PCG 2018/4EC1 - Compendium

Australian Government
Australian Taxation Office

Public advice and guidance compendium – PCG 2018/4

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft PCG 2018/4DC1 *Income tax – legal liability of a legal personal representative of a deceased person*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	***What this draft Guideline is about*** We recommend the second dot point of paragraph 3 of the draft update be amended to read as follows (new text is underlined): An LPR [legal personal representative] is: … liable to pay any outstanding tax-related liabilities of a deceased person <u>of which the LPR is treated as having notice</u> up to the <u>net</u> market value of the deceased's assets that come into the LPR's hands.	We do not agree with this recommendation. Inserting the suggested underlined words would depart from the text in section 260-140 of Schedule 1 to the *Taxation Administration Act 1953* (TAA) and footnote 4 of the Guideline which are the basis for paragraph 3 of the Guideline. Section 260-140 of Schedule 1 to the TAA permits the Commissioner to treat the LPR as standing in the shoes of the deceased person as at the date of their death, allowing any outstanding tax-related liabilities to be recovered from the LPR. At the date of the deceased person's death, the Commissioner will not have had an opportunity to assess all the outstanding tax-related liabilities owed by the deceased estate and will therefore not have notified the LPR of any such outstanding tax-related liabilities. Therefore, it would be incorrect to conclude that the LPR would only be liable to pay any outstanding tax-related liabilities which they had 'notice' of. It would similarly be incorrect to use 'net' market value as the LPR would not yet have been notified of the deceased person's liabilities to calculate the value of the deceased estate assets. It would therefore be more appropriate to use the market value.

Issue number	Issue raised	ATO response
2	***Who this Guideline applies to*** We recommend that paragraph 8 of the draft update would be clearer if it were amended to read as follows: This Guideline applies only in the following circumstances: • where the LPR has obtained probate of a deceased person's will or letters of administration of a deceased person's estate, and • the deceased person's estate is less complex (within the meaning of paragraph 9 of this Guideline).	We agree with this recommendation. The final Guideline has been updated to include this suggestion.
3	***Who this Guideline applies to*** None of the examples relate to letters of administration.	New example 1A, relating to letters of administration, has been added in the final Guideline.
4	***Amendment for clarity*** For clarity we recommend that the word 'they' in the first dot point in paragraph 9 of the draft update be changed to read 'the deceased'.	We agree with this recommendation. In the final Guideline, the wording of paragraph 9 has been updated in line with this suggestion.
5	***Expansion of assets considered within scope*** The current list of assets in the fourth sub dot point of the second dot point in paragraph 9 of the draft update is too narrow. We recommend that the list be expanded to provide more examples and include a 'catch-all' to pick up items used solely by the deceased person in their home or residence. For example, the following additions to the fourth sub dot point are proposed: • the assets of the deceased estate consist only of … – cash and personal assets such as cars, jewellery, furniture, domestic home contents, sporting equipment, musical equipment and other personal items used solely by the deceased person in their home or residence.	The list in paragraph 9 is not meant to be exhaustive. However for clarity, the fourth sub dot point of the second dot point in paragraph 9 has been updated in the final Guideline.

