

DECEMBER 2019

TECHNICAL UPDATE



LEGISLATION PASSES THAT REMOVES MAIN RESIDENCE CGT EXEMPTION FOR FOREIGN RESIDENTS

Legislation that proposes to extend the foreign resident CGT regime to deny foreign and temporary tax residents' access to the CGT main residence exemption has passed all stages of Parliament, with implications for both employers and individuals.

REVISED LEGISLATION PASSES PARLIAMENT

On 5 December 2019 Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures) Bill 2019 (the Bill), which contains changes to extend the foreign resident capital gains tax (CGT) regime to deny foreign and temporary tax residents access to the CGT main residence exemption, passed the Senate.

The changes were first announced as part of the 2017-18 Federal Budget and legislation was introduced into Parliament on 8 February 2018, but the Bill lapsed on 1 July 2019 with the announcement of the 2019 Federal Election. The Bill was then re-introduced into Parliament on 23 October 2019 but with some changes including an extension of the transitional period for dwellings owned before 9 May 2017 which can now be sold on or before 30 June 2020 and continue to be eligible for the CGT exemption. There are also some new exclusions from the new rules where the sale is owing to certain events.

CURRENT MAIN RESIDENCE EXEMPTION

The Australian main residence exemption provides an exemption from CGT where a gain is made on the disposal of an individual's main residence. Currently individuals who are foreign residents are entitled to the main residence exemption in the same way as individuals who are residents of Australia for taxation purposes.

There is also a partial exemption if the dwelling was the individual's main residence for only a part of their ownership period or if it was also used to produce assessable income (e.g. rental income) during their ownership period. Furthermore, the 'temporary absence rule' allows a taxpayer that is renting out their main residence for up to a six year period to still treat the property as their main residence while they are away and claim the main residence CGT exemption.



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CHANGES AND TRANSITIONAL RULES

According to the Bill, foreign residents will no longer be entitled to claim the CGT main residence exemption unless the owner is:

- ▶ an Australian tax resident on the date of the CGT event (usually date of contract), or
- ▶ not a tax resident of Australia on the sale date, but:
 - has been a foreign resident for not more than six years up to the date of the CGT event, and
 - sold the property owing to a life event (e.g., terminal medical condition or death of a spouse or child or divorce or separation, etc.).

The removal of the main residence exemption for foreign residents applies to CGT events happening from 7:30pm (AEST) on 9 May 2017. However, there is a transitional rule for properties held as at 7:30pm (AEST) on 9 May 2017, which means the changes will not apply to a disposal of the property until after 30 June 2020.

There are also currently no changes to amend the 'temporary absence rule' which can allow an individual to continue to treat a dwelling as their main residence (subject to meeting the conditions noted earlier) for CGT purposes. Therefore affected individuals who owned a dwelling before 9 May 2017 who apply the 'temporary absence rule' to treat this dwelling as their main residence, will still be able to benefit from the main residence exemption for a disposal on or prior to 30 June 2020. However if an individual is a foreign resident when they sell their residence, and the life event exception as described above does not apply, they would be subject to CGT on the full amount of any capital gain.

INDIVIDUALS WHO COME TO AUSTRALIA

The changes also apply to individuals who come to Australia and either have a main residence in their home country or purchase a main residence in Australia. This includes individuals seconded to Australia. The taxation implications for such individuals will differ however according to whether they remain non-residents or become residents.

If such individuals become residents, then they may be able to utilise the main residence exemption if they are a resident when they sell their main residence in either their home country or Australia. However, if such individuals remain non-residents and sell their home country main residence when they are in Australia, then they will not need to utilise the main residence exemption because the asset is not taxable Australian property (TAP) and non-residents are only taxed on capital gains from TAP. However, where the non-resident sells their main residence in Australia, the property is TAP and therefore subject to CGT, and the new rules will apply to deny the main residence exemption.

ACTION REQUIRED

Australian employees who are either currently foreign residents or plan to be so may, as a result of the changes, be more reluctant to accept an assignment outside Australia as they will no longer receive a main residence exemption should they sell their home while on assignment.

Current and future foreign residents may consider selling their main residence before 30 June 2020 to obtain the CGT main residence exemption under the transitional rules (provided the main residence was held as at 9 May 2017).

Employers who have tax equalisation arrangements for their expatriate employees and who tax equalise personal income, should consider whether they will tax equalise any CGT imposed on the sale of an employee's Australian home while they are a foreign resident.

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