



Law Council
OF AUSTRALIA

Office of the President

27 November 2020

Ms Hoa Wood
Deputy Commissioner
Individuals and Intermediaries
Australian Taxation Office
26 Narellan St
Canberra ACT 2601

By email: LegalProfessionRelationships@ato.gov.au

Dear Ms Wood

Death and Taxes Review – Consultation with the Legal Profession

The Law Council of Australia (**Law Council**) is grateful for the opportunity to provide a submission to the Australian Taxation Office's (**ATO's**) consultation with the legal profession. It welcomes the ATO's ongoing commitment to engaging with the legal profession and driving improvements in the administration of tax laws. This submission responds to some of the ATO's consultation questions.

The Law Council acknowledges the assistance of its National Elder Law and Succession Law Committee (**NELSC**), the Taxation Law Committee of the Law Council's Business Law Section, the Law Society of Western Australia and the Law Society of New South Wales in the preparation of this submission.

As an overarching comment, the Law Council observes that it can be difficult for practitioners to contact the ATO, unless they are a registered tax agent. The lack of accessible communication channels can create unnecessary delays in dealings with tax matters for a deceased person.

In addition to the Law Council's responses set out below, please find attached Part 1 of BNR Partners' Response to the Tax Practitioner Stewardship Group's paper on administrative issues (**Attachment A**). BNR Partners has indicated that it is happy for this paper to be circulated. Members of the Law Council's NELSC share some of the administrative concerns raised in the paper, in particular the obstacles for a legal personal representative (**LPR**) in accessing tax information of the deceased person. The NELSC has also indicated its support for the solutions outlined in the BNR paper.

1. How can the ATO help executors and agents better understand how to finalise the tax affairs for a deceased person?

The Law Council considers that there should be a focus on the provision of clear information which includes relevant ATO contacts and the use of appropriate language, removing jargon as much as possible.

In terms of the provision of information, the Law Council appreciates that there is a need to abide by the existing secrecy and privacy provisions relating to disclosing tax information.

It notes that section 254 of the *Income Tax Assessment Act 1936* (Cth) provides that an agent of the deceased person is liable for tax liabilities and stands in the shoes of a taxpayer. Under section 254(1)(e), their personal liability is limited by the value of the deceased's assets. These provisions require any person who is appointed as executor or administrator to regularise any outstanding taxation returns and liabilities up to the date of death. A person named as executor, or who is considering applying for a grant of administration, may not necessarily have ready access to the deceased's tax records.

The ATO generally cannot disclose any details of a deceased's tax affairs to an executor, administrator or their tax agent unless a grant of probate or administration has been obtained. In practice, however, that information may be needed before an application can be made for probate or administration. For example, in New South Wales, as part of the application, an executor or administrator is required to disclose all assets of the deceased person. If the disclosure is not made initially, a further disclosure is required,¹ which adds significantly to the LPR's costs, and hence those borne by the estate. Meanwhile, the LPR is not released from personal liability where they do not make adequate disclosure.²

The Law Council supports Recommendation 7 of the Final Report of the Inspector-General of Taxation, *Death and Taxes (IGT's Final Report)*³ that the ATO should confirm its position on the interaction between state and territory probate and succession laws and tax laws, specifically where no grant of probate or administration has been obtained. This also reinforces the need for the ATO to implement the Inspector-General's Recommendation 1, to provide clearer guidance on the information required by the ATO, including the circumstances in which the ATO will require probate or letters of administration before dealing with a representative of the deceased taxpayer.⁴

In addition, the Law Council recommends that a notice of assessment be issued for all tax returns regardless of whether there is any tax payable. The Law Council understands that this was previously the practice of the ATO.

The ATO's privacy provisions also have particular implications where probate is not required, such as, in the case of small estates. As noted in the IGT's Final Report, 'a requirement to obtain probate or letters of administration for tax purposes only (that is, where it is otherwise not required) is unnecessary red tape and adds compliance costs from the perspective of a representative and an administrative solution would be welcome.'⁵

For example, in seeking to finalise the tax affairs for a deceased person, a family member may search for lost superannuation, including any life insurance component. To do this, the deceased person's tax file number (**TFN**) is required. Where this information is not readily

¹ *Probate and Administration Act 1898* (NSW) s 81A(2).

