
Understanding Death and Taxation: The Endgame

Carlo Di Loreto

Tuesday, 4 March 2025



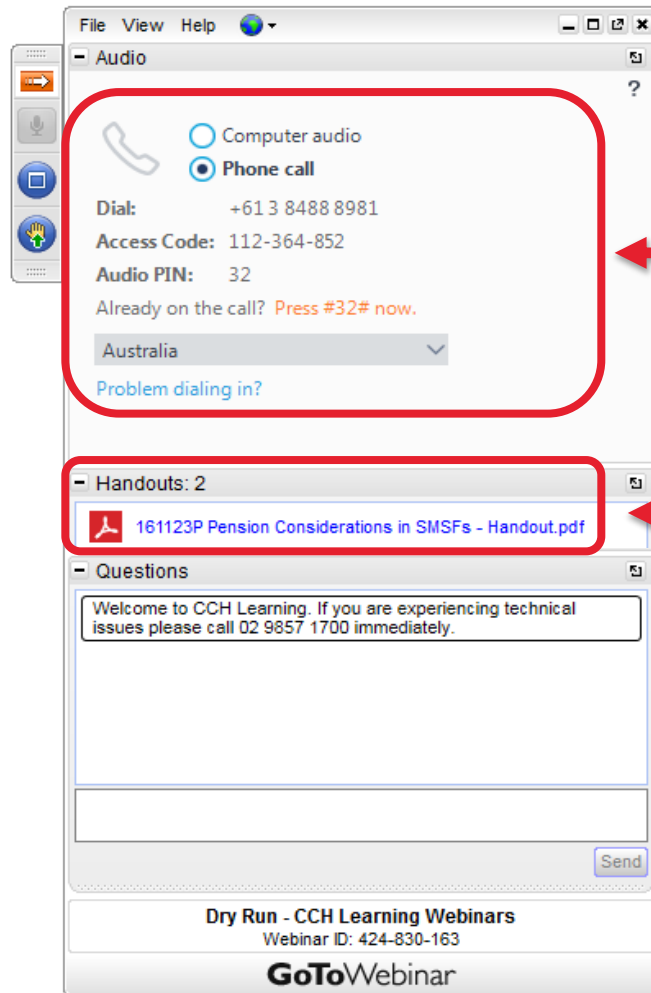
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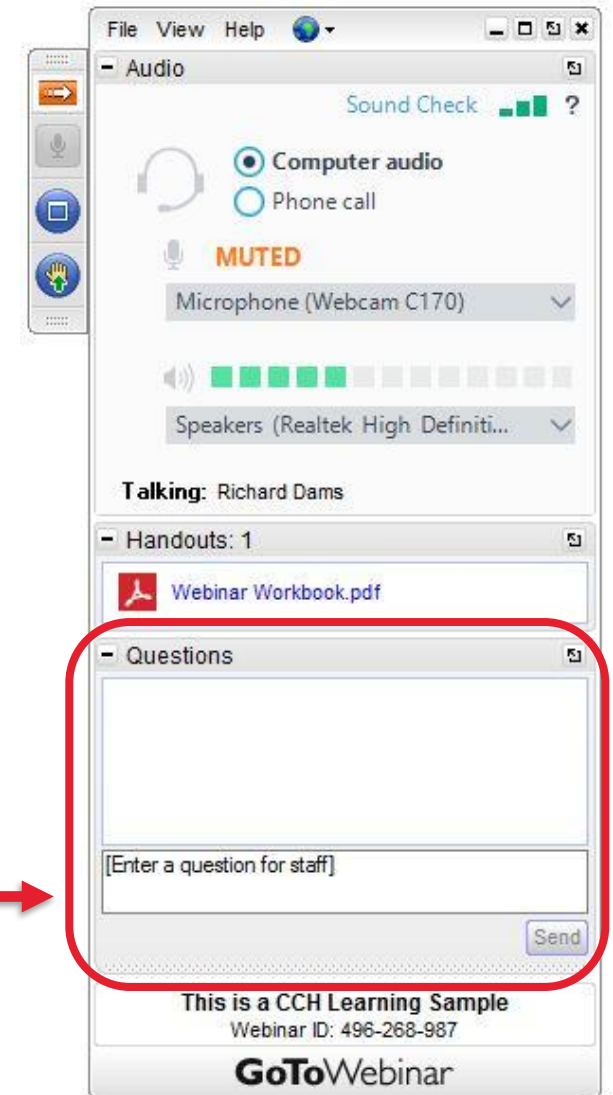
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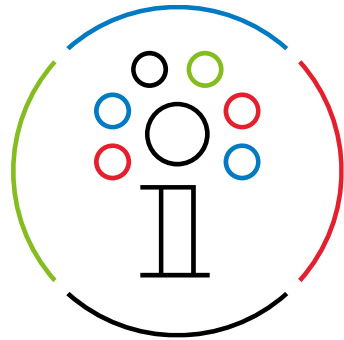


