PCG 2019/5EC - Compendium

Public advice and guidance compendium – PCG 2019/5

This is a compendium of responses to the issues raised by external parties to draft 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.*

This compendium of comments has been edited to maintain the anonymity of entities that have commented.

Summary of issues raised and responses

Issue No.	Issue raised	ATO response / action taken
1	Increasing the longer period for which the taxpayer requires the discretion to be exercised to no more than 18 months (up from 12 months) and by increasing the time period between listing the property for sale and settling the disposal to 12 months (up from 6 months) would significantly increase the utility of the safe harbour.	Agreed. Paragraphs 9, 11 and 40 of the final Guideline reflect the longer period.
2	Paragraph 1 of the draft Guideline should make clear that section 118-195 of the *Income Tax Assessment Act 1997* (ITAA 1997)[1] can be applied to a dwelling that was a deceased person's main residence and was not being used to produce assessable income just before they died *where the dwelling was acquired on or after 20 September 1985.* This is more complete in accordance with Item 1 of the table in subsection 118-195(1). [1] All further references in this Compendium are to the ITAA 1997.	Footnote 2 has been added to the final Guideline.

Issue No.	Issue raised	ATO response / action taken
3	Footnote 2 of the draft Guideline should be included in the main text. The explanation of the partial exemption contained in section 118-200 may be overlooked if it is left as a footnote.	Agreed. Paragraph 6 of the final Guideline now provides for the partial exemption explanation.
4	Footnote 3 of the draft Guideline does not add value and invites people to think too far outside the scope of this Guideline.	We do not agree. Footnote 3 of the final Guideline highlights an important practical consideration for taxpayers.
5	Paragraphs 6 and 23 of the draft Guideline should state '*sold and settled'* for completeness.	Paragraphs 3 and 26 of the final Guideline have been amended to provide clarity.
6	The final Guideline should explicitly state that the relevant taxpayer only needs to consider the factors listed in paragraphs 14 and 15 of the draft Guideline when assessing their eligibility for the safe harbour. This should be the case irrespective of the fact that the factors listed in those paragraphs are non-exhaustive. Requiring a taxpayer to hypothesise about other possible factors that the Commissioner may consider would be counterproductive to the safe harbour.	Agreed. We have recast the safe harbour so the conditions are separate from the discussion of the exercise of the Commissioner's discretion. The factors listed in paragraphs 12 and 13 of the final Guideline are relevant to the safe harbour and to the exercise of the Commissioner's discretion (when asked), but the Commissioner may take additional factors into account. Additional factors include (but are not limited to) those described in paragraph 17 of the final Guideline.
7	In relation to the first requirement in paragraph 13 of the draft Guideline, the final Guideline 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 of the draft Guideline.	It would appear that this issue arose from uncertainty surrounding the phrase '*during the first two years after the interest in the dwelling passed to you …*' contained in paragraph 13 of the draft Guideline. To provide more clarity, the phrase has been altered to state: '*during the first two years after the deceased's death …*' in paragraph 11(a) of the final Guideline. This alteration is in line with the wording used in Item 1 of the table contained in section 118-195. For the avoidance of doubt, the safe harbour would not be available

Issue No.	Issue raised	ATO response / action taken
		in a situation where a dwelling took more than two years after the deceased's death to pass to a beneficiary, who subsequently spent more than 18 months addressing the relevant favourable factors. The total maximum time period that the safe harbour can be used is a period of 42 months from the deceased's death (noting the Commissioner's discretion may be exercised for longer periods).
8	The final Guideline should consider including terms of measurement in regards to the phrase '*practically possible*' in the second condition in paragraph 13 of the draft Guideline.	We do not agree. Whether a property has been listed for sale '*as soon as practically possible*' is dependent on the circumstances. The final Guideline would be unnecessarily restricted by defining the phrase or specifying a time limit.
9	The second and third conditions set out in paragraph 13 of the draft Guideline refer to the deceased's dwelling being 'listed for sale'. It would be beneficial if the final Guideline clarified what is required to be 'listed for sale'. Areas of clarification include: • does this time frame 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 this 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?	We do not agree that this phrase needs further clarification. We consider the term 'listed for sale' is commonly understood within the community.

Issue No.	Issue raised	ATO response / action taken
10	Other factors should have been included in relation to the exercise of the Commissioner's discretion in paragraph 14 of the draft Guideline. Possible factors include: • the legal personal representative is experiencing health issues • sensitivity of the personal circumstances • the beneficiary is experiencing marital or health issues • the executor passed away, or • a delay in an insurance claim relevant to the property.	We do not agree. These factors are all relevant to whether the Commissioner will exercise the discretion (if asked). It is recognised that the safe harbour will not cover all situations where it would be appropriate for the Commissioner to extend the two year period. The aim is to give certainty to those people with straightforward circumstances that are resolved in a timely manner, whilst ensuring that the Commissioner continues to have visibility of arrangements that involve more complex factual scenarios or which extend over longer periods of time. The broad range of factual circumstances that might be covered by these factors makes them inappropriate for inclusion in the safe harbour.
11	The final Guideline should provide further clarification on the first factor in paragraph 14 of the draft Guideline. Areas for clarification include: • 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?	We do not agree that further clarification on this factor is required. Specifying parameters around what constitutes a challenge would be contrary to the utility of the safe harbour. Where a genuine challenge to the ownership of the dwelling, or to the will, has occurred, which has caused a significant delay in time, this will be a favourable factor to the exercise of the Commissioner discretion. Where a genuine challenge arises, taxpayers should keep records relating to the challenge to support their eligibility for the safe harbour.
12	The Commissioner should consider removing the three year period from the death of the deceased for the safe harbour limitation in situations where a life tenant is occupying the property. Such circumstances put the	The Commissioner does not consider that a second set of rules for life tenancies is appropriate for the safe harbour. It is recognised that the safe harbour will not cover all situations where it may be appropriate for the Commissioner to extend the two