Issue number	Issue raised	ATO response
6	***Expansion of assets considered within scope*** It is common for a deceased person to have an interest in the estate of another deceased person. We suggest that an additional fifth sub dot point to the second dot point in paragraph 9 of the draft update be added to extend the current list of assets to include interests in the estate of another deceased estate, when that other estate consists of the same assets listed in the second dot point of paragraph 9 (including the addition proposed in issue number 5 of this Compendium).	We do not agree with this recommendation. Determining whether the deceased person had an interest in the estate of another deceased person is a complex matter of law interpretation and is outside the scope of this Guideline.
7	***Meaning of 'cash'*** The meaning of the term 'cash' in the fourth sub dot point of the second dot point of paragraph 9 of the draft update is not sufficiently clear. It may be construed narrowly to mean 'currency', that is, notes and coins, or widely to include all money, such as the proceeds of a bank account or term deposit. We suggest that the word 'cash' be replaced with 'cash investments' with a footnote to make it clear that it includes all cash investments, including at-call accounts and term deposits, bonds and managed funds.	We agree with this recommendation. To provide more clarity, footnote 7 has been added in the final Guideline to define 'cash'. Further, we have added the term 'cash investments' and have included footnote 8 to provide more clarity on that term.
8	***Net value*** We query whether the asset limit in the third dot point of paragraph 9 of the draft update should be expressed as a *net* amount.	We do not agree with this recommendation. Expressing the asset limit in the third dot point of paragraph 9 of the Guideline as a net amount would be inconsistent with the rest of the Guideline and would introduce increased complexity to the calculation.
9	***Additional examples*** The inclusion of additional examples to provide greater certainty to LPRs of less complex deceased estates in distributing estate assets before the expiration of the relevant review period without concern, is welcome.	Noted.
10	***Increase in threshold*** Whilst the increase in the threshold for the market value of estate assets from $5 million to $10 million in the third dot	No change has been made in the final Guideline. The ATO will retain the monetary threshold in the third dot point in paragraph 9 in the final Guideline.

Issue number	Issue raised	ATO response
	point in paragraph 9 of the draft update is welcome, the other limitations in paragraph 9 mean that a monetary threshold is not necessary. The removal of the monetary threshold would mean that the Guideline would not need to be adjusted in future as the market value of estate assets increased and would remove arguments about valuation methodologies.	Removing this limit would mean a deceased person's estate may no longer be 'less complex'.
11	***Superannuation death benefits*** We query whether a superannuation death benefit paid to an estate following the death of the deceased is intended to be included within the assets of the deceased's estate as at date of death. We suggest this be made clear. This is because superannuation death benefits (being an asset under the second sub dot point of the second dot point of paragraph 9 of the draft update) will not form part of the deceased person's estate 'at the date of the deceased person's death'. The deceased's superannuation death benefit may be paid to the estate by a superannuation fund trustee after death.	To ensure clarity, in the final Guideline, we have changed the term 'death benefit superannuation' in the second sub dot point of the second dot point in paragraph 9 to 'superannuation death benefit'. The superannuation death benefit is to be included within the assets of the deceased person's estate even though it only forms part of their estate after death. The superannuation death benefit will have a market value at the date of the deceased person's death and this amount should be used for the purposes of paragraph 9 of the final Guideline.
12	***Intended to pass*** We query the meaning of the phrase 'intended to pass' in the fourth dot point of paragraph 9 of the draft update. A deceased person might leave assets equally between children, one of whom was not a foreign resident at the time the will was created, but who was a foreign resident at the date of death. In that circumstance, whether the assets will pass to a foreign resident will have nothing to do with the person's intention. We suggest that the fourth dot point in paragraph 9 be amended to read: • none of the assets of the deceased estate ~~are intended to~~ will pass to a foreign resident, a tax exempt entity, or a complying superannuation entity.	The fourth dot point in paragraph 9 of the Guideline refers to entities that are the subject of CGT event K3 outlined in section 104-215 of the *Income Tax Assessment Act 1997* (ITAA 1997). CGT event K3 is triggered when a CGT asset of a deceased person's estate passes to a beneficiary who is a tax advantaged entity that is specified in subsection 104-215(1). The deceased person is made liable for any capital gain or capital loss for this asset in their final income tax return as if the deceased person had disposed of the asset immediately before their death. To reduce ambiguity, in the final Guideline, we have updated the fourth dot point in paragraph 9 and deleted the words 'intended to'. This brings the wording in line with section 104-215.