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Today's session will cover



In this session we will cover the tax issues arising on death, including how to handle:

- the tax return of the deceased
- the tax return of the deceased estate
- the CGT position where assets pass to beneficiaries
- life tenants & remainderman
- testamentary trusts
- superannuation benefits

Tax issues arising on death

- when a person dies all property of deceased vests in their legal personal representative (LPR) & a deceased estate is formed
- the LPR is the executor or administrator of the estate (estate has administrator when there was no Will or if Will did not successfully appoint an executor)
- deceased estate is a trust for tax purposes
- the legal title to assets held by the individual passes to other entities, as determined by the Will (if any) and by the laws of succession in the relevant jurisdiction

Tax issues arising on death

- LPR is unable to distribute assets or income of deceased estate until probate or letters of administration granted
- a deceased estate remains in existence until it has been fully administered
- an estate is fully administered when all assets of deceased estate have been distributed to beneficiaries & liabilities of estate have been satisfied

Tax return

- LPR is required to lodge a tax return for deceased from 1 July to date of death
- income of deceased estate before administration of estate is complete, is income of the trust estate
- trustee is liable to tax under s 99 ITAA 1936 – individual rates of tax
- S 99 only applies where s 99A does **NOT** apply
- S 99A does not apply to:
 - Deceased estates
 - Where the Commissioner is of the opinion that it would be unreasonable for s 99A to apply
- TD 92/192 - individual rates apply for the remainder of the financial year after date of death and next two financial years

Stages of administration

Stages of administration

The stages of administration of the estate are as follows:

Phase 1: Death

- Executor appointed by Will or administrator appointed by Court
- Probate applied for & granted by Court
- assets & liabilities are deemed to vest in LPR

Stages of administration

Phase 2: Administration of Estate

- LPR identifies assets & liabilities of deceased
- lodgement of final income tax return for deceased ('date of death ITR')
- lodgement of trust income tax return for deceased estate ('estate ITR')
- net income surplus to debts distributed
- residual assets & property distributed

Stages of administration

Phase 3: Post Administration

- where Will provides, assets vesting in testamentary trust & ongoing administration
- administration of special circumstances such as remainderman & life tenancies



Grant of Probate

Grant of probate

- probate is the legal act of 'proving' the Will of deceased person
- a grant of probate is permission from the Supreme Court for an executor to carry out terms of the Will of deceased
- letters of administration is permission granted to an administrator (the expression 'grant of administration' generally covers both terms)

Note:

- Probate not required if all assets are held by deceased as joint tenants, as all assets automatically pass to survivor.

Grant of probate

- issuing grant of administration gives LPR authority to administer estate of deceased
- generally, only gives authority for LPR to deal with assets of deceased in the jurisdiction on which the grant was issued
- courts in many jurisdictions are able to recognise 'foreign' grants of administration & acknowledge grant by 'resealing' it
- this normally allows LPR to deal with property in the resealing jurisdiction

Grant of probate

- you must satisfy the Court that the Will is valid & show that:
 - there are no later Wills
 - the Will was signed
 - the deceased was 18 or over when Will was signed
 - the deceased was of sound mind & was not under undue influence
- no application can be made until 14 days after the date of death

How to apply for grant of probate

- an executor may apply in person or engage a lawyer or trustee company
- the necessary forms are available online and from some stationery suppliers
- executor must take paperwork to Probate Registry – generally done online
- no other person except a lawyer acting on the executor's behalf can lodge application
- Must apply within 6 months from date of death of deceased (check your State's requirements)
- In NSW
 - Register an online account with the Probate Service
 - Apply for a grant of representation
 - Download, sign and witness forms
 - Upload executed documents

How to apply for grant of probate

- documents that must be filed include:
 - the original Will plus any codicils
 - the death certificate
 - complete statement of all assets & liabilities

How to apply for grant of probate

- Information required:
 - Date of death
 - Full name and address of deceased
 - Address and details of assets – needs to be on a State-by-State basis
 - Name of executors and beneficiaries
 - Name of witnesses to the Will
 - Address for service of notices
 - if application for probate is successful, executor receives a document advising they can carry out terms of Will

