

Tax & family home

Everyone knows you don't pay tax on your family home when you sell it...right? We take a closer look at the main residence exemption that excludes your home from capital gains tax and the triggers that reduce or exclude that exemption.

Capital gains tax (CGT) applies to gains you have made on the sale of capital assets (assets you make money from). Unless an exemption or reduction 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.

What is the main residence exemption?

Your main residence is the home you live in. In general, CGT applies to the sale of your home unless you have an exemption, partial exemption, or you are able to offset the tax against a capital loss.

If you are an Australian resident for tax purposes, you can access the full main residence exemption when you sell your home if your home was your main residence for the whole time you owned it, the land your home is on is or is under 2 hectares, and you did not use your home to produce an income – for example running a business from your home or renting it out.

If the home is on more than 2 hectares, if eligible, you can treat the home and up to 2 hectares of the land it is on as one asset and claim the main residence exemption on this asset.

However, if you use your home to produce an income by running a business from home or renting it out, CGT can apply to the portion of the home used to produce income from that time onwards.

What's a main residence?

For CGT purposes, your home normally qualifies as your main residence from the point you move in and start living there. However, if you move in as soon as practicable after the settlement date of the contract, that home is considered your main residence from the time you acquired it.

If you cannot move in straight away because you are in the process of selling your old home, you can treat both homes as your main residence for up to six months without impacting your eligibility to the main residence exemption. For example, where you have moved into your new home while finalising the sale of your old home. This applies if you were living in your old home for a continuous period of 3 months in the 12 months before you disposed of it, you did not use your old home to produce an income (rented it out or used it as a place of business) in any part of that 12 months when it was not your main residence, and your new property becomes your main residence.

If the sale takes more than six months and if eligible, the main residence exemption could apply to both homes only for the last six months prior to selling the old home. For any period before this it might be possible to choose which home is treated as your main residence (the other becomes subject to CGT).

If your new home is being rented to someone else when you purchase it and you cannot move in, the home is not your main residence until you move in.

If you cannot move in for some unforeseen reason, for example you end up in hospital or are posted overseas for a few months for work, then you still might be able to access the main residence exemption from the time you acquired the home if you move in as soon as practicable once the issue has been resolved. Inconvenience is not a valid reason, and you will need to ensure that you have documentation to support your position.

Proof that your property is first established or continues to be your main residence is subjective and if the issue is ever queried, some of the factors the ATO will look at include:

The length of time you have lived in the dwelling

- Where your family live
- Whether you moved your personal belongings into the dwelling
- The address you have your mail delivered
- Your address on the Electoral Roll
- Your connection to services such as telephone, gas and electricity, and
- Your intention.

Foreign resident or resident?

The main residence rules changed in 2017 to exclude non-residents from accessing the main residence exemption.

The rules focus on your tax residency status at the time of the CGT event (normally the time the contract of sale is entered into). That is, in most cases if you are a non-resident at the time you enter into the contract of sale, you will be unable to access the main residence exemption. This is the case even if you were a resident for part of the ownership period.

Conversely, if you are a resident at the time of the sale, and you meet the other eligibility criteria, the rules should apply as normal even if you were a non-resident for some 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 eligible, access the main residence exemption.

It's important to recognise that the residency test is your tax residency not your visa status. Australia's tax residency rules can be complex. If you are uncertain, please contact us and we will work through the rules with you.

The tax rules also contain integrity provisions that can deny the main residence exemption where someone circumvents the rules by deliberately structuring their affairs to access the exemption – for example, transferring the property to a related party prior to becoming a foreign resident to access the main residence exemption.

Can I treat my home as my main residence even if I don't live there?

Once you have established your home as your main residence, in certain circumstances, you can treat it as your main residence even if you have stopped living there. The absence rule allows you to treat your home as your main residence for tax purposes:

- For up to 6 years if it's used to produce income, for example you rent it out while you are away; or
- Indefinitely if it is not used to produce income.

By applying the absence rule to your home, this normally prevents you from applying the main residence exemption to any other property you own over the same period. Apart from limited exceptions, the other property is exposed to CGT.

Let's say you moved overseas in 2019 and rented out your home while you were away. Then, you came back to Australia in 2021 and moved back into your house. Then in early 2022, you decided it is not your forever home and sold it. You elected to apply the absence rule to your home and didn't treat any other property as your main residence during that same period. In this case, you should be able to access the full main residence exemption assuming you are a resident for tax purposes at the time of sale.

The 6-year period also resets if you re-establish the property as your main residence and subsequently stop living there but rent it out in between. So, if the time the home was income producing is limited to six years for each absence, it is likely the full main residence exemption will be available if the other eligibility criteria are met.

