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CGT & the family home: expats and foreigners excluded from tax exemption

Late last year, legislative changes were made that exclude non-residents from accessing the main residence exemption. The retrospective changes directly impact foreigners and expats whose main residence is in Australia or overseas. We explore the impact.

CGT and the main residence exemption

Capital gains tax (CGT) applies to gains you have made on the sale of capital assets. Unless an exemption or exclusion applies, or you can offset the tax against a capital loss, any gain you made on an asset is taxed at your marginal tax rate. The tax triggers when a 'CGT event' occurs. For residential property, the 'CGT event' is generally the date the contract is signed.

The main residence exemption prevents CGT applying to your family home (the home you treat as your main residence). If the home was your main residence for only part of the time you owned it, or if you use your home to produce income for example, you use part of the home as business premises or rent out part of the property), then a partial exemption may be available.

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In addition, if you move out of your home and you don't claim any other residence as your main residence, then you can continue to treat the home as your main residence for up to six years if you rent it out, or indefinitely if you don't rent it out (the 'absence rule').

Previously, the main residence exemption was available to individuals who were residents, non-residents, and temporary residents for tax purposes.

The new rules

The new rules exclude foreign residents from accessing the main residence exemption and apply to CGT events that occur from 9 May 2017 onwards.

Under the new rules, if you are a non-resident for tax purposes at the time you sell your main residence, you will no longer be able to access the main residence exemption and you will need to pay CGT on any gain you make (subject to transitional rules and an exclusion). These new rules apply regardless of whether you were an Australian resident for part of the time you owned the property and no apportionment applies - the exemption simply does or does not apply depending on your residency status for tax purposes at the time the CGT event is triggered.

However, if you are a resident of Australia at the time of the CGT event, then you may be able to access the main residence exemption, even if you have been a non-resident for some or most of the ownership period. For example, an expat who maintains their main residence in Australia could return to Australia, become a resident for tax purposes again, then sell the property and if applicable, access the main residence exemption (the new rules contain provisions that will deny the exemption where someone attempts to avoid the new rules by deliberately structuring their affairs to access the exemption – for example, transferring the property to a related party).

The new rules do not impact on Australian tax residents.

The transitional rules until 30 June 2020

Transitional rules are in place for non-resident taxpayers who would have been able to access the main residence exemption prior to the changes. The transitional rules enable someone who held property continuously from 9 May 2017 to apply the existing rules if the CGT event occurs on or before 30 June 2020. This gives non-residents a limited period of time to sell their property and obtain some tax relief under the main residence rules.

Exclusions to the new rules

If you would have been able to access the main residence exemption under the prior rules, and have been a foreign resident for six years or less, there is a limited exclusion to the new rules where certain 'life events' occur.

A 'life event' is generally:

- Your death or the death of your spouse or child (under 18 years)
- Terminal illness of you, your spouse or your child
- Marriage breakdown and divorce

Under these circumstances, the taxpayer is able to access the main residence exemption. For example, if you or your spouse dies while living overseas, it has been six years or less since you became a non-resident, and the property is treated as your main residence.

After six years however, the main residence exemption will not apply. That is, if you have been a foreign resident for tax purposes for more than six years, you or your beneficiaries cannot access the main residence exemption once the transitional period has ended unless you move back to Australia and become a resident again before the CGT event occurs.

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Who is an Australian resident for tax purposes?

Working out whether or not you are a resident of Australia for tax purposes can be difficult as it requires the exercise of judgement rather than applying a single 'black and white' test. Many people believe it is just a matter of how much time you spend out of the country but this is not always the case. There are four tests that are used to work out your residency status:

- **Resides test** - The first test looks at whether you reside in Australia. For example, are you moving out of the country permanently and migrating, or just moving away for a while? The actions you take help determine this test. For example, do you appear to have cut your ties with Australia (sold your furniture as opposed to being in storage, closed memberships, etc.,)
- **Domicile test** - The second test looks at your where you are living and where you have your permanent home. Someone who was born or migrated to Australia will generally retain their Australian domicile unless they leave Australia permanently. Someone with an Australian domicile will be treated as a resident for tax purposes unless they can show that their permanent

home is overseas. There are a range of factors to consider in order to determine whether someone's permanent home is overseas. For example, is your home overseas permanent or temporary (like a hotel)?