² *Ibid* s 81B.

³ Inspector-General of Taxation, *Death and taxes: an investigation into Australian Taxation Office systems and processes for dealing with deceased estates* (July 2020).

⁴ *Ibid*.

⁵ *Ibid* 39.

available, it will need to be sought from the ATO. The ATO's website explains that it cannot disclose a deceased person's TFN unless it knows a person is authorised ie, there is a grant of probate or letters of administration.⁶ However, in general, a grant is not needed to deal with superannuation as the death benefit does not form part of the deceased's estate. This can cause practical difficulties – such as extra cost and delay, or abandoned superannuation.

2. How can the ATO improve its Trust tax return guidance material around deceased estates (Schedule 8)?

The Law Council supports the development of a simple stand-alone trust tax return form for deceased estates.

3. What would be more effective ways for the ATO to provide public advice and guidance on deceased estate tax matters? Traditional channels (improved web content), guides, a booklet?

In addition to web content, guides and booklets, the Law Council suggests web-based resources such as:

- webinars that provide guidance on processes and on completing relevant forms; and
- videos providing assistance in English and other community languages.

The Law Council considers that paper-based materials should also be made widely available at the offices of the Public Trustee, banks, the Supreme Court probate registries, private law practices and legal assistance services, accountancy practices and similar venues.

5. When and how an executor or tax agent should apply for a deceased estate trust tax file number.

As outlined in the IGT's Final Report, where a deceased estate trust return needs to be lodged, the LPR will need to apply for a deceased estate TFN because after the date of death the deceased person's estate is treated as a separate taxpayer from the deceased person for tax purposes.⁷

In contrast, when someone manages a bankrupt person's estate or a managed person's estate, a new TFN is not needed for the 'manager'. The NELSC questions the rationale for requiring the person winding up a deceased's estate to obtain a separate tax personality, and suggests that this process be reconsidered.

Where there remains a requirement for the deceased estate trust to apply for a TFN, the Law Council considers that the nominated executor or tax agent should be able to obtain the TFN online, and soon after death.

⁶ ATO, 'Getting the deceased person's TFN' (Webpage, 1 July 2020) <<https://www.ato.gov.au/individuals/deceased-estates/doing-tax-returns-for-a-deceased-person/getting-the-deceased-person-s-tfn/>>.

⁷ Inspector-General of Taxation, *Death and taxes: an investigation into Australian Taxation Office systems and processes for dealing with deceased estates* (July 2020) 24.

6. Should tax agents have the facility to digitally notify the ATO of a death of one of their clients?

The Law Council considers that tax agents should have the facility to digitally notify the ATO of a death of one of their clients.

7. What types of complex deceased estates issues require further public advice and guidance from the ATO? (Please list in order of priority)

The Law Council considers that a dedicated 'deceased estate' section of the ATO with staff specialising in the law and accounting of deceased estates would assist. As discussed above, complex issues can arise, including in relation to estates with a non-resident deceased person, a foreign executor or a foreign beneficiary. The ATO website currently provides relevant information on these issues but this is not easy to locate.

The Law Council thanks the ATO once again for the opportunity to respond on these issues. It would be happy to elaborate further on any of the above.

Please contact Ms Leonie Campbell, Deputy Director of Policy, on (02) 6246 3711 or at leonie.campbell@lawcouncil.asn.au, or Ms Sarah Swan, Research Officer, on (02) 6246 3703 or at sarah.swan@lawcouncil.asn.au in the first instance, if you require further information.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President

Response to TPSG consultation paper Part 1 (Administrative Issues)

Key contacts:

Irene Liew, Tax Manager
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Response to TPSG consultation paper – Part 1

Administrative issues

At the outset we observe that system delays are counter-productive to practitioners and the ATO.

Whilst delays are sometimes unavoidable, a lack of communication in keeping people informed about how the ATO is handling a matter (timeframes, any delays etc.) is a frequent concern.

There is also a concern, which goes beyond estate taxation, that the ATO is not using all the information available to it in processing returns – notes are not necessarily considered, and some information is not captured in labels and remains ‘unread’.

