



## Commissioner finalises discretion on extended two-year period to sell dwellings of a deceased estate

On 27 June 2019 the Commissioner of Taxation issued the Practical Compliance Guideline [PCG 2019/5](#) to provide an executor (or beneficiary) of a deceased estate with a safe harbour that can be relied upon if a dwelling of a deceased cannot be sold and settled within two years of the deceased's death.

To recap, an executor (or beneficiary) of a deceased estate can disregard a capital gain or loss arising from a disposal of an ownership interest in the deceased's dwelling within two years of the deceased's death, where the dwelling was either the deceased's main residence and not used to produce assessable income, or the dwelling was acquired by the deceased before 20 September 1985.

However, the Commissioner has a discretion to extend the two-year period in which to sell and settle the disposal of an interest in such a main residence or pre-CGT acquired dwelling.

PCG 2019/5 provides a safe harbour compliance approach which allows the executor (or beneficiary) to assume that the Commissioner had provided an additional period of up to 18 months after the expiry of the two-year limitation period that otherwise applies to the settlement of the property.

To qualify for the safe harbour it is necessary that all of the five following conditions be met:

- During the first two years after the deceased's death, more than 12 months was spent addressing one or more of the following factors (which would be favourable to the exercising of the Commissioner's discretion):
  - The ownership of the dwelling or the Will is challenged;
  - A life or other equitable interest in the Will delays the disposal of the dwelling;
  - The complexity of the deceased estate delays the completion or administration of the estate; or
  - The settlement of the contract of sale of the dwelling is delayed or falls through for reasons outside the taxpayer's control.
- 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 (ie settled) within 12 months of the dwelling being listed for sale;
- None of the following circumstances have materially delayed the disposal of the ownership interest in the dwelling (being factors that would be adverse to exercising the Commissioner's discretion):
  - 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 executor (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.
  - The sale and settlement of the ownership interests in the dwelling **must** be completed within 18 months of the end of the above two-year period at the latest.

Importantly, where the executor (or beneficiary) chooses to rely on the safe harbour and is subsequently chosen for an ATO compliance check, it will be necessary to ensure that records are retained to evidence compliance with all of the above conditions.

In addition, PCG 2019/5 also provides details of the circumstances where the Commissioner may exercise the above discretionary power to extend the two-year period, or where the executor (or beneficiary) fails to satisfy the eligibility criteria to apply the above safe harbour rules. In such cases, it is necessary to make an application for the Commissioner to exercise this discretionary power.

In seeking to determine whether the Commissioner would exercise the discretion in such circumstances, the following factors will be taken into account:

- The sensitivity of the beneficiary's 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 the taxpayer held the ownership interest in the dwelling.

The Commissioner stresses that the circumstances that caused the delay beyond the two-year period are more important than the length of the delay, and that the amount of any potential capital gain or loss is not relevant as to whether the discretion is exercised or not. Accordingly, no extension of time will be provided even for a very short delay if the above circumstances are not present.

The Guideline also includes [eight examples](#) to illustrate how the safe harbour applies in various situations including where one of the beneficiaries has a life interest; family members reside in the dwelling without a right to reside; renovations are undertaken to improve the value of the property; the sale is delayed because of a Subdivision application, and where there are challenges to the veracity of the Will.

BNR strongly commend the ATO for the issue of PCG 2019/5 as it provides practitioners with a safe harbour which can be relied upon when disposing of the main residence or a pre-CGT acquired dwelling of the deceased. It is also useful to understand with much more certainty the factors that would be taken into account by the Commissioner in exercising a discretion to allow further time to dispose of a main residence or pre-CGT acquired dwelling where the conditions of the safe harbour may not be met as may arise in respect of particularly protracted estates.

It is particularly noteworthy that the ATO has consulted extensively on the finalised Guideline which only provided a safe harbour for a maximum 12 month extension period when issued as Draft Practical Compliance Guideline PCG 2018/D6, but which now provides a more commercially realistic 18 month maximum extension period.

BNR looks forward to working closely with the ATO on the co-design of future guidelines wherever possible to reduce the compliance burden for executors (or beneficiaries) of deceased estates and the broader profession.

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