

PCG 2018/4 - Income tax - liability of a legal personal representative of a deceased person

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! An updated version of this guideline has been issued as a draft for public comment until 8 November 2023.

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Income tax – liability of a legal personal representative of a deceased person

Relying on this Guideline

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. If you decide to use this Guideline and follow it in good faith, then the Commissioner will administer the law in accordance with this approach.

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What this Guideline is about

1. An executor who has obtained probate of a deceased person's will, or an administrator who has obtained letters of administration of a deceased person's estate is required to provide tax returns and other information that the deceased was required to provide to the ATO. In this Guideline, both are referred to as the legal personal

representative (LPR) of the deceased. If the LPR fails to lodge a return or provide relevant information, the ATO can assess the amount of the deceased person's liability.¹

2. An LPR is also liable to pay any outstanding tax-related liabilities of a deceased person up to the value of the deceased's assets that come into the LPR's hands.² The LPR may have to meet those liabilities personally if they distribute estate assets with notice of a claim by the ATO.

3. A liability may relate to either an assessment or an amended assessment that is made after the death of the deceased person. Feedback from practitioners has been that distributions of estate assets are sometimes delayed until after the relevant review period (either two or four years from the date of an assessment), to ensure that the LPR does not have to personally satisfy a liability relating to an amended assessment.

4. This Guideline is intended to enable LPRs of smaller and less complex estates to finalise those estates without concern that they may have to fund a liability of the deceased from their own assets. It sets out when an LPR will be treated as having notice of a claim by the ATO (including a claim arising from an amended assessment).

5. This Guideline **does not** deal with liabilities that an LPR may have in relation to the deceased estate, that is, for the period after the death of the deceased person.³

Who this Guideline applies to

6. This Guideline applies to an LPR who has obtained probate of a deceased person's will, or letters of administration of a deceased estate provided that:

- in the four years before the person's death
 - the deceased did not carry on a business
 - the deceased was not assessable on a share of the net income of a discretionary trust
 - the deceased was not a member of a self-managed superannuation fund
- the estate assets consist only of
 - public company shares or other interests in widely-held entities
 - death benefit superannuation
 - Australian real property
 - cash and personal assets such as cars and jewellery, and
- the total market value of the estate assets at the date of death was less than \$5 million and none of the estate assets are intended to pass to a foreign resident, a tax exempt entity or a complying superannuation entity.

7. This Guideline does not apply if probate or letters of administration have not been obtained because in these cases an LPR is not made personally liable for the deceased's outstanding tax liabilities. A different collection mechanism applies under sections 260-145 and 260-150 of Schedule 1 to the TAA.

¹ Section 260-140 of Schedule 1 to the *Tax Administration Act 1953* (TAA).

² As explained in *Barkworth Olives Management Limited v. DFC of T* 2010 ATC 20-172 at paragraph 40, the rationale for limiting the LPR's liability in this way is that the LPR had no opportunity during the period when the income was derived to make provision for any tax liability.

³ The LPR may have a liability under section 99 of the *Income Tax Assessment Act 1936* as trustee of the estate.

Guideline

8. It is a question of fact whether the LPR has notice of a claim by the ATO. Paragraphs 9 to 29 of this Guideline set out the situations when we consider the LPR has such notice and those when we will treat an LPR as not having notice.

Notice of amounts owing at time of death

9. Because an LPR 'stands in the shoes of the deceased person' regarding the deceased's outstanding tax-related liabilities⁴, the ATO considers that the LPR has notice of any amount that the deceased owed to the ATO at the date of their death (in addition to charges accruing in respect of those amounts following death, such as interest).

Notice of liabilities from outstanding assessments

10. Similarly, the ATO considers that an LPR has notice of any liabilities arising from the assessment of income tax on returns that the deceased person had lodged, but that had not been issued at the time of the person's death.

Notice of liabilities arising in respect of outstanding returns

11. An LPR is required by law to lodge all income tax returns that the deceased person has not lodged, including for the period up to the date of their death.⁵ The ATO considers that an LPR has notice of any liability arising from assessments relating to these returns. The LPR should also notify the ATO if a particular outstanding return is not required to be lodged because, for example, the amount of the deceased person's taxable income was below the tax-free threshold.

Notice of liabilities arising from amendments or other changes

12. Where the ATO has decided to review or examine the affairs of a deceased estate, it will notify the LPR. The LPR will have notice of liabilities that may arise from the review. Where any tax liability arises, such as from omissions of rental income from estate assets, the ATO will promptly amend relevant returns.

