DLK ADVISORY

DECEASED ESTATES AND CGT: DISPOSAL OF DWELLING

The ATO has recently updated its practical compliance guideline on how the CGT main residence exemption may apply in cases where a dwelling is disposed either in the capacity of an individual beneficiary or a trustee of a deceased estate. Generally, CGT on disposal of an ownership interest (as either an individual beneficiary or as the trustee of the deceased estate) within 2 years of the deceased's death, can be disregarded.

For disposals that take longer than 2 years, the Commissioner has the discretion to extend this period. Practical compliance guideline PCG 2019/5 outlines a safe harbour compliance approach that allows individual beneficiaries and trustees of the deceased estate to manage their tax affairs as if the Commissioner had exercised the discretion to allow for a longer period.

To qualify for the safe harbour, the following conditions must be satisfied:

- During the first 2 years after the deceased's death, more than 12 months was spent addressing one or more of the following circumstances:
  - ownership of the dwelling, or the will, is challenged;
  - a life tenancy 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;
  - settlement of the contract of sale of the dwelling is delayed or falls through for reasons outside of control; or
  - restrictions on real estate activities imposed by a government authority in response to the COVID-19 pandemic.
- The dwelling was listed for sale as soon as practically possible after the above circumstances were resolved, and the sale was actively managed to completion.
- The sale was completed (settled) within 12 months of the dwelling being listed for sale.
- If any of the below conditions applied, they were immaterial to the delay in disposing of the interest:
  - waiting for the property market to pick up before selling the dwelling;
  - waiting for refurbishment of the dwelling to improve the sale price;
  - inconvenience on the part of the trustee or beneficiary in organising the sale of the dwelling; or
  - unexplained periods of inactivity by the executor in attending to the administration of the estate. the longer period for which discretion is otherwise needed to be exercised is no more than 18 months.

The updated guideline now explicitly considers the effect that COVID-19 has had and contains examples to illustrate the complexity in claiming safe harbour.

In the event that safe harbour conditions cannot be met, the guideline also outlines factors that the Commissioner may consider when weighing up whether or not to exercise their discretion. These include the personal circumstances of the surviving relatives, the degree of difficulty in locating all beneficiaries required to prove the will, any period the dwelling was used to produce an assessable income, and the length of time an ownership interest was held in the dwelling.

It is important to note that the ATO considers the circumstances that have caused the delay in disposal to be more important than the length of the delay. Any potential capital gain or loss is also not considered to be relevant to the exercise of discretion.

CONTACT

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