- **183 day test** - Assuming you are not already considered to be an Australian resident by the other tests, the 183 day test looks at how long you are physically present in Australia during a particular income year.
- **Superannuation test** - If you are a current member of certain superannuation funds covering Commonwealth Government employees then you will generally be considered a resident for tax purposes regardless of how long you intend to live overseas.

The residency tests can be confusing. If you are uncertain, you should seek advice to clarify your position.

Common questions

I have been living overseas for the last 5 years for work. I am a non-resident for tax purposes but my main residence is in Australia. My house, which I bought in 2005, is being rented out while I am overseas. Now what?

If you own a property in Australia that used to be your main residence, you can use the absence rule to maintain

the exempt status of your property just in case you decide to return to Australia. When you return permanently to Australia and decide to sell, you may be able to access the main residence exemption (or a partial exemption). If you rent out your property while you are away, the absence rule allows you to treat the property as your main residence for up to six years.

If you sell the property while you are a non-resident, you will no longer be entitled to the main residence exemption or a partial exemption unless you enter into a contract and sell the property prior to 30 June 2020. Similarly, if you die while overseas, and your home is sold within two years of the date of your death, it's unlikely that your beneficiaries will be able to claim all or part of the main residence exemption.

If you intend to return to Australia and become a resident again at some point, there is no change to your position as a result of the new rules. If you remain overseas but enter into a contract to sell prior to 30 June 2020, your position is also unchanged under the transitional rules.

If you remain a foreign resident and sell the property after 30 June 2020, you will

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Bushfire support and assistance

Ten million hectares, lives lost, wildlife on the brink, billions in lost revenue and clean-up costs. For many, returning life to normal is a long way off this summer. We summarise the help available to those impacted by the bushfires.

What we can do for you

If you are impacted by bushfires, we can help. Many will need to lodge economic loss claims to ensure that the true value of what they have lost is recognised.

We will help with these claims should you require our assistance.

Tax relief

Approximately 3.5 million businesses, individuals, and self-managed superannuation funds in identified areas (see the list of [affected postcodes](#)) have been granted special concessions and relief by the ATO:

- An automatic extension until 28 May 2020 to lodge and pay activity statements, income tax, SMSF and FBT lodgements.

The deferral does not apply to:

- Superannuation guarantee payments or lodgements
- Large PAYG withholders (although they will be assessed on a case by case

basis if they apply for relief from the ATO)

- Fast tracking of refunds due
- Tax debt recovery on hold until 28 May 2020.
- Impacted taxpayers need to apply for special consideration.

The ATO has stated they will, “consider releasing individuals and businesses from income tax and fringe benefits tax debts if they are experiencing serious hardship.”

- Interest and penalties accrued by taxpayers in affected areas since the bushfires commenced will be remitted
- Income tax instalments able to be varied to nil without penalty

If you are not in one of the identified postcodes but have been impacted by the bushfires, relief might still be available to you. We can work with the ATO on your behalf.

Support for individuals and families

Services Australia have [mobile units](#) assisting those

in fire affected areas. Several payments and different forms of relief are available to those in fire affected areas:

[Disaster recovery payments](#)

The Disaster recovery payment is a tax exempt Federal Government payment available to those who are seriously injured, have lost an immediate family member, have lost their home or had it significantly damaged, or have lost major assets (or damaged):

- \$1,000 for each eligible adult, and
- \$400 for a dependent child under the age of 16.
- An additional \$400 to help with education expenses for eligible children. These payments are automatic if you are the primary carer of a child affected by the bushfires after 30 June 2019.

Loss of income: Disaster recovery allowance

If you work in a bushfire affected area, are an

Australian resident over 16 years of age, are not already receiving a Government allowance, and have lost income as a result of the fires, you might be able to claim the Disaster recovery allowance. The allowance provides income support for up to 13 weeks (equivalent to the maximum Newstart or Youth Allowance).

You will need to prove that you earned below the relevant income threshold to access the payment. While these payments are normally taxable, the Government has announced that it plans to introduce legislation that would make them tax-free, but this is not yet law.

