

5 September 2017

Deputy Commissioner of Taxation
GPO Box 1797,
Melbourne VIC 3001
Via Email: Robert.Charles@ato.gov.au

Attention: Robert Charles

Dear Deputy Commissioner,

Disclosure of information about deceased taxpayers

We refer to previous discussions with Tony Riordan from our Taxation Committee concerning dealings between the Australian Taxation Office (**ATO**) and lawyers engaged to assist dealings with deceased estates. We also refer to the letter dated 13 July 2017 from Olivia Abbott of the Australian Government Solicitor to Joseph Fabbro, General Counsel of the ATO (the **AGS Advice**).

The AGS Advice, advises, among other things, that ATO officers should not be permitted to provide information about a deceased's tax affairs to a representative of the deceased person before a grant of probate is obtained.

This advice creates an entirely unsatisfactory state of affairs for the deceased's immediate family and his/her legal personal representative/s (**LPR**). We are writing to ask you to support legislative change to correct this state of affairs or, alternatively, to reconsider the advice and adopt measures that would allow ATO officers to respond to reasonable requests for information without risking a breach of the privacy provisions of the *Taxation Administration Act 1953* (the **TAA**).

We are focusing on this issue because it is very common for a deceased person's LPR or immediate family, or a lawyer acting under their instructions, to contact the ATO to find out basic information in relation to the deceased's tax affairs, such as whether or not they are lodging returns and whether there is any outstanding tax debt. Sometimes this information will be critical in determining whether or not the LPR applies to the relevant Supreme Court for a grant of probate. It is therefore no answer

to our concern to suggest that the LPR can obtain the information after obtaining a grant of probate.

Our experience is that in the aftermath of a death, the immediate family (who will often include the LPR) take some time to attend to the administration of the estate. This can lead to the estate's financial and tax affairs getting out of control, which often leads to breaches of the tax law, including failures to pay tax debts.

It is therefore particularly unsatisfactory that a person who contacts the ATO as a first step in bringing the estate's financial affairs under control, or instructs a lawyer to do so, would receive the response that the ATO will not deal them.

Legislative change

For reasons set out below, we believe that ATO officers can provide information prior to probate to appropriate people, but we understand that the ATO is concerned about the risk that its officers may breach s 355-25(1) of Sch. 1 of the TAA. If the ATO is unwilling to change its position without a change in the law then we ask you to support an amendment to Division 355 to make it clear that the ATO can provide information to an LPR before probate is obtained. The amendment should also make it clear that a legal practitioner appointed by an LPR is also a "covered entity" within s 355-25(2) of Sch 1 of the TAA in relation to a deceased person.

In addition to these amendments, we believe that the law should authorise the ATO to provide information about the tax affairs of a deceased person who dies intestate to the statutory next of kin of the deceased person and a lawyer appointed by the statutory next of kin. In most cases where a person dies intestate, the statutory next of kin are the individuals who are likely to apply for letters of administration.

We believe that the amendments we are proposing should be relatively straight forward and would resolve the issue.

Alternatively, the ATO could change its practice

An alternative to a legislative amendment would be to rely upon section 355-50 of Sch 1 of the TAA. Under section 355-50(1), disclosure of information about a deceased's tax affairs is permitted if an ATO officer makes the disclosure in performing their duties as a taxation officer. A taxation officer would be performing their duties if they are trying to recover a tax debt or to ensure that tax returns or other relevant information are being filed in a timely manner. We note that ss 260-140 and

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260-145 of schedule 1 to the TAA contemplate post death obligations in respect of deceased taxpayers and involvement of others in those obligations. It seems to us that it is squarely within the ambit of ATO responsibilities to deal with finalisation of deceased persons' tax affairs. That includes lodgement of returns and payment of liabilities. That being the case, it should be within ATO officers' duties to involve themselves in matters directed to this end. Providing information to an LPR or next of kin, who is trying to find out whether the deceased has a tax debt or needs to lodge a tax return would clearly advance compliance with the deceased person's tax obligations and would therefore fall within the performance of the ATO officer's duties as an ATO officer. An ATO officer who provides information in response to such a request would therefore not breach s 350-25.

If you wish to discuss this matter further would you please contact Tony Riordan on (03) 9670 0200.

Yours sincerely,



Teresa Dyson, Chair
Business Law Section

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