Note:

- Expenses of obtaining probate are capital in nature – Not Deductible but may be included in cost base of CGT assets



Date of death tax return

Date of death tax return - Key Issues

- all income derived by deceased prior to their death must be included in final ('date of death') tax return of the deceased
- all expenses incurred by deceased prior to their death that were incurred to earn assessable income are allowable
- expenses associated with preparing deceased's final tax return allowable even though expense is incurred by LPR after date of death [s 25-5(8) ITAA 1997]

Date of death tax return - Key Issues

- the deceased receives benefit of normal tax rates in the period 1 July prior to their death to the date of their death
- the tax-free threshold is usually pro-rated based upon number of days the deceased was a resident
- the deceased receives the benefit of the full tax-free threshold in their final tax return, if they were tax resident for the full year

Date of death tax return - Key Issues

- if deceased operated a business on a cash or accruals basis, same basis should be applied when determining what income included in date of death ITR
- if deceased held trading stock, the market value of the stock to be included as assessable income in date of death ITR

Note:

- LPR can make an election under s 70-105 ITAA 1997 - if made, MV of stock is ignored & closing value at date of death is included instead.

Date of death tax return - Key Issues

- Trading stock election can only be made:
 - within required time frame – usually the date of lodgement of date of death return [s 70-105 ITAA 1997] but Commissioner has discretion to extend; and
 - if LPR carries on the business using the trading stock

Note:

- If trading stock is certain crops or trees, LPR can elect for 'nil' value in date of death ITR.
- Person to whom trading stock devolves treated as having acquired at value shown in the date of death ITR.

Date of death tax return - Key Issues

- revenue losses & capital losses are extinguished on death (TD 95/47)
- accumulated losses can only be used to offset any taxable income disclosed in the date of death ITR

Planning:

- if testator has significant unused tax losses
- gifting assets while taxpayer still alive uses tax losses & provides 'beneficiary' with a deemed MV cost base
- if asset transferred by Will 'beneficiary' has cost base equal to cost base of deceased

Date of death tax return - Key Issues

Reminders:

- under trust loss measures, a deceased estate is deemed to be an 'excepted trust'
- trust loss measures therefore do not apply to deceased estates
- commercial debt forgiveness provisions do not apply to debts forgiven upon death
- a beneficiary who has debt from a deceased forgiven by a Will, is not caught by the debt forgiveness provisions

Final tax liabilities

- LPR personally liable for payment of any tax (but has right to be indemnified from the estate assets)
- until early 1990's ATO issued tax clearance notice which provided LPR with comfort they were satisfied all returns properly completed & lodged
- such notices no longer issued (means greater onus on LPR to ensure tax affairs of the deceased are in order)

Final tax liabilities

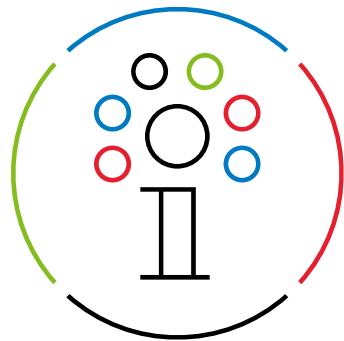
Note:

- Commissioner has same powers & remedies for assessment & recovery of tax from LPR of estate, as he would have had against debtor if debtor was still alive
- where returns have been lodged but no notice of assessment (or advice that no tax payable) received - LPR should enquire of ATO - extent of liability
- failure to make such enquiry before distributing assets of estate & without making provision for taxation liabilities - may be held distribution made in knowledge of Commissioner's claim

Final tax liabilities

- where amended assessment issued after assets of estate distributed - Commissioner will consider whether LPR should have anticipated ATO would review past assessments
- if LPR had no reason to expect further assessments & requirements of state legislation on advertising & assets of estate fully-distributed, then it is unlikely Commissioner would recover any of the outstanding tax
- if assets of an estate are distributed without regard to a creditor's claim, the LPR may be personally liable to the extent of assets that were held by them
- the Commissioner is not entitled to recover from a beneficiary, any assets from the estate distributed to them by the trustee.

Poll Question



Your client Steve passed away on 28 February 2025 and you are the executor. Section 99 rates of tax will apply to from 1 March 2025 until 30 June:

- a) 2025
- b) 2026
- c) 2027
- d) 2028



Deceased estate tax return

Deceased estate tax return

What income is included?