Issue number	Issue raised	ATO response
13	***Deductible gift recipients*** CGT event K3 happens if the assets of the deceased estate pass to a foreign resident, a tax exempt entity or a complying superannuation entity. The requirement in the fourth dot point of paragraph 9 of the draft update was inserted to ensure that CGT event K3 capital gains did not escape tax simply because of the Guideline. However, there is no assessable capital gain if an asset passes to a tax exempt entity that is a deductible gift recipient (DGR) (see section 118-60 of the ITAA 1997) and there are many estates where assets are left to charities that are DGRs. Therefore, the fourth dot point of paragraph 9 of the draft update should be amended by adding 'that is not a DGR' after 'tax exempt entity'.	The final Guideline has been updated to reflect the appropriate tax consequences arising from the interaction between sections 118-60 and 30-15 of the ITAA 1997.
14	***When a legal personal representative has notice of a claim by the ATO*** The final Guideline should explain the significance and meaning of 'notice of claim' in paragraph 11.	The phrase 'notice of claim' is explained in paragraph 5 of the final Guideline. Further, paragraphs 12 to 51 of the final Guideline set out the situations where an LPR is considered to have a notice of claim by the ATO and when an LPR is treated as not having such notice. Further explanation of the phrase would introduce unnecessary repetition into the final Guideline.
15	***Notice of liabilities arising from amendments or other changes*** The references to the 'affairs of a deceased estate' and 'estate assets' in paragraph 15 of the draft update should be changed to the 'affairs of the deceased person' and 'assets of the deceased'. As per paragraph 7 of the draft update, the Guideline is not about the estate.	Any review or examination of the affairs of a deceased person's estate includes the examination of the affairs of the deceased person until their date of death. For clarity, in the final Guideline, the reference to 'affairs of a deceased estate' has been changed to 'affairs of a deceased person's estate'. In the final Guideline, the reference to 'estate assets' has also been changed to 'assets of the deceased person's estate' to be consistent with the terminology in paragraph 9 used to define the less complex estates to which the Guideline applies.

Issue number	Issue raised	ATO response
16	***Notice of liabilities arising from amendments or other changes*** Paragraph 15 of the draft update should be rephrased to contain some restriction regarding liability of the LPR. For example, if the deceased had lodged all returns except for the date of death return and the LPR has lodged that and not identified any material irregularity, the ATO should be required to give notice within 6 months of the lodgment of the last return. Some examples would be useful.	The circumstances and timeframe in which 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) are set out in paragraph 16 of the final Guideline. It would be repetitive if paragraph 15 were rephrased to contain some restriction regarding liability of the LPR. Instead, a new example 1A has been included in the final Guideline.
17	***Notice of liabilities arising from amendments or other changes*** In the final Guideline, the reference to 'returns' in paragraph 15 should be amended to 'assessments'.	We agree with this suggestion, in part. In the final Guideline, the reference formerly in paragraph 15 to 'relevant returns' has been changed to 'assessments relating to the relevant returns'.
18	***Legal personal representative acting reasonably*** The advice in paragraph 17 of the draft update will often be from an accountant. Therefore, the reference in paragraph 17 to 'written legal advice' should be to 'written advice from an advisor' or 'written advice from a solicitor, accountant or financial advisor'.	We agree with this suggestion. In the final Guideline, the final sentence of paragraph 17 has been updated to change the reference from 'Reliance on written legal advice' to 'Reliance on relevant written professional advice' to better reflect the various types of written professional advice that may be a relevant factor in establishing that the LPR has acted reasonably.
19	***Legal personal representative and material irregularities*** The words 'bring it to the attention of the ATO in writing' in paragraph 18 of the draft update are not sufficient and do not specify how the disclosures it contemplates are to be made to the ATO. There should be a dedicated process by which notifications can be made in writing. For example, notifications could be sent to a particular post box or email address. A confirmation receipt by the ATO should be provided to the party making the notification.	In the final Guideline, a footnote has been inserted into paragraph 18 to instruct the LPR to use an ATO-approved amendment request form to bring any material irregularities to the ATO's attention.
20	***Legal personal representative and material irregularities*** There is concern regarding the change in the draft update to paragraph 19 and the inclusion of paragraph 20. Six months is more than enough time for the ATO to either tell the LPR	Based on the feedback we further examined the risk of the amendment requests not being processed within the 6-month period. Paragraphs 20 and 21 of the draft update have not been included in the final Guideline:

