

Part B The Collection of Taxation Debts**32 DECEASED ESTATES**

The policy in this chapter is to be followed by Tax Office staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in 'plain English' and should not be read or interpreted like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.

Date of effect: 4 July 2006 *(This replaces the 2003 version.)*

32.1 PURPOSE

32.1.1 This chapter deals with:

- the pursuance of claims against a deceased estate by the Commissioner;
- the personal liability of a trustee of a deceased estate;
- the personal liability of the beneficiaries of a deceased estate; and
- the priority of taxation debts in deceased estates and situations in which the Commissioner will forego that priority.

32.2 LEGISLATION

32.2.1 This includes:

- Section 260-140 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).
- Section 216 *Income Tax Assessment Act 1936* (ITAA 1936).
- Section 97 *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986).
- Section 72 *Sales Tax Assessment Act 1992* (STAA 1992).
- Section 54 *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992).

32.3 INTRODUCTION**A The liability of a trustee of a deceased estate.**

32.3.1 For deceased estates, the Commissioner has the same powers and remedies for the assessment and recovery of taxes and charges from the trustees of the estate as the Commissioner would have had against the debtor if the debtor were still alive.

32.3.2 After the death of a taxpayer, the trustee or personal representative of the deceased stands in the place of the deceased to collect the assets and pay the debts of the deceased. If the deceased left a will, the representative appointed in the will is called the executor/executrix. If there is no will (or if the will does not appoint an executor, the executor has predeceased the deceased or declined to act) the representative is called the administrator/administratrix.

- 32.3.3 Most states have separate legislation which affects creditors' claims, the personal liability of the trustee and the process of administration of the estate. That legislation is contained within the *Wills, Probate & Administration Act (1898) [NSW]*, *Trustee Act (1958) [Victoria]*, *Trusts Act (1973) [Queensland]*, *Trustees Act (1962) [Western Australia]* and *Trustee Act [South Australia]*. There is no consistency between such state legislation; so it is important to check the requirements applicable to a particular state.
- 32.3.4 The authority of the trustee to attend to the deceased's affairs is provided by the relevant Supreme Court. An executor obtains a Grant of Probate from the court whereas an administrator is granted Letters of Administration. To obtain probate or Letters of Administration, the trustee must file with the court an application form together with a copy of the last will of the deceased. These documents, as well as a copy of the form of Probate or the Letters of Administration which issued to the trustee, may subsequently be obtained from the court by any creditor. In some jurisdictions, the application for probate or letters of administration will also be accompanied by a statement of assets and liabilities. Although the court will usually only provide this document to the beneficiaries of an estate, the Commissioner may obtain it from either the trustee, or their solicitor or the court using the access powers.
- 32.3.5 The trustee is required by state legislation to publish a notice in:
- a daily metropolitan newspaper;
 - a local newspaper, if the deceased lived in a rural district; or
 - the relevant state government gazette calling for creditors to submit their claims within a prescribed time before the assets of an estate can be distributed.
- 32.3.6 A person appointed executor has no power to act in relation to the property of the deceased until a grant of probate is obtained. Nevertheless, a person can by his own acts without proper authority clothe himself with some of the powers. A person who is neither executor nor administrator and who deals with the goods of the deceased or does any of the acts characteristic of the office of an executor, becomes an 'executor de son tort'. An example would be collecting the debts or selling property of the deceased.
- 32.3.7 Care should be taken when considering assets which have been owned by the deceased in conjunction with other persons. A deceased's share of an asset co-owned as 'joint tenants' does not become part of the estate but passes to the co-owners by way of survivorship. The deceased's share of an asset co-owned as 'tenants in common' would become part of the estate. Most forms of property may be owned as joint tenants (eg joint bank accounts and real property). The affidavit of assets and liabilities which is filed in support of an application for probate or letters of administration will specify whether assets were held as 'joint tenants' or 'tenants in common'.
- 32.3.8 A trustee is required to lodge with the Commissioner returns of all indirect taxes, as well as returns of all income, profits or gains of a capital nature or of any other nature prescribed by legislation derived by the deceased person in respect of the period to the date of death in which no return was lodged by the deceased person [subsection 260-140(3) of Schedule 1 to the TAA]. Non-salary and wage final returns should be accompanied

by a full and true statement of assets and liabilities valued at the date of death. This same information may be requested by the Commissioner in regard to salary and wage returns.

