannot be material to the delay in the disposal to qualify for the safe harbour, this should be distinguished from the situation where the only offers made by prospective purchasers are well below the valuation obtained by the legal personal representative (**LPR**). That is, the LPR is not waiting for the market to 'pick up' but is seeking to achieve the market value. If the LPR sold for an amount that is less than market value, the LPR could be in breach of their fiduciary duties). Including an additional example in the PCG to highlight this point would be helpful. This situation also raises the issue about the requirement for a sale within 12 months of the dwelling being listed to be eligible for the safe harbour.

Does the property need to be sold before a discretion could be exercised?

We find that many discretion requests are received before the property is sold. At a practical level, the facts that the Commissioner would take into account in deciding whether to exercise the discretion are likely to be fully understood only once the CGT event has occurred. In the ordinary circumstance, it would not be appropriate for the Commissioner to exercise the discretion prior to that time. Would clarifying this be useful?

We understand that the Commissioner will generally refuse to exercise the discretion if the relevant dwelling has not actually been sold when seeking the discretion. It is not uncommon for the parties in an estate to be in dispute and clarity about the potential and likely tax liability that might arise from the sale of a dwelling is needed to assist with resolving the dispute. We consider that the exercise of the Commissioner's discretion should not be confined to those cases where the sale of a deceased person's dwelling has already concluded. There is nothing in the provisions that prescribes this approach.

We would like to see the Commissioner consider exercising the discretion before the CGT event actually happens in these cases, provided all of the relevant conditions are otherwise satisfied and the sale of the dwelling is concluded within a specified period, as this will provide greater certainty to those parties in an estate.

Visibility of PCG

Is the tax agent/professional associations community aware of the PCG 2019/5? How about your clients, are they aware of it?

How can we improve the visibility of PCG 2019/5?

While there is an increasing awareness of the PCG among legal practitioners who specialise in estates and trusts, and those tax agents who habitually assist with the administration of deceased estates, this does not mean that there is a broad awareness of the PCG across the tax profession or the community, nor does it necessarily follow that the requirements of the PCG are well understood. Awareness of the PCG by the community could generally be regarded as poor.

There is an opportunity to increase awareness of the PCG across the tax profession through targeted communication content, including web content, as well as including references to the PCG when ATO officers are dealing with LPRs.

Other

We would appreciate your feedback on any aspects of PCG 2019/5 you may have.

Suggestions for improvements are welcome.

We are aware of different approaches taken by the ATO as to whether the exercise of a discretion can properly be the subject of a private binding ruling. For example, the ATO will not issue a private ruling about the discretion in paragraph 292-95(1)(b)² of the ITAA 1997.

While it might not be appropriate to deal with a general issue like this in the context of a document dealing with one particular discretion (in this case, the discretion in section 118-195 of the ITAA 1997), it would be useful if the PCG could consider explaining how taxpayers should apply for the exercise of the discretion in section 118-195 — that is, whether this should be done by applying for a private binding ruling or by way of another form of request.

We also suggest that:

- This broader issue be dealt with in another ATO guidance document; and
- Given that similar issues can arise in the context of the discretion that is available in subsection 152-80(3)³ of the ITAA 1997, it would be useful if a similar PCG could be developed to deal with this discretion.

² About contributions to superannuation arising from structured settlements or orders for personal injuries.

³ About where a CGT event happens to an asset or interest within two years of an individual's death for the purpose of the small business CGT concessions in Division 152 of the ITAA 1997.

APPENDIX B

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.