Issue number	Issue raised	ATO response
	that they intend to review the matter or to issue an assessment. The existing test does not require both matters to be done in 6 months. There should not be an onus on the LPR to keep following up with the ATO about what it intends to do with the disclosure regarding a potential outstanding tax liability. If the ATO has had to seek further information, then that is covered by the existing wording of the paragraph, that is, the ATO has notified the LPR that it intends to review the matter. An example would be better than the change contemplated. In paragraph 21 of the draft update, where the ATO has 'not been able to process the amendment request within the 6-month period' as per the first bullet point in paragraph 21, it is necessary for the ATO to issue a written notification to the LPR. It is unreasonable for the LPR to not have in writing anything from the ATO confirming its intention after 6 months.	• As part of our commitment to service standards, we strive to process amendment requests within short timeframes for all entities (90% of electronic amendments to be finalised in 20 business days and 80% of paper amendments to be finalised in 50 business days for the 2023–24 income year). Based on actual performance metrics for the 2023–24 income year (See Current year performance), the risk of not processing an LPR's electronic or paper amendment request within the 6-month period is low. • There were instances where the LPR lodged a letter with an unprompted voluntary disclosure about irregularities in the past returns of the deceased person (that is, outside the approved amendment request form). This presented a risk to the ATO that those type of requests may not be processed within the 6-month period. To mitigate this risk, in the final Guideline, paragraph 18 has been updated to state that irregularities need to be brought to the ATO's attention in writing by requesting an amendment using an ATO-approved amendment request form. This will ensure prompt processing.
21	***Legal personal representative and material irregularities*** Regarding the 6-month rule in paragraphs 19 to 21 of the draft update – the second bullet point in paragraph 19 appears to contradict the first bullet point in paragraph 21.	Paragraphs 20 and 21 of the draft update have not been included in the final Guideline. See the ATO response to Issue 20 of this Compendium.
22	***Legal personal representative and material irregularities*** It is recommended that the draft update be amended to be consistent with judicial authority, namely that actual knowledge of the LPR of a source of income is required for the LPR to be liable. The test is not that the LPR have constructive notice. Example 2 should explain whether and, if so when, an LPR is expected to go back through tax returns within the review period if the LPR is not on notice of anything potentially untoward about the deceased. Paragraphs 20 and 21 of the draft update should be reviewed for clarity and consistency with the law, and Examples 3 and 4 reconsidered in light of those amendments. Example 6	These concerns have been largely addressed by not including paragraphs 20 and 21 of the draft update in the final Guideline. However, under the final Guideline, LPRs may be personally liable if they distribute the estate's assets when there was a notice of claim by the ATO. It is a question of fact whether the LPR has notice of a claim by the ATO. The final Guideline sets out the situations when we consider the LPR to have such notice and when we will treat an LPR as not having notice.