- 32.3.9 In addition, a trustee is required to meet various tax obligations after the date of death of a deceased. For example, a trustee is required to lodge with the Commissioner returns of all indirect taxes as well as returns of all income, profits or gains of a capital nature or of any other nature prescribed by legislation. Such returns would include amounts received that would have been assessable to the deceased had they been received during his or her lifetime.
- 32.3.10 Where returns have been lodged, but the trustee has not received a notice of assessment (or an advice that no tax is payable), the trustee should make enquiries of the Commissioner to determine the extent of the liability which may be raised by the issue of any notices of assessment. If a trustee fails to make such enquiries before distributing the assets of the estate, and without making provision for taxation liabilities, it may be held that the distribution was made in the knowledge of the Commissioner's claim. Notification from the Commissioner in the form of a notice of assessment or nil tax advice may be relied on by a trustee to distribute the assets of the estate.
- 32.3.11 Where an amended assessment has issued after assets of an estate have been distributed, it is important to determine whether the trustee should have anticipated that the Commissioner would review past assessments. Consideration should be given to whether the trustee had knowledge that the deceased had dishonestly understated income. If the trustee had no reason to suspect that further assessments might issue, the requirements of relevant state legislation regarding advertising have been satisfied and the assets of the estate have been fully-distributed, then it is unlikely that the Commissioner could recover any of the outstanding tax. (*DCT v. Taylor* 12 FLR 173).
- 32.3.12 If the assets of an estate are distributed without regard to a creditor's claim the trustee may be unable to escape personal liability to the extent of the assets that were held by the trustee.

B The liability of a beneficiary of a deceased estate.

- 32.3.13 The Commissioner is not entitled to recover from a beneficiary any assets from the estate which have been distributed to them by the trustee. (*DCT v. Brown* 100 CLR 32).

C The priority of tax debts in deceased estates where the date of death is before 1 July 2000 and the estate has not yet been finalised.

- 32.3.14 Where a taxpayer dies on or after 1 July 2000, the payment of a tax or charge is generally no longer a first charge on an estate.
- 32.3.15 However, where the date of death is before 1 July 2000 and the estate has not yet been finalised, the following provisions require the payment of the tax or charge as a priority ahead of other unsecured creditors' claims:
- subsection 216(1)(d) ITAA 1936
 - subsection 97(6) FBTAA 1986
 - subsection 72(6) STAA 1992

- subsection 54(6) SGAA 1992

32.3.16 Where there are insufficient assets in an estate to satisfy the claims of all creditors, there are two options available:

- (i) an application can be made to the Federal Court by a creditor to have the estate administered by the Official Receiver pursuant to the provisions of Part XI of the *Bankruptcy Act 1966* ; or
- (ii) the trustee can continue to administer the estate as an insolvent estate.

32.3.17 If the estate is administered under the Bankruptcy Act, the Federal Court has held that subsection 216(1)(d) ITAA 1936 does not apply to the Official Receiver and therefore income tax has no priority over other unsecured creditors. This principle is considered to extend to other taxes and charges on account of the similar wording of their provisions. (*Stapleton v. FCT* 6 AITR 274).

32.3.18 If the estate continues to be administered by a trustee, subsection 216(1)(d) ITAA 1936 and the equivalent provisions in other taxation legislation are applicable which place a charge on the estate and require the payment of the tax or charge ahead of other unsecured creditors claims. The Commissioner recognises that this anomaly is unfair to other creditors. In addition, there are costs associated with placing an estate into the hands of the Official Receiver, including higher administration costs, which may affect the ultimate return to creditors. Consequently, it would be appropriate that tax debts rank equally with debts owing to other unsecured creditors. The rationale behind this is that since the introduction of the *Crown Debts (Priority) Act 1981*, the Commissioner no longer receives priority for income tax debts in bankruptcy and liquidation administrations. It follows that this concept extends to other creditors of a deceased estate who would be discriminated against by the enforcement of the priority.

D Remission of General Interest Charge / Additional charges for late payment

32.3.19 Remission of additional charges for late payment (applicable prior to 1 July 1999) and General Interest Charge (applicable from 1 July 1999) are discussed elsewhere in this policy. (See policy chapters entitled 'Remission of additional charges for late payment' and 'General Interest Charge').

32.4 POLICY

32.4.1 A trustee is personally liable to the full value of the assets held by the estate if:

- the assets were distributed with knowledge of an outstanding claim by the Commissioner;
- the trustee has not made reasonable attempts to establish any tax-related liability;
- the trustee has failed to lodge any outstanding returns to the date of death, or for income received by the estate.

- 32.4.2 Where a trustee has not fulfilled the requirements of relevant state legislation such as advertising for creditors to submit their claims, the Commissioner may pursue a claim against the trustee.
- 32.4.3 The Commissioner is not entitled to recover from a beneficiary any distribution from the estate which they have received from the trustee.
- 32.4.4 The payment of a tax or charge may be a first charge on the unfinalised estate of a taxpayer who died before 1 July 2000. Where the total of the amount of creditors' claims outweigh the assets of the estate and it is apparent that all creditors will not have their debts satisfied in full, the Commissioner will forgo his claim to priority. Where there is likely to be a return to beneficiaries, the Commissioner's priority should be enforced.

32.5 TERMS USED

- 32.5.1 A 'trustee' is defined to mean an executor, executrix, administrator, administratrix or trustee of a deceased estate.