- 2 forms of income included:
 - s 101A ITAA 1936
 - income which would have been assessable income in hands of deceased if these amounts had been received during their lifetime
 - s 95 ITAA 1936
 - income derived by the deceased estate

s 101A ITAA 1936

- where s 101A applies, income is deemed to be income to which no beneficiary is presently entitled
- LPR is assessed but is able to access ordinary adult resident tax rates for the first 3 years
- for period after 3 years assessed under modified rates

Present entitlement

- generally, while deceased estate is administered, beneficiaries are not presently entitled & LPR is assessed
- while Will may provide beneficiaries with absolute interests in capital or income of an estate under State laws, interests cannot crystallise until probate granted
- IT 2622 sets out when a beneficiary of a deceased estate becomes presently entitled

Present entitlement

- leading case on present entitlement is the High Court of Australia decision in *FCT v Whiting* (1943) 68 CLR 199; 7 ATD 179
- Court held that a beneficiary of a deceased estate cannot be presently entitled to the income until the estate has been fully administered
- until the estate has been fully administered & the net residue ascertained, a beneficiary has no proprietary interest in any specific investment of the estate

Present entitlement

- administration does not have to reach stage where estate is wound up for beneficiary to be presently entitled
- if LPR has determined that deceased estate has sufficient funds to pay the debts of the deceased estate, LPR can distribute income to the beneficiary
- the beneficiary will be deemed to be presently entitled [IT 2622]

Present entitlement

Example:

- Maria dies, leaving an estate of \$2 million. During the administration period, her LPR was confident that most of her liabilities had been identified but was awaiting confirmation of some amounts that were likely to be around \$50,000.
- The LPR decided to distribute \$1.0 million to Maria's niece Rebecca, the sole beneficiary & retain the remaining funds until the exact liabilities determined.
- In the circumstances, Rebecca is presently entitled to the \$1.0 million & so is liable to tax on the future earnings on this sum but is not presently entitled to the assets retained by the LPR.

Apportioning of present entitlement

- if an estate has been administered on or prior to 30 June all of the income is assessed to the beneficiaries
- IT 2622 allows the LPR to divide the income year into 2 periods:
 - Period 1 – 1 July to date administration is completed
 - Period 2 – from administration until end of the income year

CGT and death

CGT implications

- death does not cause a deemed disposal of assets [s 128-10 ITAA 1997]
- s 104-215 ITAA 1997 (*CGT event K3*) sets out exception to this rule if the *post-CGT asset* passes to a beneficiary under a Will who is:
 - a tax-exempt entity e.g. charities
 - a complying superannuation fund or
 - foreign resident

Note:

- If asset passes to a foreign resident, CGT event triggered only if asset is not 'taxable Australian property'.

CGT implications

- If CGT event K3 happens:
 - asset deemed to have been disposed of by deceased at MV resulting in:
 - a capital gain if MV of asset on date of death > cost base
 - a capital loss if MV of asset on date of death < cost base
 - a capital gain or loss must be included in the date of death ITR
 - in the absence of a provision in the Will that directs otherwise, the tax is payable from the residue of the estate

Assets held by the deceased as a joint tenant

- assets held by deceased as a joint tenant do not form part of estate - interest automatically divests to other joint tenants
- each tenant has a separate vested right to a specific share or portion of an asset when held as tenants in common
- at common law joint tenancy is presumed in the absence of a contrary intention

Joint tenants to tenants in common

- under s 108-7 joint tenants treated:
 - as if they each owned an equal interest in the asset &
 - as if each held the interest as tenant in common
- means a change from joint tenants to tenants in common does not create a disposal for CGT purposes.

CGT implications to LPR

- any capital gain or capital loss LPR makes if asset passes to a beneficiary is disregarded [s 128-15]
- ordinary CGT rules apply for any CGT assets LPR sells
- Division 128 only applies to a CGT asset owned by the taxpayer before dying
- if LPR acquires assets ordinary CGT rules apply

Note:

- if beneficiary is absolutely entitled to the asset there would be no CGT event when the asset was transferred by the LPR to the beneficiary [s 106-50, TD 93/36].

