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specialising in the taxation of **Estates and Trusts**

# ESTATE TAX GUIDE
# 2020-21

## Resident adult individual rates
## Resident estate rates for first 3 years.

| Taxable income | Tax payable |
|---|---|
| 0 - $18,200 | Nil |
| $18,201 - $37,000 | 19% excess over $18,200 |
| $37,001 - $90,000 | $3,572 + 32.5% on excess over $37,000 |
| $90,001 - $180,000 | $20,797 + 37% on excess over $90,000 |
| $180,001 and over | $54,097 + 45% on excess over $180,000 |

## Rates for an estate's fourth and later years.

## Rates for testamentary trusts where no beneficiary is presently entitled.

| Taxable income | Tax payable |
|---|---|
| 0 - $416 | Nil |
| $417 - $670 | 50% of excess over $416 |
| $671 - $37,000 | Entire amount from $0 taxed at 19% |
| $37,001 - $90,000 | $7,030 + 32.5% on excess over $37,000 |
| $90,001 - $180,000 | $24,255 + 37% on excess over $90,000 |
| $180,001 and over | $57,555 + 45% on excess over $180,000 |

*Medicare levy applies to testamentary trusts (but not to estates) at 2%.*

## Rates for non-resident individuals, estates and testamentary trusts
### *(for income other than interest, unfranked dividends, royalties and managed fund income)*

| Taxable income | Tax payable |
|---|---|
| 0 - $90,000 | 32.5% for each $1 |
| $90,001 - $180,000 | $29,250 + 37% on excess over $90,000 |
| $180,001 and over | $62,550 + 45% on excess over $180,000 |

*Medicare levy is not applicable*

*Interest, unfranked dividends, royalties and managed fund income is subject to non-resident withholding tax. Withholding tax must be withheld by the payer and remitted to the ATO. Franked dividends are exempt from withholding tax.*

## Withholding tax rates for non-residents

| Income type | Treaty country | Non-treaty country |
|---|---|---|
| Interest | 10% or refer to DTA* | 10% |
| Unfranked dividends | 15% or refer to DTA* | 30% |
| Royalties | 15% or refer to DTA* | 30% |

**DTA – Double tax agreement*

| Income type | Where AU has effective exchange of information agreement | Where AU does not have effective exchange of information agreement |
|---|---|---|
| Managed investment trusts payments | 15% | 30% |

## Do you need to lodge an estate return?

An estate tax return would generally be required for a year of income if any of the following applies:

- an estate TFN has been issued by the ATO
- all executors are non-residents
- in any of the first 3 years after date of death the net income of the estate is more than $18,200
- the deceased passed away more than three years ago
- the estate received franked dividends
- tax was withheld on estate income
- the estate made capital gains for example, as a result of the sale of estate assets
- the estate carried on a business
- a beneficiary is presently entitled to estate income
- one or more beneficiaries is a non-resident.

**Helpful Tip** *To facilitate the administration of smaller and less complex estates, the ATO has published PCG 2018/4 about a legal personal representative's liability in respect of the outstanding tax liabilities of a deceased individual.*

## What if there is a minor beneficiary?

- If a minor is presently entitled to estate income, the trustee is required to pay tax at adult rates on behalf of the minor beneficiary's share of net income. The minor may also be assessable but will receive a credit for tax paid by the trustee.
- A separate notice of assessment will be issued to the trustee on behalf of each minor beneficiary.

**Helpful Tip** *On lodgement of a return, a minor beneficiary may be entitled to a full refund of franking credits attached to their estate income where their taxable income does not exceed $18,200.*

- The excepted trusts income rules for testamentary trusts will no longer apply to income from property that was not part of the deceased's estate if the property was transferred to the trusts after I July 2019.

## What if there is a non-resident beneficiary?

- If a non-resident beneficiary is presently entitled to income of an estate, the executor is required to pay tax on behalf of the beneficiary at non-resident rates. The non-resident will also be assessable but will receive a credit for tax paid by the trustee
- A separate notice of assessment will be raised against the trustee on behalf of each non-resident beneficiary.

## Superannuation lump sum death benefits tax rates

| Component | Dependant | Non-dependant |
|---|---|---|
| Taxable element – taxed | Tax-free | The lower of marginal tax rate or 15% |
| Taxable element – untaxed | Tax-free | The lower of marginal tax rate or 30% |
| Tax-free | Tax-free | Tax-free |

### Who is a death benefits dependant? (Section 302-195 of the ITAA 1997)

For tax purposes, a 'death benefits dependant' of a person who has died is:

- the spouse or former spouse of the deceased
- a child of the deceased aged under 18
- any other person with whom the deceased had an interdependency relationship (see below) just before he or she died
- any other person who was a dependant of the deceased person just before he or she died (see below).