Lodgments and advice of no lodgments necessary by an LPR

13. The ATO will treat an LPR as not having notice of any further ATO claim relating to returns the LPR lodged (or advised were not necessary) if:

- the LPR acted reasonably in lodging all of the deceased person's outstanding returns (or in advising the ATO that they were not necessary), and
- the ATO has not given the LPR notice that it intends to examine the deceased person's taxation affairs within six months from the lodgment (or advice of non-lodgment) of the last of the outstanding returns by the LPR.

Lodgments and advice of no lodgments necessary by the deceased

14. An LPR may become aware (or should reasonably have become aware) of a material irregularity (or irregularities) in an income tax return lodged by the deceased.

⁴ Subsection 260-140(2) of Schedule 1 to the TAA.

⁵ Subsection 260-140(3) of Schedule 1 to the TAA.

15. The ATO will treat the LPR as not having notice of an ATO claim relating to that irregularity if the LPR brings it to the attention of the ATO in writing (for example, by requesting an amendment) and the ATO does not, within six months, issue an amended assessment or indicate that it intends to review the matter.

Example 1 – straightforward small estate

16. Alfred died on 1 June, 2017. Bill was appointed executor of Alfred's will. He obtained probate in July 2017. Alfred's estate consists of his main residence, shares in publicly listed companies and money in a bank account. The collective value of the estate is less than \$1 million. Up until his death, Alfred had been receiving a pension. Alfred had advised the ATO in 2012 that he was not required to lodge further returns.

17. Based on all of the information available to him, Bill determines that no return is necessary for the period from 1 July 2016 to 1 June 2017. Bill lodged a Return Not Necessary (RNN) Advice with the ATO on 31 October 2017. If the ATO did not notify Bill that it intended to review Alfred's tax affairs by 30 April 2018 (six months from the time Bill lodged his RNN advice), the ATO will treat Bill as not having notice of any claim relating to Alfred's estate. Bill can distribute the estate to beneficiaries without risk of personal liability.

Example 2 – small estate – material tax irregularity identified by the LPR

18. Peter died on 12 December 2016. Jill was appointed executrix of his will. She obtained probate in January 2017.

19. In the course of discharging her duties as executrix, Jill confirmed with the ATO that Peter had lodged all of his income tax returns other than the returns for the 2015–2016 year and the final period to Peter's date of death.

20. In preparing those returns, Jill discovered that Peter had never returned rental income from a property that he had owned in Sydney since 2010. Jill included rental income from that property in the returns for the 2016 income year (\$20,000) and the period to Peter's date of death (\$10,000). She lodged both returns on 3 March 2017. Jill did not seek to amend any of Peter's earlier year assessments or otherwise bring the irregularities to the ATO's attention.

21. On 4 April 2017, the ATO issued notices of assessment relating to the returns that Jill had lodged. Jill paid those assessments out of the estate's assets.

22. On 1 July 2017, Jill published a Notice of Intended Distribution (under State succession laws) for claims to be made within 30 days. On 4 August 2017, Jill distributed the remaining assets of the estate.

23. On 20 October 2017, the ATO wrote to Jill advising that Peter's assessments for the 2014 and 2015 years were being reviewed because of the non-reporting of rental income.

24. Jill had become aware of a material irregularity for those income years because she had discovered that Peter had not included rental income in his returns. Jill will be personally liable for any outstanding tax liabilities resulting from the amendment of Peter's 2014 and 2015 income tax assessments. Jill cannot avoid liability on the basis that she had no notice of it.

25. If Jill had brought the prior year irregularities to the ATO's attention when she lodged the outstanding returns, Jill would not be personally liable because the ATO did not advise her within six months that it was intending to review the assessments.

Notice of liabilities where further assets discovered

26. If further assets come into the hands of an LPR after what was thought to be the completion of the estate's administration, the LPR must reconsider the deceased's tax position. The identification of further assets might suggest that the deceased's taxable income was understated previously. The ATO will treat the LPR as having notice of a claim by the ATO to the extent of those further assets.

Example 3 – further assets identified

27. *Vincent died on 26 November 2016. Ben was appointed executor of Vincent's will and obtained probate. To the best of Ben's knowledge, the assets included in Vincent's estate consist of his main residence, a number of rental properties that Vincent acquired using his superannuation lump sum, and some money in a bank account. Based on all of the information available to him including tax returns for earlier years, Ben determined that no return was necessary for the period from 1 July 2016 to 26 November 2016 because Vincent's income was below the tax-free threshold. Six months after advising the ATO that no return was necessary, Ben proceeded to distribute the estate's assets.*

28. *In 2019, the ATO receives information that Vincent owned further assets, the income from which was not disclosed by Vincent or Ben (due to Ben not knowing of their existence).*

29. *The ATO issues amended assessments for the 2017 and four preceding income years. The ATO is not bound by this Guideline to refrain from issuing an assessment or amended assessment to reflect the income from the further assets. The ATO will seek to recover tax-related liabilities from Ben up to the value of the further assets that come into Ben's hands as LPR.*

Date of effect

30. This Guideline applies from the date it is issued. It will be reviewed from time to time under the ATO's standard review process to ensure the currency and relevance of the content, and that the content remains aligned with Australian taxation requirements and industry practice.

