B N R PARTNERS
... specialising in the taxation of Estates and Trusts

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5 March 2018

Dear Sir / Madam

Re: Submission regarding the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No.2) Bill 2018

We write regarding the abovementioned bill to lodge a submission to the proposed changes to the main residence capital gains tax (CGT) exemptions for non-resident taxpayers, with particular reference to the proposed amendments to sections 118-195 to 118-210 of the Income Tax Assessment Act 1997 (ITAA 1997) relating to deceased estates. All legislative references in this submission are to the ITAA 1997 unless otherwise stated.

Who we are:

BNR Partners is an accounting practice that has specialised in the taxation of Deceased Estates and Testamentary Trusts since the year 2000. BNR Partners provide both technical advice on Estate taxation matters and compliance solutions for the taxation obligations of deceased estates for Executors, Legal Practitioners and listed Trustee companies Australia wide.

The writer is recognised nationally for his technical knowledge and expertise on the taxation of Deceased Estates and is a frequent presenter at both legal and accounting conferences across the country, including for various law societies, the Society of Trust and Estate Practitioners, CPA Australia, the College of Law and LegalWise seminars. The writer also regularly provides in-house training sessions for both legal practices and Trustee companies, and consults with professional bodies, regulators and the private sector on Estate taxation issues. He has also published two books on estate taxation, including '*CGT on a Deceased's Residence – A Tax Minefield*'.

Our Submission

We submit the following commentary for consideration by the committee in their review of this draft bill.

Commonwealth Employees

1. Section 6(1)(a) of the Income Tax Assessment Act 1936 (ITAA 1936), provides the definition of who is considered an Australian Tax Resident. Of note is that an Australian Government employee working

abroad would still ordinarily meet the definition of an Australian Tax Resident by their membership of the Commonwealth Superannuation Scheme.

This would therefore infer that such an employee may still have access to the 'absentee rules' of section 118-145. Accordingly, should they either sell their Australian homes whilst abroad, or die whist serving abroad, the future sale of their family home in Australia may be exempt from these proposed amendments.

2. It is proposed that unintended exclusion of commonwealth employees as against other Australian taxpayers that may either chose to work abroad, or be sent abroad by their employer, would appear to;

   a. Provide commonwealth employees with an unfair advantage as to CGT on their residence,
   b. Provide an unfair employment advantage to the Commonwealth as against the private domestic and academic sectors.

Residency Issues

3. Contrary to suggestion in the explanatory memorandum, determining a taxpayer's tax residency can be a complex and subjective process, which must be assessed on an individual case by case basis, and upon the respective circumstances and affairs of each taxpayer.

4. These complexities are clearly demonstrated by the Commissioner in TR 98/17 and IT 2650, and further by case law in *Joachim v FC of T 2002 ATC 2088, Sneddon v FC of T 2012 ATC, and Pillay v FC of T 2013 ATC.*

5. As such residency tests would need to be applied to both Australian residents living abroad or upon residents moving back to Australia. This adds to the administrative burdens, costs and complexities of applying the already complex CGT rules relating to a taxpayer's principal place of residence.

6. Where a person who is unwell and in the latter stages of life, chooses to relocate back to Australia for their remaining days, a question could arise as to where their actual tax residency is located, and therefore could raise a question as to whether the taxpayer seeking a tax advantage, thereby invoking potential consideration of Part IVA. This may come into questioned for example, when the tax payer's relocation occurs within a short time period of their respective death.

7. Moreover, section 118-195(1) stipulates that where a property is acquired post the 20 September 1985, that a deceased's dwelling needs to have been the main residence of the deceased immediately prior to their death and not be income producing. Where this occurs, the prior use of the property is ignored for CGT purposes, and the sale of the property within two years of date of death be CGT exempt.

Life Interests

8. Schedule 1, Item 20 of the Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018, proposes to insert into section 118-210, an exclusion from the CGT relief

provided by this provision where a trustee of a deceased estate acquires a dwelling under the terms of a deceased non-resident's Will, to accommodate an individual who has been granted a right of occupancy.

9. The operations of Section 118-210 ordinarily provide a CGT main residence exemption where a person with such a right of occupancy under a Will uses the property as their residence.

