EVA LAW & ASSOCIATES
Chartered Accountants & Business Advisers

Removal of the CGT discount for non-residents and temporary residents

September 2013

Background

The 50% capital gains tax (CGT) discount was previously available to any individual who has a taxable capital gain on disposal of an asset held for more than 12 months, regardless of their tax residency status. This means that only 50% of the capital gains are included in assessable income.

Generally, non-residents and temporary residents are only subject to CGT on taxable Australian property, which includes residential and commercial real estate located in Australia, certain mining assets and indirect interests of more than 10% in land-rich entities.

In the 2012-2013 Federal Budget, the Government announced that the 50% CGT discount will no longer be available to non-residents with effect from 7.30pm (AEST) on 8 May 2012. The CGT discount will remain available for capital gains accrued prior to this time if a market valuation of the assets as at 8 May 2012 is obtained.

The legislation enacting these changes has finally been passed. The new law applies to both non-residents and temporary residents, and whether the capital gains are derived from direct ownership of an asset (such as an investment property) or from a trust distribution.

Who will be affected

The new measures apply to individuals who were non-residents / temporary residents at any time on or after 8 May 2012 and to capital gains from a CGT event (eg. disposal of an asset) that occurs after 8 May 2012.

If you are a foreign investor who owns taxable Australian property (eg. residential property in Australia) or you cease to be a tax resident, these changes may affect you.

Summary of changes

The effect of the new measures is to:

a) remove the CGT discount for capital gains of non-resident / temporary resident individuals that arise after 8 May 2012

b) retain access to the full CGT discount for capital gains of non-resident / temporary resident individuals in respect of the increase in value of an asset that occurred prior to 9 May 2012

c) where an individual has been both an Australian resident and non-resident / temporary resident during the period after 8 May 2012, the discount percentage is apportioned based on the period of time when the individual is an Australian resident.

Assets acquired after 8 May 2012

Where an asset is acquired after 8 May 2012 and the individual is a non-resident / temporary resident during some or all of the ownership period, the CGT discount percentage is reduced to disallow the discount for the period when the individual is a non-resident / temporary resident. In other words, if the individual is a non-resident / temporary resident during the entire ownership period, then no CGT discount is available on the capital gains.

Assets acquired on or before 8 May 2012

Individuals who were non-residents / temporary residents on 8 May 2012 and held an asset on that date have a choice to obtain a market valuation of the assets as at that date.

a) If an independent market valuation of an asset as at 8 May 2012 is undertaken, a CGT discount up to 50% will be available depending whether the gain accrued up to 8 May 2012 is higher or lower than the overall capital gain.

   If the capital gain accrued up to 8 May 2012 is more than the overall capital gain (ie. the asset has fallen in value after 8 May 2012), the full 50% discount can be applied to the overall capital gain.

   If the overall capital gain is more than the capital gain up to 8 May 2012 (ie. the asset has increased in value after 8 May 2012), the full 50% discount will apply to the capital gain up to 8 May 2012.

Any increase in the value of the property relating to the period after 8 May 2012 will not be subject to any discount if the individual remains as a non-resident / temporary resident throughout the ownership period (see "Change of residency" below for more details).

b) Non-residents / temporary residents who do not obtain a market valuation will not be eligible for any CGT discount on any capital gains prior to 9 May 2012.

They will be taxed on the full capital gains upon the sale of the asset if they remain as non-residents / temporary residents throughout the ownership period (see "Change of residency" below for more details).

Change of residency

Special rules apply where an individual has been both an Australian resident and non-resident / temporary resident during the period after 8 May 2012.

For example, an individual who was a non-resident / temporary resident on 8 May 2012 may subsequently become an Australian resident.

In this case, the discount percentage in respect of capital gains accrued after 8 May 2012 is apportioned based on the period during which the individual is an Australian resident.

What to do next

a) If you were a non-resident / temporary resident holding a taxable Australian property (for example an investment property) on 8 May 2012 and wish to make the choice to value the property at 8 May 2012, you should obtain a formal valuation as soon as possible. The more time lapses, there is more scope for the Australian Taxation Office to challenge the valuation.

b) Non-residents and temporary residents intending to purchase a property in Australia may wish to consider the appropriate structure or entity to hold the asset, since the 50% CGT discount is no longer available to non-resident / temporary resident individuals.

c) Individuals who cease to be a tax resident can avoid a deemed disposal of their CGT assets when their residency changes. This involves making an election to treat non taxable Australian property (such as shares in listed companies) as taxable Australian property. Previously, making this election has the benefit of delaying the taxation of capital gains until the asset is sold. Given the recent changes to the law, it should be considered carefully whether there are still benefits from making such an election because the full 50% CGT discount will not be available to the overall capital gains when the asset is subsequently sold.

If you have any queries in relation to this article or like to seek specific advice on how the new rules may affect you in your circumstances, please contact us.

Eva Law & Associates
Level 18, Citigroup Centre
2 Park Street
Sydney NSW 2000

T +61 2 9264-8887
F +61 2 9264-8885
E info@evalaw.com.au

This publication is a general guide only and should not be treated as advice. It does not cover the topics exhaustively and should not be regarded as offering a complete explanation of the matters referred to. We disclaim any liability or responsibility to any person, who acts or fails to act as a consequence of reliance upon the whole or any part of the contents of this publication.

Liability limited by a scheme approved under Professional Standards Legislation.

© 2013 Eva Law & Associates Pty Ltd