

18 June 2009

Dr Ken Henry  
AFTS Secretariat  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By post and e-mail to: [afts@treasury.gov.au](mailto:afts@treasury.gov.au)

Dear Dr Henry,

**Capital Gains Tax provisions relating to deceased estates s118-195 ITAA 1997 Cth**

The Law Institute of Victoria (LIV) thanks the Secretariat for the opportunity to provide this submission noting that one of the objectives of the review is to examine parts of the Australian taxation system.

**PRESENT LEGISLATIVE FRAMEWORK**

Section 118-195 (1) provides that a capital gain or loss from a CGT event that happens in relation to a “dwelling” or the deceased’s “ownership interests” in the dwelling is disregarded if:

- a) you are an individual and the interest passed to you as a beneficiary in a deceased estate, or you owned it as a trustee of a deceased estate;  
and
- b) at least one of the items in column two and one of the items in column three of the table are satisfied.

**BENEFICIARY OR TRUSTEE OF DECEASED ESTATE ACQUIRING INTEREST**

| ITEM | QUALIFICATION  | ADDITIONAL QUALIFICATION SATISFIED                                   |
|------|--|--|
| 1    | The deceased acquired the ownership Interest on or after 20 September 1985 and the dwelling was the deceased’s main residence just before the deceased’s death and not used for the purpose of producing assessable income | The ownership interest ends within two years of the deceased’s death |

| ITEM | QUALIFICATION   | ADDITIONAL QUALIFICATION SATISFIED   |
|------|---|--|
| 2    | The deceased acquired ownership interest before 20 September 1985 | <p>The dwelling was, from the deceased's death until "your" ownership interest ends, the main residence one or more of:</p> <ul style="list-style-type: none"> <li>a) the spouse of the deceased's immediately before death (except a spouse who was living permanently separately and apart from the deceased); or</li> <li>b) an individual who had a right to occupy the dwelling under the deceased's Will;</li> <li>c) or if the CGT event was brought about by the individual to whom the ownership interest passed as a beneficiary – that individual.</li> </ul> |

### **IMPLEMENTATION ISSUES**

The LIV is concerned that the two year timeframe in the third column of what is labelled Item 1 can provide for inequitable outcomes contrary to the intention of the section.

Originally, the equivalent to section 118-195 (section 160ZZQ(14) of the *Income Tax Assessment Act* 1936 (Cth) required the "ownership interest" to end within 12 months of the deceased's death. However, Parliament recognised that (paragraph 5.16 of the explanatory memorandum to *Taxation Laws Amendment Act* 1997 (Cth) (No 3)) "[b]eneficiaries and trustees of deceased estates may have difficulty arranging the orderly sale of the deceased's principal residence within the current 12 month period." Therefore, Parliament amended the 12 month period to the current two years to "give beneficiaries and trustees more time to make appropriate arrangements by extending the current time limit by 12 months."

The LIV's view is that two years is no longer sufficient. For example, in situations where the third column of what is labelled Item 2 does not apply, the LIV has witnessed:

- an increase in the number of people challenging wills and delaying the transfer of dwellings to the relevant beneficiaries beyond two years; and
- an increase in the complexity of deceased estates, requiring in detailed advices and delays in obtaining probate.

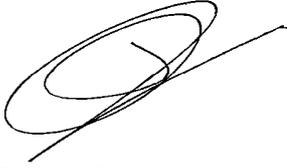
In these cases, the "ownership interest" ends more than two years after the deceased's death, but through no fault of the trustee or beneficiary. The LIV considers that such outcomes are contrary to the policy intention behind the CGT exemption.

### **CONCLUSION**

The LIV submits that the two year period should be replaced with a condition that the ownership interest ends within 12 months after probate has been granted, with a discretion for the Commissioner to extend that time if it is just and reasonable to do so. Similarly, a request for an extension of time to lodge an objection under section 14ZW of the *Taxation Administration Act* 1953 (Cth), the Commissioner's decision should also be subject to review by the Administrative Appeals Tribunal.

If you wish to discuss this matter further, please do not hesitate to contact either Michael Hayes LIV Commercial Lawyer on 03 9607 9382 or myself.

Yours Sincerely

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

**Danny Barlow**  
President  
Law Institute of Victoria