To the extent that the ‘system’ cannot deal with something appropriately, and a fix cannot be made in a timely way, there needs to be an effective and efficient ‘work-around’. Such work-arounds need to be available for all who need it, not just some – there should be a level playing field.

In a digital world, the acceptance by the ATO of only paper documents is frustrating and can lead to unnecessary and potentially costly delays.

More broadly, ATO administrative practices should facilitate and encourage, not hinder, speedier finalisation of estates and payments of tax owed to the ATO. This includes making it easier not harder to obtain information necessary for executors and administrators to finalise estates, and providing timely private rulings and advice where requested. Commonly encountered technical issues should be addressed by web materials or public rulings.

While the need to ensure integrity in relation to information access can readily be recognised, examples set out below demonstrate that this is not the major driver behind restrictive practices.

Accessing tax information of the deceased

A prudent executor will want to ensure that the deceased’s outstanding tax obligations have been met. Currently information from 2009 is available through the OSfA. But if an LPR wants earlier information they can get information back to 2001 via a freedom of information request. This can be a very time-consuming process. Is there some way that this additional information can be made available through the OSfA?

Perhaps now might be an appropriate time to revisit PCG 2018/4 – for example would the ATO countenance a general approach to say that it will not devote compliance resources to issuing assessments (including amended assessments) for a period more than 5 years before the deceased’s death?

While tax agents no longer resort to the Data Pack (now that they can again access information via the OSfA), we observe that it is still something that LPRs acting on their own account will find useful. However, the Data Pack only provides information for the last three years. This may lead LPRs to believe that the ATO is only concerned about raising assessments/amended assessments for those years. If this is not the case, then the data pack should come with a caveat.

Alternatively, it should include all relevant information such as:

- Copy of most recently lodged income tax return, or Return Not Necessary (RNN) notification
- Copy of most recent Notice of Assessment (NoA)
- Copy of most recent Statement of Account (SoA) including integrated client account, income tax account and any suspended legal recovery account)
- Details of all outstanding income tax returns and Business Activity Statements and copies of all ATO pre-filing reports that relate to all the years of the outstanding returns.
- Details of any single touch payroll report lodged in respect of the deceased
- Details of any outstanding HELP debt owed by the deceased as at the date of death
- Information on the deceased's superannuation accounts, and
- Notification of any outstanding dispute, objection or audit concerning the deceased.

TFN application

The current ATO practice is to require a non-resident LPR to complete and send in a hard copy to the ATO rather than accept lodgement through the Online Service for Agents (OSfA). This can result in processing delays.

Archived TFNs

In many instances the deceased's TFN has been suppressed on the basis that they have not been required to lodge income tax returns for a number of years before their death. In order of an LPR to get an understanding of the deceased's tax history, an agent must make a request for the suppression to be removed. This is not something that can be done via the OSfA.

Our experience is that it will take at least a month to process the request and involve us making numerous follow up requests of the ATO. Finally, there is no process by which the ATO notifies the agent that the suppression has been removed, perhaps this could be built into the system or ATO practice.

Early returns

There is an issue regarding the electronic lodgment of tax returns prior to the end of an income year, for example for a taxpayer who died part way through the year. All such 'early' returns must be prepared in paper format as the ATO has advised that it is up to the Digital Service Providers (DSPs) to provide such a service. We are aware that many LPRs delay the distribution of an estate because to avoid this problem. It appears that in some instances the ATO will process a PDF version of an earlier year form that has been downloaded and completed. If the ATO accepts this alternative lodgment approach; then perhaps it should disseminate that information more broadly.

Lodgment program issues

Tax agents have many elderly LPR clients who previously signed and lodged income tax returns by paper. Tax agents are still trying to identify the ones that cannot sign electronically because of lack of IT or email access. This can make the lodgment process protracted which has been exacerbated by the COVID-19 emergency. Some recognition to the challenges of getting such returns signed and lodged should be built into the agent's lodgment program. Perhaps consideration could also be given to alternative ways in which the client could be regarded as authorising the return's lodgment'

Current Online service issue

There appears to be a glitch/problem in the ATO OSfA affecting some newly added deceased Individuals. The Deceased can be added into a tax agent list and the agent can access all tax records, only to find a few days later that the Deceased is no longer a client or the agent no longer has permission to access the client's information. The OSfA will sometimes fix the issue itself in day or two. On other occasions, the agent will have to add the client back into their TAN again (and this process might be repeated multiple times).

