



SMATS Services Pte Ltd
Global Headquarters
#17-01 Sim Lim Tower
10 Jalan Besar
Singapore 208787

Tel +65 6293 3858
Fax +65 6293 4332

Email: steve@smats.net
Web: www.smats.net

Singapore
Australia
Hong Kong
Malaysia
United Arab Emirates
United Kingdom
United States of America

Australian Tax Agent Number
62364 000
Australian Credit Licence
385201

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Rontia Ram, Manager
Cross-Border Taxation Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: frcgt@treasury.gov.au

Dear Ronita,

Submission in response to Exposure Draft on Housing tax integrity – Capital gains tax changes for foreign residents

Our company was established in 1995 and has become the largest taxation firm assisting Australian expatriates and foreign investors to properly comply with their Australian taxation obligations. As such we feel that we can provide further valuable insight into the potential impact of these changes and come from a position of high understanding and knowledge in this specific area.

It is with great concern that I submit this paper in response to the Exposure Draft. So manifestly unfair is the proposed legislation that it needs an urgent and strong condemnation for the protection of the thousands of Australian Citizens and Permanent Resident Visa Holders that have a rightful and historical entitlement to have faith in the past system that granted them, sensibly and legally, an appropriate concession to Capital Gains Tax on their family homes while living in Australia.

It has long been an accepted social and political belief that the family home should be afforded tax concessions due to the importance of the asset in the lifting of our nations pride and socio-economic fabric.

Furthermore, it has long been established that any changes to a tax regime should not be made on a retrospective basis, so as not to disadvantage any person that appropriately relied on the clarity of legislation at the time of their decision to influence their actions.

In the proposed legislation released, these principals are not only challenged, but completely ignored to the absolute detriment of many Australians that have, for whatever reason, chosen to spend a period of their lives in a foreign posting.

I quote the Budget Overview released in May 2017 which stated the intention for **"Strengthening the capital gains tax rules so that foreign investors pay their fair share of capital gains tax."**

It is clear that the proposed legislation is a great deviation of the intentions announced insofar that:

- Australian Expatriates (Citizens & Permanent Residents) have been unfairly targeted to pay more than their fair share of tax by removing all past rights and entitlements to any main residence CGT free portion they are currently entitled to.
- To remove the main residence CGT concession that was accrued under appropriate law for the period of time the taxpayer was in fact a resident of Australia.
- To unfairly remove the real entitlement of any deceased estate to pass on the main residence tax free entitlement accrued to the deceased taxpayer if the deceased or their beneficiary happen to be living overseas at the time of death, regardless of any past or current period of time spent in the family residence.

These measures are at the extreme of unfair, and we urge the Government to amend the proposed legislation to restore faith and fairness in the integrity of the tax system.

In support of this request I have summarised some of the key issues below for Treasury's consideration:

Adequacy of Current Legislation

The current law is more than sufficient and is already achieving the fairness in relation to the position of Australian Citizens & Permanent Resident Visa holders ("**Expats**") in so far as:

- There is no tax free period when property is bought at the time the taxpayer is an expat. The main residence exemption does not currently apply for the period of ownership from acquisition as an expat to date of return to Australia and moving into the property. Upon sale, the main residence tax free exemption is only available for the pro-rata period that the property was actually the main residence of the taxpayer.
- If the expat had acquired the property prior to their departure, they benefit from the temporary cessation rules that deem the property to remain a main residence for up to 6 years. This rule was brought in specifically to manage the transient nature of our emerging country and has served well. It fairly provides the opportunity to continue to benefit from the main residence exemption when you may be required to work away from your usual place of residence, sometime voluntarily and sometimes due to forced employment postings or economic circumstance. In the modern world of global mobility the movement of interstate or international is all the same.
- Where the executor of any deceased taxpayer sells their main residence then the rightful entitlement to the Capital Gains Tax concession applies due to the historic and factual nature of the deceased having used that property as their main residence. If a foreign national inherits the property in specie, they are deemed to acquire the property at market value and all future profits are rightfully and fairly subject to Capital Gains Tax.
- In May 2012, legislation was passed to remove the entitlement of the current 50% Capital Gains Tax concession for expats and foreign investors. This means that already this group is paying more tax than Australian residents in relation to their Australian property assets. There is a great irony that an Australian Citizen living in Singapore does not get the 50% tax concession when investing in Australian property, whereas an Australian resident investing in Singapore property would get 50% of the Capital Gains Tax free if the property was held for more than 12 months. This is a clear example that there is currently no fairness and the change in 2012 clearly already achieves the intended desire of the government to have "foreign investors pay their fair share".

