This Week in Tax

Senior Tax Counsel's Report
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Using the family home to best advantage through super

Making the most of the family home has always been a key element of most Australians' retirement tax plans. This has become even more so since the introduction last year by the Federal Government of the so-called downsizer incentive.

Basically, the downsizer incentive is designed to provide a form of incentive to many aging Australians to sell their large family homes and move to something more manageable which is perhaps more in line with their newly acquired lifestyles as aging Australians. The plan is to free up the larger homes for younger people with young families who obviously have greater space needs.

While sounding somewhat condescending in tone, the policy idea nonetheless is quite sound and the proof, to some extent at least, is in the pudding.

Recently released ATO statistics show that more than 5,500 Australians took advantage of the downsizer incentive in the first 12 months of its existence. In macro terms, that represents a total of around $1.2 billion going into super at an average of some $218,000 per person.

The incentive allows each owner to use up to $300,000 of the proceeds of sale of the family home to be tipped into super. Such a contribution will count towards the transfer balance cap currently sitting at $1.6m but should have no other consequences.

There are some important conditions on the availability of the benefit and some interesting quirks. To take advantage of the downsizer incentive:

- Each participating party must be over 65 years of age at the time the contribution is made;
- The home being sold must have been owned by each of the relevant participants for at least 10 years before the date of exchange of sale;
- The home being sold must be situated in Australia;
- The proceeds of sale must be wholly exempt from capital gains tax by reason of the principal private residence (PPR) exemption;
- The downsizer contribution must be made within 90 days of the proceeds being received;
- In respect of each participant, a previous downsizer contribution must not have been made.

In a husband/wife situation, these conditions can raise many interesting issues in other than plain vanilla cases.

If husband and wife jointly own the family home but only one is above 65, only one downsizer contribution can be made.

In many cases, the property is in the name of one spouse only. That was often the norm to protect the family home from claims by third party creditors where one spouse was in a risky business or professional venture. Presumably in such instances, only one downsizer contribution can be made.

If ownership ratios have been changed within the last 10 years, the availability of the concession may be compromised.

If the CGT PPR exemption is for whatever reason not available or only partially available, the concession may be lost in full or maybe in part only?

Even when downsizing, if there is a substantial mortgage to pay off the family home, the full $300,000 may not be available in a cash sense to make such a contribution. A partial contribution can be made in such circumstances and as the participants are necessarily over 65, funds can thereafter be withdrawn as and when needed by the participants.

I have focused above on a husband and wife selling the family home to move to smaller accommodation, but the legislation is by no means limited to that scenario. An individual on his or her own, a de facto couple and a same-sex couple are all entitled to utilise exactly the same concession with the same conditions. Of course, having two people increases the potential benefit, so the sole individual is at a relative disadvantage.

The quirkiest aspect of the whole thing however is that it is by no means limited, as one might have expected, to downsizers – one could be upsizing, downsizing or same sizing – it does not seem to matter in the least. So long as you meet the conditions (none of which actually requires downsizing), you can take advantage of the concession. Thus, a wealthy couple who sell their principal private residence for $5m which they have continuously owned for more than 10 years together as joint tenants and buy a $9m waterfront home in the next street, can put $600,000 of their own separate money into super as a "downsizer contribution" so long as they are both 65 plus and make the relevant contribution within 90 days of receiving the proceeds of sale from their original property. Not exactly consistent with the intended policy but looks perfectly legal to me!