10. To the extent that both the estate and life tenant are Australian Tax Residents, we would suggest that this exclusion is extremely harsh, as it should be the tax residency of the life tenant that is used as the measurement of tax residency and not that of the deceased. If the deceased had instead bequeathed cash to the life tenant to acquire such a property in which to reside, the main residence CGT exemption would apply. However, such a gift would not permit the deceased to direct the ultimate placement of the capital of their estate.

Non-Resident Deceased Taxpayer at Date of Death

11. Where a taxpayer dies aboard and is considered a non-tax resident at date of death, the proposed bill states that that the deceased will not be eligible to access the CGT main residence exemptions for the entire ownership period. This is due to their tax residency status as at their date of death.

12. Example 1.7 in the explanatory memorandum demonstrates the proposed application of this provision. We refer to this example for ease of reference below.

    a. Edwina has been an Australia tax resident for over five years, and would have contributed to Australian society and our tax system throughout this ownership period.
    b. We propose that it is now unreasonable to effectively penalise her for departing Australia for work or personal purposes, by revoking a right to a CGT exemption during a period that she was contributing to Australian society.
    c. Hypothetically Edwina may have been aboard undertaking work that did in fact benefit Australia's humanity or scientific advancement. A question than arises, as to if she would have undertaken this work if she was either forced to sell her home, or run the risk of losing her CGT exemption on her residence.
    d. Moreover, the skills that Edwina may have obtained whilst abroad, could significantly benefit Australia upon her return to Australia in future years.

13. The removal of the CGT exemptions of a non-resident at date of death, is a form of death duty, that is purely imposed on a taxpayer due to their tax residency status at a single point in time, and does not consider either their personal circumstances, or prior contributions to Australia society.

Current Estates in Administration

14. It would appear that the proposed transitional measures have in part been aligned with the two-year CGT exemption extended to executors by section 118-195.

15. Under the current provisions, where executors are unable to dispose of the dwelling within two years of date of death, the legislation imposes CGT to any gain in the underlying asset value from date of death to the date of sale.

16. Since the 2008/09 financial year, the Commissioner has the discretion to extend the CGT two-year exemption under circumstances where the delay in disposal is 'beyond the control of the executors'. This discretion reflects the increasing complexities and litigation occurring in estate administration, that is exponentially and increasingly creating delays in the ability of executors to administer the estate within what was once consider a reasonable time. This is also evidenced by the volume of private binding ruling requests to the Commissioner to extend this two-year period.

17. It is our position, that by capping the transitional period to only two years, that legislators would unfairly be imposing CGT on the entire ownership on residences of deceased taxpayers that were non-residents at date of death, and whose estates are undergoing complex estate litigations that often restrict executors from disposing of the estate assets.

Our Recommendations

18. That a person that remains a citizen of Australia, but changes their tax resident's status, still be entitled to access the absentee rules of section 118-145. At a minimum, we would recommend that the 6-year absentee rule be retained, as this would still provide taxpayers with an incentive to work abroad, and hopefully repatriate these acquired skills back to Australia. This also caps the exposure to the Australian tax system.

19. That a person that dies abroad, also be permitted to continue to access these absentee rules, for the reason stated above. Their premature death should not be penalised by the Australian Tax System.

20. Alternatively, this particular group of taxpayers should be able to establish a market value of their dwelling for the purposes of establishing a notional cost base for CGT purposes, when it ceases to be their main residence when they moved overseas.

21. That if the proposed amendments do progress forward, that members of the Commonwealth Superannuation Scheme should also be subject to the same provisions.

22. Where a life interest is established under the Will of a non-resident taxpayer, that it is the residency status of the life tenant that establishes the eligibility to exemptions of section 118-110.

23. That the transitional rules for estates already in administration be removed, but rather that the two-year disposal rule of section 118-195 be maintained and that where disposals occur post this period, that the current practices of applying CGT to any growth since date of death be continued.

24. The removal of the absentee rule for citizens who are currently living abroad and in part made this decision based on current tax law in Australia, seems to be inequitable, and could inadvertently place a number of families in very difficult life changing situations.

Please do not hesitate to contact the writer directly should further details on this submission be of further assistance. We take this opportunity to thank you for considering this submission.

Yours faithfully

Ian Raspin FCPA, CTA, TEP
Director – Estates & Trusts
BNR Partners