Intentions of the Government

It would appear from the vague statement and references in the Budget that the Government was seeking to target one area of anomaly in regards to Capital Gains Tax policy around the main residence.

One can only theorize on this, but I would suggest the area that was intended to be targeted is when foreign nationals obtain a temporary visa, such as a Student Visa, and acquire a property to be used as the main residence for the duration of the visa. Under current rules, if this is subsequently sold, then they would be entitled to a main residence exemption.

It would be hard to believe that the Government's genuine intention was to remove a legally entitled right of any Australian expat that happened to sell their property during a period of offshore posting.

As such, if the intention was indeed to ensure that the main residence exemption should only apply to those genuinely living in Australia, as Australians of permanence, then the simple legislative change should be to add a minor clause stating that:

For the main residence CGT exemption to apply, the taxpayer must be an Australian Citizen or Permanent Resident Visa holder at the time they lived in the property.

This change could be expanded to include another important visa class, such as temporary visa holders under the various retirement programs, where people have moved to Australia for prolonged periods and made it their home, but may be forced to return to their original country for health or personal reasons.

In making only this change, then the current integrity of the system remains, as does the current fairness that properly recognizes any genuine period of main residence as tax free under current laws.

It also ensures that any actual "foreigner" that has only chosen Australia as a short term destination cannot benefit excessively and does indeed pay "their fair share" of CGT on gains made should they choose to acquire a main residence during their period of Australian occupation, however long or short that may be.

This suggested change will also be easy to understand, provide no negative impact into past or future mobility of Australians that may work abroad from time to time.

Economic Merit

There are no real statistics available to properly assess the quantum or value of the properties held by expats and foreign nationals that may be affected by the proposed changes.

That aside, there is a stronger measure of the positive effect of expats in the global community including trade opportunities, global reputation, enhanced skills that will return to Australia eventually and significant ongoing investment in property and business assets.

To provide a further significant tax deterrent in removing their rightful accrued main residence CGT exemption may have a far greater indirect cost than any potential collections from increased CGT on sale. This is especially true when you consider they are already massively disadvantaged from the loss of the 50% CGT Concession for any period of time as a non-resident taxpayer.

It should also be noted, that a great majority of expats continue to acquire property and investment assets in Australia and repatriate significant financial resources, adding great value to the Australian economy and national wealth. This investment provides valuable housing stock that reduces pressure on the property market through additional supply of rental stock, often in the more traditional "family home" sector.

The proposed legislation would not make any improvement in the housing affordability, as expats would actually be encouraged to not sell any property during periods of overseas assignment. In the current environment, there is a modest rotation of sales and acquisitions.

A tax driven policy that fails to recognize their main residence period would simply ensure that the rotation would cease as sales would be discouraged through the higher CGT impost, and only acquisitions would occur putting additional pressure on the property market through reduced supply that inevitably further accelerates values.

In essence, it is likely that properties would only be sold where the expat was in potential financial distress, and therefore selling the property as they cannot afford the holding costs. This would create an extremely unfair environment, penalizing the less fortunate.

Summation

It would seem hard to believe that the Government was genuinely seeking to remove past legal entitlements for anyone who has historical right under the main residence exemption, yet this proposed legislation does exactly that.

We understand and appreciate the need for actual foreign nationals to be appropriately taxed and the need to maintain fairness in any taxation system is extremely important. The proposed changes remove fairness to any expat.

Our proposal to remove the main residence exemption only for any person that was not either an Australian Citizen or Permanent Resident (and perhaps other more long term temporary visas) would ensure real fairness was maintained within the current legislation, safety of the current balance of expatriate investment activity and housing rotation and provide no negative economic impact.

As such, we strongly recommend the Government change the proposed legislation to a fairer adaption to reflect their intentions as stated in the Budget Overview.

We remain available to provide further information or assistance as required.

Regards



Steve Douglas
Executive Chairman
SMATS Group
Australasian Taxation Services
Registered Australian Tax Agent