



THE TAX INSTITUTE

21 September 2018

Mr Geoffrey Gibbons
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By email: geoffrey.gibbons@ato.gov.au

Dear Geoffrey

PCG 2018/D6 – The Commissioner’s discretion to extend the two-year period to dispose of dwellings acquired from a deceased estate

The Tax Institute welcomes the invitation to make a submission in relation to *Practical Compliance Guideline* PCG 2018/D6: The Commissioner's discretion to extend the two-year period to dispose of dwellings acquired from a deceased estate (**Draft PCG**).

The safe harbour

Paragraph 13 of the Draft PCG provides a safe harbour where a deceased's dwelling has not been sold within two years of the deceased's death. To qualify for the safe harbour, you must satisfy all of the following conditions which are listed in paragraph 13:

- 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.

The Tax Institute considers that the safe harbour outlined in the Draft PCG is beneficial. In this regard, we note that providing a safe harbour may reduce the need for taxpayers

to apply for private rulings. This simplification is welcomed and will save both taxpayers and the Commissioner time and money.

To provide more clarity in relation to the safe harbour, we consider that the Draft PCG should contain a direct statement to the effect that the relevant taxpayer only needs to consider the factors listed in paragraphs 14 and 15 when assessing their eligibility for the safe harbour. It should be stated in the Draft PCG that this is the case, irrespective of the fact that the factors listed in paragraphs 14 and 15 are non-exhaustive. In our opinion, requiring the taxpayer to hypothesise about other possible relevant factors that the Commissioner may consider, would be counterproductive to the safe harbour.

In relation to the first condition to be eligible for the safe harbour, we consider that the Draft PCG should clarify whether the safe harbour would be available in circumstances where the interest in the dwelling passes to a beneficiary more than two years after the deceased's death and subsequently the beneficiary spends more than 12 months addressing one or more of the factors listed in paragraph 14.

The second and third conditions set out in paragraph 13 refer to the deceased's dwelling being "*listed for sale*". In our opinion, it would be beneficial if the Draft PCG clarified what is required to be "*listed for sale*". For example:

- Does this time refer to the date of appointment of the first agent engaged to handle the sale?
- Is this time the same regardless of whether the sale is by private treaty or auction?
- Is the time reset if that first agent is subsequently replaced? Does that depend on why the agent is replaced?
- What would be the position if the executor or beneficiary advertised the dwelling directly through on-line marketing?

Factors to be considered

In relation to the exercise of the Commissioner's discretion, the Draft PCG at paragraph 14 outlines a non-exhaustive list of factors which would weigh in favour of allowing a longer period including:

- 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.

As a general point, it is concerning that a non-exhaustive list has only four factors. It would be beneficial if examples of each factor were included in the Draft PCG.

Further, we query whether the list should be expanded to at least include other relatively common issues such as the beneficiary is experiencing marital or health issues, the executor passes away or there is a delay in an insurance claim relevant to the property.

The Draft PCG would be more effective if further clarification was provided in relation to the first factor (ie whether the ownership of the dwelling, or the will, is challenged). For example:

- Does there need to be correspondence between lawyers for there to be a challenge?
- Does the matter have to end up in court? Many such challenges do not end up formally being filed in court.
- Is it enough that there is correspondence between the executors and the challenger?

In relation to the third factor (ie the complexity of the deceased estate delays the completion of administration of the estate), it would be more effective if the Draft PCG included examples in relation to this factor and made further comment on the types of “complexity” that would be viewed favourably in terms of the Commissioner exercising his discretion.

Examples

In relation to Example 1, we consider that redrafting the example would make it more effective. In our opinion, Example 1 would be more useful if it included a long period before death of the life tenant, say 5 to 10 years. The Draft PCG should provide guidance in relation to the question of “how long is long enough?”.

In relation to Example 2, we suggest that Bevan’s age should be specified. In our opinion, whether Bevan is a minor or not impacts the assessment of whether the ATO’s position is reasonable.

Lastly, as mentioned above, we consider that it would be beneficial to include additional examples in the Draft PCG.

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If you would like to discuss, please contact either me or Tax Counsel, Angie Ananda, on 02 8223 0011.

Yours sincerely



Tracey Rens
President