ATO not reading return notes – this is an issue that is not limited to deceased estates.

Often agents will use the Other Attachment facility to attach a note to explain why a return has been prepared in a particular way. For example, it might explain why the return data is different from the pre-fill and what income is subject to tax by withholding rather than assessment.

However, in our experience the advice in the Other Attachment schedule is often ignored with no note to explain why. Agents must then expend resources following this up for their client. In our experience, it will generally take between half to one hour simply to find the right person to speak to and 28 days to process an amendment that would not have been necessary had the note been read.

Perhaps the ATO might set up a process whereby returns with notes relating to the amount of an assessment are diverted for consideration and the agent contacted if the ATO disagrees with the approach that the agent has adopted.

Death benefit tax withheld

Sometimes superannuation trustees withhold tax from death benefit payments in error. There is a problem with using the general trust tax return for deceased estates where tax has been withheld from a death benefit payment. There is no label (at Item 13) in the trust return where this amount can be shown as a credit and it is not picked up by the ATO systems by some other mechanism. This means that an objection/amendment must be lodged in all of these cases to ensure that a credit is obtained

Non-resident CGT withholding receipt

It appears that the ATO practice is to require receipt details where a credit is being sought for non-resident CGT withholding has been deducted. While that is understandable, short of a data field being created, it would be helpful if the tax return instructions explained that the receipt number should be added to the 'Other Attachments' schedule. As discussed above, each time a return deviates from the standard processing route, there is extra expense and delay for taxpayers and agents as well as for the ATO.

ABN/GST registration

This is another area where there is processing inconsistency. An LPR who has taken on the running of the deceased's business has to login and approve the ABN registration before the ATO will accept the application. This is not something that an agent can do on their behalf. For those LPRs who struggle with digital delivery this can cause delays. Compare the TFN applications where an agent can complete an application on behalf of an LPR.

PBR delays and court processes

Since Covid, we have experienced significant delays in the processing of private ruling applications. Previously, we were kept informed of the reasons for delays, but it seems that applications are now simply not being allocated so that there is nobody responsible for providing an update.

We understand that resources have had to be diverted to deal with Covid but at the same time the legal world moves on; LPRs are still under an obligation to finalise estates in a timely manner (particularly where beneficiaries have been impacted by the economic slump and are looking for distributions) and Court processes are awaiting a view of the law from the ATO.

We have used ATO complaint processes and those for early engagement to prioritise some of these rulings. We do not want to have to resort to complaint processes in every case but finding the right person to speak to in order to have a ruling escalated is time consuming. Even when we do find someone that is willing to help, we are not necessarily provided with contact details and so it is hard to find out what is happening with a request.

Inability to access ATO message

There seems to be a problem accessing messages from the ATO. Take the following example, agents will receive an email from the ATO like this

Portal email notification new message in inbox



Taxofficeportalmessage notify@ato.gov.au
To Robert Pizzimento



09/10/2020

This is an automated response - do not respond to this email.

You have received a new message in your Tax Agent Portal mailbox. Log into the Tax Agent Portal using TAN 24752052 to view the message.

IMPORTANT

The information transmitted is for the use of the intended recipient only and may contain confidential and/or legally privileged material. Any review, re-transmission, disclosure, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited and may result in severe penalties. If you have received this e-mail in error please notify the Privacy Hotline of the Australian Taxation Office, telephone 1300 661 542 and delete all copies of this transmission together with any attachments.

On accessing the OSfA to view Practice mail messages Inbox, a message like this appears:

Example:

 **An error has occurred**

We are currently experiencing technical difficulties. We apologise for any inconvenience.

Try again later.

If the problem continues visit [Troubleshooting for tax practitioners](#) or [contact us](#).

ATOO-1604972014760

Logout

This can take up to 20-30 phone calls to resolve.