

## DEATH AND TAXES

A common public view is that Australia unlike other countries does not impose death and gift taxes. In fact Australia abolished both state and federal death and gift taxes during the late 1970 and early 1980's.

This, however, is a misconception as there are a number of taxes that can be and are imposed under various laws in the event of death.

Capital Gains Tax, Income Tax, Land Tax and Stamp Duty are some of the taxes that can be imposed in certain circumstances to the assets of a deceased person and can be a minefield for the unprepared or ill advised executor of an estate to navigate or beneficiary on the receipt of an asset. Some of these taxes may be payable by the estate of a deceased or by the beneficiaries. Taxes may be hidden in the assets distributed to beneficiaries and not payable until the asset is realised by the beneficiary, which along with unexpected tax bills can create difficulties with documentation to substantiate claims as the documentation required may have been produced at a time prior to the death of the deceased.

### Capital Gains Tax

Capital Gains Tax (CGT) is a tax that can catch the unwary. A CGT rollover concession ensures that CGT is not payable on the death of an individual and not payable, in most circumstances, where the asset is passed onto the beneficiary by the executor. However, CGT will generally be payable by the beneficiary or the executor on the sale of the asset by them.

In the circumstances where an asset is passed onto a beneficiary by the executor that was acquired by the deceased after the introduction of CGT in September 1985, the beneficiary is deemed to have acquired that asset for the same amount that the deceased paid for it.

Therefore, if your grandfather left you 5,000 BHP shares that were acquired for \$1 in 1986, you are deemed to have acquired those shares at his cost for \$5,000 (ignoring the impact of capital management initiatives, mergers and demerges that have occurred since 1986). Based on the current market price of BHP shares of approximately \$40, if you sold the shares you will have made a capital gain of \$195,000 with a potential CGT bill of \$45,337.50 (assuming eligibility for the 50% CGT discount).

CGT may also be payable by the deceased even when those assets have not been sold. This could occur for example if the shares were left to a non resident beneficiary.

If the asset was acquired by the deceased prior the introduction of CGT in September 1985, the estate or the beneficiary will be deemed to have acquired the asset on the date of the death of the deceased for CGT purposes, at the market value on that date. Therefore, market valuations will be required to determine the appropriate cost base.

### Main Residence Exemption

After death of an individual the main residence exemption may continue to be claimed if either the deceased acquired the property before 19 September 1985 or if after that date, was the main residence of the deceased immediately prior to death and was not used to produce income; and either:

- (a) from the date of death the property is your main residence and (i) you are the deceased spouse; (ii) have a right to occupy the dwelling under the will of the deceased; or (iii) are a beneficiary to whom the property passed to under the will; or
- (b) the property is sold and the sale settled within two years of the death.

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### SUPERANNUATION CONTRIBUTIONS

Are you self employed or a partner of a partnership and you made a superannuation contribution during the year ended 30 June 2011?

If so and you intend to claim an income tax deduction in respect of the superannuation contribution you need to ensure that you have notified your superannuation fund(s) that you intend to claim an income tax deduction. The superannuation fund will then issue to you an acknowledgement of your intention to claim the income tax deduction.

These notices need to be attended to prior to either the lodgement of your income tax return or 30 June 2012, whichever is the earlier, to be eligible to claim the tax deduction. If they are not attended to by the relevant date your entitlement to the tax deduction will be lost.

The maximum that you are able to claim as a tax deduction for personal super contributions accumulated across all superannuation funds is \$50,000 provided you turned 50 prior to 30 June 2011, otherwise \$25,000.

Please note that your ability to claim a tax deduction for a personal super contribution may be affected if you have received salaries and wages income during the year.

### GET YOUR TAX INFORMATION IN EARLY!

In order to avoid penalties and delays in processing your income tax return for the year ended 30 June 2011, please ensure that you forward your information to our office as soon as possible.

If the conditions above are not met, CGT may be payable on the sale of the home, and could be the difference between the market value at date of death and the sale proceeds.

### Superannuation (Self Managed Superannuation Funds)

Once a member of superannuation fund commences a pension all income of the superannuation fund, including capital gains are tax free. Furthermore, the receipt of pension payments by a member, who is over the age of 60, is tax free.

These tax benefits cease on the death of the member of the superannuation fund.

On 13 June 2011 the Australian Taxation Office (ATO) released a draft ruling, TR 2011/D3, which, if finalised in its current form, will confirm that the tax free status of a pension ceases on the death of a member (amongst other circumstances), unless there is a dependent beneficiary who is automatically entitled to be paid an income stream from the deceased benefits (eg a revisionary pension beneficiary). This is not new but is commonly misunderstood by Trustees and members.

This means that any income earned by the superannuation funds, including capital gains on the sale of assets to pay out a death benefit will be subject to income tax or CGT.

In addition to the CGT problem, if the benefits of the deceased member are paid out as a lump sum, the taxation of the payment (depending on the relationship of the recipient to the deceased) could be up to 15%. If the recipient is a dependent of the deceased then the benefits will be tax free. However, if the recipient is a non-dependant, the "taxable" benefits will be taxable in the hands of the recipient. If the recipient is the executor of the deceased's estate the executor will need to look to who the beneficiaries of the estate are to determine if they are dependants or non-dependants.

### Non-Resident Beneficiaries

As an executor of a deceased estate you will need to be aware that the distribution of assets or income to non-resident tax beneficiaries may have taxation consequences.

If assets (excluding taxable Australian asset such as real property) are transferred by an executor to non-resident beneficiaries, the deceased will be deemed to have disposed of the asset at the date of death and CGT will be payable by the estate on the lodgement of the final return of the deceased (ie there is no CGT rollover provided on the transfer of the asset to the non-resident beneficiary).

Furthermore, any distributions of income to non-resident beneficiaries are likely to be subject to withholding tax that the executor has an obligation to remit to the ATO.

### Testamentary Trusts

Testamentary trusts are used to set aside assets of a deceased for the benefit of one or more beneficiaries. These assets could be held in a testamentary trust until a beneficiary reaches a certain "responsible" age or used to protect the assets of the family.

Where minor beneficiaries exist, such as children or grandchildren of a deceased, there are tax advantages available where distributions of income are applied on their behalf.

### International Assets

Care should be taken where assets of a deceased are held in foreign jurisdictions. Many foreign jurisdictions still impose death duties or inheritance taxes, such as the United Kingdom. Generally where two countries have death duties or inheritance taxes, double tax agreements between those jurisdictions work to alleviate double taxation. However, Australia is not party to double tax treaties dealing with inheritance. Inheritance tax paid in foreign jurisdictions is usually not recognised for any Australian tax purposes, even as a part of forming a cost base for an inherited asset for CGT.

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