### Interdependency relationship
**(Section 302-20 of ITAA1997)**

Two persons, whether or not related, have an interdependency relationship if all of the following are satisfied:

interdependency relationship if all of the following are satisfied:

- they have a close personal relationship
- they live together
- one or each of them provides the other with financial support
- one or each of them provides the other with domestic support and personal care.

### Dependant

A person must demonstrate that they were financially dependent on the deceased person just before they died. The ATO relies heavily on case law to determine financial dependency. It is often the case that establishing 'financial dependency' is not clear cut and it would be prudent for an executor to apply for a private ruling from the ATO.

## Death benefit pensions under the $1.6 million transfer balance cap

From 01 July 2017, a $1.6 million 'transfer balance cap' (TBC) places a limit on the total amount an individual can have in the retirement or pension phase of a fund. It is important to be aware that a death benefit pension (paid to an eligible SIS dependant) is taken into account for that dependant's personal TBC.

*If the estate has received a death benefit during the year but the amount was not paid to a dependant before end of the income year, the LPR will be assessed on the basis of who is expected to benefit from the payment as at the end of the year. A deed of arrangement entered into after the end of the income year is unlikely to change the tax result*

## Capital gains tips & traps

### A full main residence exemption applies to the estate where:

- the dwelling was the main residence of the deceased and non-income producing at date of death
- land surrounding the dwelling was less than 2 hectares, <u>and</u>
- settlement of the sale of the property occurred within two years of the deceased's date of death (or such further time as the Commissioner may allow). Alternatively, a full exemption may be available if the property was the main residence of the deceased's spouse or an individual who had a right to occupy it under the deceased's Will.

**Helpful Tip**

*PCG 2019/5 provides the LPR of a deceased estate with a safe harbor than can be relied upon if a dwelling is sold and settled within 3.5 years from the date the deceased died. It provides a list of factors the Commissioner will consider in exercising the discretion in other cases.*

### Consider if the main residence exemption would apply if the deceased was in aged care:

- If a choice is made to treat the deceased's former dwelling as their main residence while they were in aged care, a full main residence exemption may apply for an indefinite period provided the home was not used to produce income.
- If the property was income producing for less than six years whilst the deceased was in aged care, the full main residence exemption may still apply if a choice is made.
- If the property was income producing for more than six years, a partial main residence exemption could apply.

### Removal of main residence exemption if deceased was an excluded foreign resident

From 1 July 2020, a trustee (or beneficiary) of a deceased estate will no longer have access to the main residence exemption if the deceased had been a foreign resident just before their death for a continuous period of more than six years.

Further, there is no cost base step-up to market value for a dwelling that was a deceased's main residence if, at the time of death, the deceased had been a foreign resident for more than six years.

### Capital gains and non-resident LPRs

If the LPR is a non-resident (and the estate a non-resident trusts), capital gains and losses from non-taxable Australian property (including that which the deceased owned) are not included in the net (taxable) income of the estate.

But if an amount attributable to the capital gain is paid to a esident beneficiary, it will be fully assessable – that is, it can't be reduced by the CGT discount or capital losses.
*(Tax Determinations 2017/23 and 2017/24)*

*Consider the tax consequences if post-CGT assets pass to a non-resident beneficiary or tax-exempt entity (unless it is a deductible gift recipient) as the estate may need to pay tax on any gain to the date of death.*

## Exempt entity entitled to income or gains

*If an exempt entity is a beneficiary under a Will and is presently entitled to an amount of estate income, you should ensure that the amount is paid or the entity notified within two months of the end of the income year. If not, the trustee will be assessed.*
*(Section 100AA of the ITAA 1936)*

*It may be apporpriate to consider whether an exempt entity can be made specifically entitled to trusts capital attributable to capital gains to avoid an assessment of the trustee under Section 100 AB.*


## Contact us

**Melbourne** 03 9781 6800
**Sydney** 02 9131 4270
**Brisbane** 07 2101 5390
**Adelaide** 08 7221 9750
**Perth** 08 6323 5480

**estates@bnrpartners.com.au | bnrpartners.com.au**

CPA
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