What happens if I have been running my business from home?

If your home is also set aside as a dedicated place of business (i.e., you do not have another office or workshop), then you might only be able to claim a partial main residence exemption. This is because income producing assets are excluded from the main residence exemption.

If you are running a business from home, you can usually claim a tax deduction for occupancy expenses such as interest on the mortgage, council rates, and insurance. If you claimed or were eligible to claim these expenses, then you will only be able to access a partial main residence exemption. These rules apply even if you have not claimed these expenses as a deduction; the fact that you are eligible to make a claim is enough to impact your access to the main residence exemption.

In many cases, if your home would have qualified for a full main residence exemption before it is used as a dedicated place of business, the cost base of your home for CGT purposes should also be reset to its market value at that time.

Also, if only a partial main residence exemption is available, you will need to check whether you can access the small business CGT concessions on any remaining capital gain. As these rules are complex, please contact us and we will work through the rules with you.

However, if you have only been working from home out of convenience and there is another office that you normally work from, then your eligibility to access the main residence exemption should be unaffected. The ATO has confirmed that all that time working from home temporarily during the pandemic should not impact your ability to access the main residence exemption.

If I rent out a room on AirBnB, can I still claim the exemption?

If your home has been used to produce income while you are living in it, the portion used to produce income will be excluded from the main residence exemption. The rules might

apply differently if you move out of the home completely – see Can I treat my home as my main residence even if I don't live there?

Before you start renting out a portion of your home, it is a good idea to have it valued. If you would have qualified for the main residence exemption just before it was rented out, there are some rules that can apply in most cases and for CGT purposes, you are taken to have re-acquired your home for its market value at that time. So, if your home has increased in value over and above its cost base, this should reduce any gain when you eventually sell.

Can I have a different main residence to my spouse?

Let's say you and your spouse each own homes that you have separately established as your main residences for the same period. The rules do not allow you to claim the full CGT exemption on both homes. Instead, you can:

- Choose one of the dwellings as the main residence for both of you during the period; or
- Nominate different dwellings as your main residence for the period.

If you and your spouse nominate different dwellings, the exemption is split between you:

- If you own 50% or less of the residence chosen as your main residence, the dwelling is taken to be your main residence for that period and you will qualify for the main residence exemption for your ownership interest;
- If you own greater than 50% of the residence chosen as your main residence, the dwelling is taken to be your main residence for half of the period that you and your spouse had different homes.

The same rule applies to the spouse.

The rule applies to each home that the spouses own regardless of how the homes are held legally, i.e., sole ownership, tenants in common or joint tenants.

Divorce and the main residence rules

The last two years have seen the highest divorce rate in Australia for a decade. When a property settlement occurs between spouses and if the conditions are met, the marriage breakdown rollover rules apply to ignore any CGT gain on the property settlement.

Assuming the home is transferred to one of the spouses (and not to or from a trust or company), both individuals used the home solely as their main residence over their ownership period, and the other eligibility conditions are met, then a full main residence exemption should be available when the property is eventually sold.

If the home qualified for the main residence exemption for only part of the ownership period for either individual, then a partial exemption might be available. That is, the spouse receiving the property may need to pay CGT on the gain on their share of the property received as part of the property settlement when they eventually sell the property.

I have inherited a property, if I sell it, do I have to pay CGT?

Special rules exist that enable some beneficiaries or estates to access a full or partial main residence exemption on the inherited property. Assuming the house was the main residence of the deceased just before they died, they did not then use the home to produce an income, and the other eligibility criteria are met, a full exemption might be available to the executor or beneficiary if either (or both) of the following conditions are met:

- The dwelling is disposed of within two years of the deceased's death; or
- The dwelling was the main residence of one or more of the following people from the date of death until the dwelling has been disposed of:
 - The spouse of the deceased (unless they were separated);
 - An individual who had a right to occupy the dwelling under the deceased's will; or
 - The beneficiary who is disposing of the dwelling.

An extension to the two-year period can apply in limited certain circumstances, for example when the will is contested or complex.

If the deceased did not actually live in the property prior to their death and other eligibility criteria are satisfied, it still might be possible to apply the full exemption where the home was treated as their main residence under the absence rule.

If the full exemption is not available, a partial exemption might apply.

If you have any questions about how the main residence rules might apply to you, please drop us a line and we will be happy to work through it with you.

Here's how you can contact us:

Tom Newton

tom.n@eclipseadvisory.com.au

Alyson Parsons
Pauline Espejo

alyson.p@eclipseadvisory.com.au
pauline.e@eclipseadvisory.com.au