

7 December 2021

Ms Hoa Wood
Deputy Commissioner
Individuals and Intermediaries
Australian Taxation Office
26 Narellan St
CANBERRA ACT 2601

By email: TPSG@ato.gov.au



Law Council
OF AUSTRALIA

Office of the President

Dear Ms Wood

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

The Law Council of Australia (**Law Council**) is grateful for the opportunity to provide a submission to the Australian Taxation Office’s (**ATO’s**) consultation on [Practical Compliance Guideline 2019/5](#) (the **Guidelines**). It welcomes the ATO’s ongoing commitment to engaging with the legal profession and driving improvements in the administration of tax laws. This submission responds to some of the ATO’s consultation questions.

The Law Council acknowledges the assistance of its National Elder Law and Succession Law Committee (**NELSC**) and the Taxation Law Committee of the Law Council’s Business Law Section in the preparation of this submission.

1. Background

Section 118-195 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA**) 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 the 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. However, as highlighted by the ATO, the practical application of the Commissioner’s discretion provided under the Guidelines causes confusion.

2. Safe harbour

In the Law Council’s view, increasing the additional 18 months’ timeframe under safe harbour would reduce the number of private ruling requests with respect to the Guidelines. The Law Council observes that if the dwelling is the subject of litigation, the additional 18 months’ period for settlement is often exceeded, despite the executors otherwise satisfying the conditions for safe harbour under the Guidelines.¹

¹ PCG 2019/5 cl 11.

By way of example, in *Richardson v Richardson*², one beneficiary (the **Occupier**) was in occupation of the deceased's property at the date of the deceased's death in April 2016. The Occupier remained in occupation rent-free following the deceased's death. The Occupier was an executor and did not cooperate with efforts of the other executors (and co-beneficiaries) to sell the property. In December 2019, an independent administrator was appointed with power to obtain vacant possession of the property for sale. However, it was not until July 2020 that the Occupier was evicted. The property was sold at auction on 5 December 2020 ie, four and a half years after the deceased's death. This was well outside the two-year period of grace, and beyond the discretionary 18-month extension provided in the Guidelines.

To otherwise qualify for safe harbour, the Guidelines require, amongst other things that:

- the dwelling must be listed for sale as soon as practically possible after the circumstances that caused the delay have been resolved; and
- the sale is completed (settled) within 12 months of listing.³

The Law Council suggests that if the above conditions are satisfied, there may be no need for the 18-month time limit.

3. Practical Compliance Guideline examples

The Law Council considers that the examples provided in the Guidelines cover most common scenarios.⁴ However, it suggests that a variation on Example 1 – safe harbour – life interest – could be provided for a beneficiary who leaves a house in which they have a right to reside for as long as they wish, following which the house is sold.

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

The Law Council considers that it would be useful for the ATO to provide further clarity with respect to whether the relevant property needs to be sold before the Commissioner's discretion can be exercised.

If you would like to discuss this matter further, please do not hesitate to contact me directly on 0438 301 956 or Jacoba.Brasch@lawcouncil.asn.au. Alternatively, please contact Ms Sarah Swan, Policy Lawyer, on (02) 6246 3703 or at sarah.swan@lawcouncil.asn.au, if you require further information or clarification.

Yours sincerely



Dr Jacoba Brasch QC
President

² [2021] NSWSC 353.

³ PCG 2019/5 cl 11.

⁴ PCG 2019/5 cls 20 – 52.