Issue number	Issue raised	ATO response
	should either be amended to reflect the decision in *Taylor v Deputy Commissioner of Taxation* [1969] HCA 25, or rewritten to explain why, properly applying the principle of constructive knowledge, the LPR should be held liable.	
23	***Example 1 – straightforward estate*** The reference to 'straightforward' in Example 1 of the draft update should be deleted or another word used. The use of this word creates issues in perception, as the number or value of assets does not necessarily correlate to whether a matter is more or less complex.	We agree with this suggestion. In the final Guideline, the reference to 'straightforward' in Example 1 has been changed to 'less complex'.
24	***Example 2 – legal personal representative acting reasonably to complete the tax affairs of the deceased*** Paragraph 27 of the draft update should perhaps follow paragraph 9. That is, this is an issue relevant to determining whether the estate is less complex (paragraph 9) than whether the LPR has acted reasonably in respect of the deceased's tax position.	Paragraph 9 of the Guideline sets out the circumstances when a deceased person's estate is considered less complex. Where it is considered necessary, in the final Guideline, further explanation of a specific circumstance is included in the examples. The key purpose of Example 2 is to provide some guidance about when an LPR is considered to be 'acting reasonably'.
25	***Example 2 – legal personal representative acting reasonably to complete the tax affairs of the deceased*** In paragraph 27 of the draft update, it is often the case that a relevant individual will have been the trustee of their family trust such that when they die enquiries cannot be made of the trustee directly. What should the LPR do in that instance?	This will depend on the relevant clause within the family trust deed dealing with appointment of a new trustee. The LPR needs to act reasonably in making the relevant enquiries, and this may involve appropriate steps being taken to locate the identity of the new trustee.
26	***Example 5 – what is not a material irregularity*** Example 5 of the draft update is not particularly helpful. Would it be material if John (the LPR) found that Susan's income was understated by $100, particularly given the cost of amendment for the LPR and the ATO?	There is no support in the law for this type of material irregularity to be ignored as it will still impact on the calculation of the deceased person's income tax liability.
27	***Example 5 – what is not a material irregularity*** Example 5 of the draft update illustrates what is not a material irregularity due to an error in disclosure. It is recommended that the ATO also state in the example that	We agree with this recommendation. In the final Guideline, a change has been made to the language of paragraph 45.

Issue number	Issue raised	ATO response
	where there is an error in the calculation of the income tax liability instead, the error is material irrespective of the quantum of the amount. This is because the Commissioner has no power to write off or waive a debt owing to the Commonwealth.	
28	***Example 5 – what is not a material irregularity*** Example 5 of the draft update refers to an error in disclosure of the period the rental property was rented out and not an error in the rental income reported in the tax return. On those facts, the tax assessment is correct and not as stated 'an error in the assessment for the 2015 income year'. Therefore, paragraph 46 could be rephrased as follows: When preparing the date of death tax return, John thought that there was an error in the assessment for the 2015 income year, noting that the tax return for that year disclosed that Susan's rental property was rented for half a year when in fact the property was rented for a full year. Following enquiries with Susan's property manager, John confirmed that the reported rental income for the 2015 income year was still correct. Or alternatively, 'an error in the assessment' should be clarified to read 'an error in the information disclosed to the ATO'.	We agree with this suggestion. In the final Guideline, a change has been made to the language of paragraph 44.
29	***Background and additional information – deceased estates and legal personal representatives*** ***Life insurance*** Paragraph 55 of the draft update refers to assets available to satisfy the debts of the deceased. The position of life insurance should also be considered. Life insurance is protected from creditors under section 205 of the *Life Insurance Act 1995*. Practitioners assume that this would include the ATO. If so, it is suggested that the LPR's	Section 205 of the *Life Insurance Act 1995* provides exceptions to when the money paid to a deceased estate under a life insurance policy may be available to discharge the debts of a deceased estate. For this reason, it could not be included in now paragraph 53 of the final Guideline and is outside the scope of the final Guideline.

Issue number	Issue raised	ATO response
	liability to the ATO be limited to the net value of deceased's assets which are available for the payment of creditors. If life insurance is paid under a standalone policy and the deceased estate is the beneficiary, it must be captured as an asset of the estate.	
30	***General comments*** The examples would be more realistic if they were based on a reference date of 2023.	No changes have been made in the final Guideline to the examples in relation to the dates, as the dates used do not directly impact the relevance of the examples.
31	***General comments*** It is not clear why 'tax liability' has been changed to 'tax-related liability'.	The term 'tax-related liability' has been used in the Guideline to be consistent with the wording in section 260-140 of Schedule 1 to the TAA.