Issue No.	Issue raised	ATO response / action taken
	delay in sale and settlement of a property outside of the control of the trustee and beneficiaries.	year period. The aim is to give certainty to those people with straightforward circumstances that are resolved in a timely manner, whilst ensuring that the Commissioner continues to have visibility of arrangements that involve more complex factual scenarios or which extend over longer periods of time. Where a relevant life tenancy extends beyond 42 months and the test in column 3 of item 2 of the table in subsection 118-195(1) is not satisfied, the taxpayer should request the Commissioner exercise the discretion.
13	The final Guideline should include examples of the third factor in paragraph 14 of the draft Guideline, as well as provide comment on the types of 'complexity' that would be viewed favourably when the Commissioner is exercising his discretion.	Agreed. Example 8 of the final Guideline has been included to provide guidance in relation to the 'complexity of the estate' factor.
14	Example 1 of the draft Guideline would be more worthwhile if it included a longer period before death of the life tenant (for example five or ten years). The final Guideline should provide guidance in relation to the question of 'how long is long enough?'	We do not agree (refer also to the response to Issue 12 of this Compendium). The purpose of Example 1 of the final Guideline is to demonstrate a set of circumstances where the safe harbour could operate. Extending the time period between the death of Mr Bishop and Mrs Bishop would mean that the situation would no longer satisfy the final condition in paragraph 11 of the final Guideline and would cease to demonstrate a situation which would qualify for the safe harbour. **Note:** The timeframes have been extended in this example in line with the changes described in Issue 1 of this Compendium, but are still within the timeframes required to apply the safe harbour.

Issue No.	Issue raised	ATO response / action taken
15	Example 2 of the draft Guideline should specify the age of Bevan. Whether he is a minor or not impacts the assessment of whether the ATO's position is reasonable.	Example 2 of the final Guideline has been amended to specify that Bevan is of adult age.
16	Paragraph 25 of the draft Guideline should include the concept contained in Taxation Determination TD 1999/74 *Income tax: capital gains: in what circumstances does a trustee of a deceased estate acquire an ownership interest in a dwelling 'under the deceased's will' for the purposes of subsection 118-210(1) of the Income Tax Assessment Act 1997*? That is, the right to enjoy or use the property.	Paragraph 26 of the final Guideline has been added to make clear that Bevan was not granted a right to live in the house under the will.
17	Example 3 of the draft Guideline is particularly harsh and should be reconsidered. Often when damage is done to a property you cannot simply do repairs; further renovations are required.	In a situation where significant renovations are required the Commissioner may still exercise his discretion to extend the time period. However, due to the wide range of factual scenarios that may present on this point, it would not be appropriate to extend the safe harbour to try and cover a subset of them.
18	Example 4 of the draft Guideline, or one of the other 'no safe harbour' examples, should be used to highlight that CGT would apply to the capital growth in the asset from date of death of the deceased.	Agreed. Paragraph 54 of the final Guideline has been added to address this issue.

Issue No.	Issue raised	ATO response / action taken
19	Example 5 of the draft Guideline invites unnecessary confusion by discussing the 'sensitivity of the circumstances', which is not listed as a factor favourable to the exercise of the Commissioner's discretion in paragraph 14 of the draft Guideline. In the example, the court order requiring the wife to vacate the property happened only 6 months after death, meaning that it would not be a factor in applying the safe harbour (paragraph 39 of the draft Guideline). The fact that the will was challenged is the deciding factor. The wife refusing to vacate would only be relevant under other circumstances, such as, if it took two years for the court to decide she should vacate.	Agreed. References to the sensitivity factor have been removed from Example 5 of the final Guideline.
20	The term 'legal personal representative' should replace the word 'trustee' in Example 7 of the draft Guideline. The term 'legal personal representative' covers executor and administrators of an estate and is consistent language with Practical Compliance Guideline PCG 2017/D12 *Income tax – liability of a legal personal representative of a deceased person*. A 'trustee' really only applies to a testamentary trust.	The word 'trustee' has been replaced with 'legal personal representative' in light of Example 7 of the final Guideline. However, we note for the purposes of section 118-195, 'trustee' is the term used and takes its meaning from the legislation.
21	Example 7 of the draft Guideline causes confusion by stating that *'… the period for which the discretion needs to be exercised is less than 12 month.'* Given that the safe harbour is not in play in this example, mentioning the specific time period of 12 months causes uncertainty. When exercising the discretion, the Commissioner can allow as much time as is appropriate	Agreed. The mention of less than 12 months has been removed, and replaced with the phrase *'…is only short*'.

Issue No.	Issue raised	ATO response / action taken
	in the circumstances.	
22	A paragraph should be added to the final Guideline which explains the process a taxpayer should take if their circumstances fall outside of the safe harbour but they wish for the Commissioner to consider exercising his discretion.	Agreed. Paragraph 53 of the final Guideline has been added to explain that a private ruling should be requested.