

MAY 2019

**TAX ALERT:
ATO'S DISCRETION TO EXTEND THE TWO-YEAR PERIOD TO DISPOSE OF DWELLINGS
ACQUIRED FROM A DECEASED ESTATE**

Introduction

During August 2018, the ATO issued a draft Practical Compliance Guideline (**PCG**) in relation to the ATO's discretion to extend the two year period to dispose of dwellings acquired from a deceased estate.

Background

As a general rule, the trustees and beneficiaries of a deceased estate are able to disregard any CGT implications from the sale of a deceased person's principal residence, provided the sale of that property settles within two years of the deceased's death.

However, given that unforeseen circumstances (such as complex estate administration or challenges to the estate) may make it difficult to finalise a sale within this two year period, the Commissioner of Taxation has a discretion to extend the period where trustees or beneficiaries meet the conditions to apply for a longer period to complete the sale of the property.

The Guideline sets out the factors that the Commissioner will take into account when deciding whether to exercise his discretion to allow a period longer than two years.

The Guideline states that the Commissioner will generally allow a longer period where the dwelling could not be sold within two years of the deceased's death due to reasons beyond the beneficiary's control that existed for a significant portion of the first two years.

However, there is no formal extension period which is automatically applied. The Commissioner will weigh up all factors, favourable and adverse, in the context of the facts and circumstances of each case and then make a determination whether an extension period will be granted.

Factors used for Consideration by the ATO

This is a non-exhaustive list of factors which may be considered for extending the period:

Favourable factors:	Adverse factors:
<ul style="list-style-type: none"> the ownership of the dwelling, or the will, is challenged; 	<ul style="list-style-type: none"> the beneficiary waiting for the property market to pick up before selling the dwelling;
<ul style="list-style-type: none"> a life or other equitable interest given in the will delays the disposal of the dwelling; 	<ul style="list-style-type: none"> delay due to refurbishment of the house to improve the sale price;
<ul style="list-style-type: none"> the complexity of the deceased estate delays completion of administration of the estate; or 	<ul style="list-style-type: none"> inconvenience on the part of the beneficiary to organise the sale of the house; or
<ul style="list-style-type: none"> settlement of the contract of sale of the dwelling is delayed or falls through for reasons outside of the beneficiary's control. 	<ul style="list-style-type: none"> unexplained periods of inactivity by the executor in attending to the administration of the estate.



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The guidelines also outline a safe harbour compliance approach that allows the legal personal representative (**LPR**) of the deceased or a beneficiary of the estate to manage their tax affairs as if the Commissioner had (positively) exercised the discretion to allow an extended period.

To apply the safe harbour compliance approach, the LPR or beneficiary must satisfy all of the following conditions:

- 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 “favourable factors” listed above;
- the dwelling was listed for sale as soon as practically possible after those factors were resolved (and the sale was actively managed to completion);
- settlement occurred within six months of the dwelling being listed for sale;
- the “adverse factors” listed above were immaterial to the delay in disposing of the interest in the dwelling;
- and
- the longer period for which you would otherwise need the discretion to be exercised is no more than 12 months.

The draft PCG (and legislation) is silent on how a taxpayer should apply for a time extension; however it would be reasonable to assume that a written request should be made directly to the ATO.

Conclusion

While PCG 2018/D6 currently remains in draft format, the Commissioner will administer the law in accordance with the guidelines for those taxpayers who have followed the guidelines in good faith.

Please do not hesitate to contact your Lowe Lippmann Relationship Partner if you wish to discuss any of these matters further.



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