THE TIP OF A TAXATION ICEBERG?

The potential liability of a legal personal representative

A person's appointment as a legal personal representative (LPR) is often perceived as a privileged role whereby a family friend or trusted adviser ensures that the deceased's wishes are given effect.

However, this fiduciary role also carries with it an array of responsibilities which should be considered before any appointment as an executor or administrator is accepted.

An LPR is personally liable for all liabilities incurred in the estate's administration. The LPR has a right of indemnity against the assets of the estate, but if they fail to pay a liability before distributing the estate, the LPR will be personally liable.

Further, an LPR inherits the liabilities which were owing by the deceased at the date of death. This liability is, however, limited to the value of the assets of the estate. This includes the deceased's outstanding tax liabilities and any tax payable following the issue of amended assessments that may be issued to the LPR in respect of the deceased's prior year assessments.

When probate or letters of administration are obtained, and the estate has been distributed prior to the payment of tax liabilities, the Commissioner of Taxation will pursue the LPR. Alternatively, when probate or letters of administration are not granted, the commissioner may determine the deceased's outstanding tax-related liabilities and authorise a member of the Australian Federal Police (or state police) to recover such an amount from the deceased's property.

Essentially, there are three time periods in which the Australian Taxation Office (ATO) may issue a notice of amended assessment in respect of a deceased individual.

Ian Raspin and **Angela Cornford-Scott** discuss the potential taxation liabilities of a legal personal representative (LPR) and note the release of a practical compliance guideline which may reduce these.

Firstly, the commissioner may issue an amended assessment in respect of a deceased individual within two years of the date on which the commissioner gave notice of the assessment to the deceased, and that person was either not carrying on a business or was a sole trader that would otherwise qualify to be a small business entity, (or was a partner in a partnership or a beneficiary of a trust where the partnership or trust was itself a small business entity).

Broadly, a small business entity is an entity that carries on a business whose aggregated turnover is less than $10 million.

Given the breadth of persons covered by this amendment period, most deceased individuals have a prospective amendment period capped to two years.

Secondly, the commissioner may have up to four years after the date on which the commissioner gave a notice of assessment to the deceased if that individual carried on a business and was not a small business entity, (or was a partner in a partnership or a beneficiary of a trust which was not a small business entity). While less common, an individual (for example, a beneficiary of an investment trust) may be subject to an extended four-year amendment period.

Thirdly, an assessment may be amended at any time if the commissioner believes that there has been fraud or evasion. If an LPR believes such an amended assessment may issue, they should seek specialist advice.

Accordingly, a prudent LPR should make sure that all the deceased's outstanding income tax returns are lodged and that any related income tax liabilities have been met before the estate is distributed. An LPR should also request an amended assessment if they become aware of any prior year errors or omissions to ensure that outstanding tax liabilities are crystallised before the estate is wound up.

In Queensland, an LPR can advertise for creditors pursuant to the *Trusts Act 1973*, but the protection provided by this section is unlikely to protect against a liability arising under Commonwealth legislation, such as the Income Tax Assessment Acts.[1]

Further, it is doubtful that the defence of *plene administravit* would be available when a claim is made by the commissioner against an LPR after the estate has been distributed.[2]

Understandably there are examples where an LPR has elected to defer the distribution of an estate until the relevant amendment period has elapsed to quarantine themselves from any prospective tax liability.

To alleviate such concerns the ATO has issued Practical Compliance Guideline PCG2018/4, which proposes that an LPR of certain smaller and less complex deceased estates can distribute assets of the estate to beneficiaries within a shorter time frame, without exposing themselves to a personal liability.

Essentially, the LPR of such estates will not be liable for any taxation liability of the deceased if:

1. The LPR has no notice of any actual errors in the assessments or any fraud or evasion.
2. The LPR acted reasonably in lodging all of the deceased's outstanding returns (or advising the ATO that such returns were not necessary).
3. 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 deceased's outstanding returns.

However, importantly from a Queensland perspective, reliance can only be placed on the above guideline if either probate or letters of administration have been granted.

In addition, all the following conditions must be met:

- In the four years before their death, the deceased did not carry on a business and was not assessable on a share of the net income of a discretionary trust.
- The estate assets only comprise public company shares or interests in widely held entities, death benefit superannuation, Australian real property, cash and personal assets (for example, cars and jewellery).
- The total market value of the estate's assets at date of death is less than $5 million.
- The deceased was not a member of a self-managed superannuation fund.
- That no estate assets are intended to pass to a tax advantaged entity.

In any estates where these conditions cannot be met, then the LPR remains liable for a period of potentially up to four years.

Finally, when further assets come into the hands of the LPR after the administration of the estate, the ATO will treat the LPR as having notice of potential claim by the ATO, to the extent of those assets.

While the guideline is not a binding public ruling, it nonetheless has the capacity to significantly streamline the administration of smaller and less complex estates.

Accordingly, while it may appear counterintuitive, it may in fact be preferable for probate or letters of administration to be sought to accelerate the administration of the estate.

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Notes

1. S109 Commonwealth Constitution gives primacy to Commonwealth laws over inconsistent state laws.
2. See *Taylor v Deputy Commissioner of Taxation* (1969) 23 CLR 206.