Background and additional information

Deceased estates and LPRs

31. Succession law in Australia is State and Territory based. While the laws of each State and Territory operate in a broadly similar manner, there are differences. For example, in most States assets that a deceased person owned and which form part of their estate vest in their LPR once a grant of probate or letters of administration have been obtained. However in Queensland, those assets vest automatically in the deceased's executor if they died leaving a will. This can mean that section 260-140 of Schedule 1 of the TAA applies to some, but not all executors.

32. An LPR is responsible for collecting the assets of the deceased person, paying their debts and funeral and testamentary expenses and distributing the residue to the beneficiaries. An LPR will always remain such, so that if further assets of the deceased are identified after the estate was thought to have been fully administered, the LPR's duties continue in respect of those assets.

33. Not all assets that a person owned when they died will form part of their deceased estate. Most significantly, assets which they owned as a joint tenant will pass by survivorship to the surviving joint tenant(s) and superannuation benefits may be paid directly to a dependant. [These assets are not available to satisfy the debts of the deceased including outstanding tax liabilities.]

34. Relevant Acts of the various States/Territories ensure that an LPR who has satisfied certain advertising requirements is protected from certain claims of which they did not have notice at the time they distribute the assets of the estate. It is not the case that an LPR has notice only of the claims made in response to an advertisement. For example, if an LPR has notice of a claim prior to advertising, that notice persists even if the creditor does not respond to the advertisement.

35. If estate debts (including the funeral and testamentary expenses) exceed the value of the assets, then the estate is insolvent. An insolvent deceased estate may be administered in bankruptcy (under the Bankruptcy legislation or provisions in State and Territory Acts dealing with insolvent estates). See Law Administration Practice Statement PS LA 2011/16 *Insolvency – collection, recovery and enforcement issues for entities under external administration*.

Collection of outstanding tax liabilities of deceased persons

36. Income tax on a person's income, though not assessed until after their death, has been held to answer the description of an outstanding tax-related liability.⁶

37. In the absence of fraud or evasion, the Commissioner cannot seek to recover estate assets that have been distributed to beneficiaries in order to satisfy outstanding tax liabilities of a deceased person. In *Deputy Commissioner of Taxation v. Brown*⁷, the High Court held that the liability of any person to pay a debt for unpaid income tax is conditional upon the right of the Commissioner to assess that person and upon the correlative right of that person to appeal against the assessment (which right the beneficiaries did not possess).

38. The scope of an LPR's liability was considered in *Deputy Commissioner of Taxation (NSW) v. Taylor* and on appeal in *Taylor v. Deputy Federal Commissioner of Taxation*. The LPR was paid an amount which it understood to be a repayment of a gambling debt. In fact, the amount was attributable to a share trading profit which had not been returned by the deceased or the LPR.

39. The Commissioner argued that the LPR should have been on notice of a claim for additional income tax in respect of the profit.

40. The LPR in that case was able to discharge the onus that rested on them of showing that they had no notice of any claim, contingent or otherwise, against the estate by the Deputy Commissioner when they distributed the estate assets.⁸

Commissioner of Taxation

22 August 2018

⁶ *Binetter v. FCT* [2016] FCAFC 163 – in the context of section 260-145 of Schedule 1 of the TAA.

⁷ (1958) 100 CLR 32.

⁸ The High Court assumed that the making of an assessment was not a condition precedent to the making of a claim by the Deputy Commissioner.

References

| ATOlaw topic(s) | Income tax ~~ Trusts ~~ Other |
|------------------------|--|
| Legislative references | TAA 1953 TAA 1953 260-140 TAA 1953 260-140(2) TAA 1953 260-140(3) TAA 1953 260-145 TAA 1953 260-150 ITAA 1936 ITAA 1936 Pt III Div 6 ITAA 1936 99 Bankruptcy Act 1966 |
| Case references | Barkworth Olives Management Limited v. DFC of T 2010 ATC 20-172 Binetter v. FCT [2016] FCAFC 163 Deputy Commissioner of Taxation v. Brown (1958) 100 CLR 32 Deputy Commissioner of Taxation (NSW) v. Taylor (1983) 14 ATR 567; 83 ATC 4539 Taylor v. Deputy Federal Commissioner of Taxation [1969] HCA 25 |
| Other references | PSLA 2011/16 |

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