Mental health support

Up to 10 free support sessions are available through [primary health networks](#). In addition, Medicare rebates for 10 psychological therapy sessions through eligible GPs, psychologists, occupational therapists and social workers (you will not need a GP referral to access these services).

Phone, internet and energy

Many of the telecommunications providers are offering support packages for those impacted by the fires including free call diversion, extended time for bill payments, bill waivers in

extreme hardship, and free prepaid recharges. Contact your provider.

Many of the [energy providers](#) are also offering support such as freezing accounts.

Support for business

Businesses in fire affected areas that have suffered direct losses or indirect economic loss may be able to access:

- **Recovery grants of up to \$50,000** (tax free)
- **Concessional loans of up to \$500,000** for eligible small businesses (including farmers, fishers and foresters) and non-profit organisations who have suffered significant asset loss of significant loss to revenue. The loan would be for up to 10 years and used for the purposes of restoring or replacing damaged assets and for working capital.

A range of [State Government grants](#) are also available.

Support for volunteer firefighters

Volunteer firefighters in NSW and QLD may be eligible for payments of up to \$300 per day, with a cap of \$6,000.

The payments are not means tested and are tax-free. The payment is a Federal Government initiative administered by the State Governments (see [Volunteer Firefighter Payment](#) for NSW and [Volunteer Compensation Package](#) for QLD).

If you are in the public sector, you now have access to 20 days of paid emergency services leave to work on the front lines in addition to normal leave provisions.

Many telecommunications providers are offering eligible volunteer firefighters and SES volunteers support. [Optus](#) and [Telstra](#), for example, will cover the bills of these volunteers for December 2019 and January 2020.

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Alerts to protect SMSFs from fraud

A new system alerting SMSF trustees of changes made to their SMSF will roll out this month. The ATO will alert trustees by text and/or email when changes are made to bank details, electronic service address of the fund, the authorised contact and members.

Trustees need to notify the ATO within 28 days of key changes to the fund including a change in trustees, directors of the corporate trustee, members, contact details, address and fund status.

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CGT & the family home

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not be able to access the main residence exemption in part or in full.

My mother lives overseas after retiring four years ago and is a non-resident for tax purposes. The family home in Australia is her main residence. My sister is living in the home rent free. What happens if my mother dies? Can my mother gift the home to her children now and still access the main residence exemption?

After 30 June 2020, if your mother is a foreign resident for six years or less at the time she passes away, the main residence exemption she accrued continues to be available to the trustee or beneficiaries of the deceased estate that inherit the property.

If the trustee or beneficiaries sell the property within two years of your mother's death, then the main residence exemption accrued by the deceased applies. If the property is sold more than two years after the date of death then the position is more complex.

If your mother passes away and was a non-resident for tax purposes for more than six years, then the main residence exemption she accrued does not pass to the estate or beneficiaries. However, if your sister

inherits all or part of the property and continues to be her main residence then a partial exemption may apply on future sale if she is a resident of Australia at the time of the CGT event.

If your mother gifts the property to her children prior to 30 June 2020 then it may be possible to apply a full exemption under the main residence rules depending on the situation. If the property is transferred to the children after 30 June 2020 then the exemption won't be available at all.

The Main Residence Rules and identifying residency for tax purposes can be complex. If you need assistance with your personal situation, please call us.

ATO targets 'lifestyle' assets

The ATO has requested insurance policy information from 30 insurers for lifestyle assets such as yachts, thoroughbred horses, and fine arts.

The review, expected to impact 350,000 taxpayers, reaches from the 2015-16 to 2019-20 financial years, revealing assets that previously may not have been disclosed or

underreporting of income. "If a taxpayer is reporting a taxable income of \$70,000 to us but we know they own a three million dollar yacht then this is likely to raise some red flags," Deputy Commissioner Deborah Jenkins said.

The ATO is looking for:

- under-reporting of income and mismatches between lifestyle assets and reported income,
- the purchase of assets in a company name but where those assets are used for private purposes (incorrect claims or non-reporting of GST credits, FBT, Division 7A, capital gains tax), and
- lifestyle assets purchased by self-managed superannuation funds that might breach the sole purpose test.

The ATO has stated that the data matching will not result in automatic audits but will be reviewed by compliance officers to support the profiling of selected taxpayers.

Quote of the month

"Courage is grace under pressure."

Ernest Hemingway