CGT assets passing to beneficiary

- if deceased acquired an asset *pre-CGT*, then beneficiary deemed to have acquired the asset at MV on date of death of deceased [s128-15(4)]
- if deceased acquired asset *post-CGT*, beneficiary is deemed to have acquired the asset for its cost base or reduced cost base
- exception to the above rules relates to a main residence

CGT discount

- pre-CGT assets deemed acquisition at date of death
- post-CGT assets deemed acquisition when the deceased originally acquired the asset
- 12-month period of ownership is from the deemed date of acquisition

CGT death deeming rules

Time of death	Acquisition date of Deceased	Acquisition date for Beneficiary	Deemed cost base
Pre CGT	Pre CGT	Pre CGT	N/A
Post CGT	Pre CGT	Date of death	Market value at date of death
Post CGT	Post CGT	Date of death (for Div 115 when deceased acquired asset)	Cost base of Deceased

CGT main residence exemption

- full exemption from CGT applies where:
 - dwelling continues to be owned by beneficiary of an estate
 - is occupied as a main residence
 - or alternatively:
 - if beneficiary sells the dwelling within 2 years of the date of death, whether or not they reside in the property, exemption will apply
- s 118-195 ITAA 1997

CGT main residence exemption

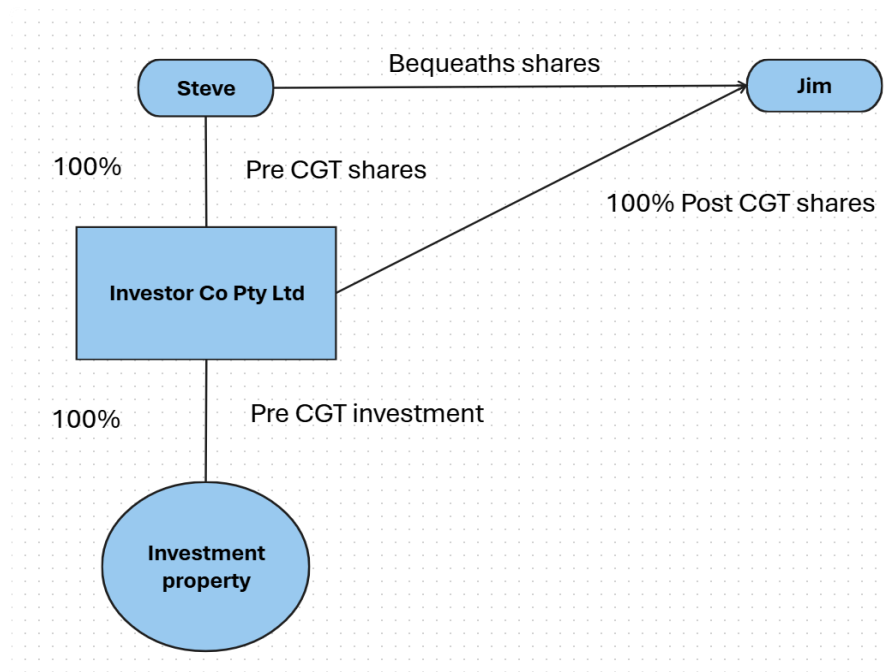
- partial exemption from CGT applies where:
 - property sold later than 2 years from death &
 - dwelling was not main residence at all times beneficiary owned the property [s 118-200 ITAA 1997]

Reminder:

- 6-year period of absence rule for main residence can apply provided beneficiary has first made the dwelling their main residence

Death & Division 149 ITAA 1997

- s 149-30 ITAA 1997 deems pre-CGT assets to be post-CGT assets when more than 50% change in the majority underlying interests
- deeming rules do not apply where change in ownership is due to death of the shareholder or unit holder
- Example:





Life tenants and remainderman

Life tenants and remainderman

Life tenancy

- where Will provides one beneficiary with right to use the asset (e.g. reside in a property) or derive income from the asset until their death
- life tenants have no actual ownership interest in the underlying asset
- right is to use the asset during their lifetime
- rights expire on their death

Life tenants and remainderman

Remainderman

- another beneficiary receives title to the asset
- remainderman does not become entitled to ownership of asset, until death of life tenant
- prior to death of life tenant, asset remains in name of LPR

Life tenants and remainderman

Date of acquisition

- if deceased died before 20 September 1985 remainderman & life tenant are taken to have acquired asset before that date
- this is the case even if the asset does not pass to the remainderman until the life tenant dies after 20 September 1985

Life tenants and remainderman

- if life tenant disposes of post-CGT rights, CGT applies
- when life tenant dies, LPR deemed to have disposed of asset to remainderman for its MV
- as remainderman is capital beneficiary, capital gain assessable to remainderman [TR 2006/14]
- when remainderman receives asset, also deemed to have disposed of the remainder interest [no CGT implications – TR 2006/14]
- if remainderman disposes of interest before life tenant dies a capital gain arises

Life tenants and remainderman

- Division 128 provides a form of rollover relief (i.e. death does not cause a deemed disposal)
- relief only applies to CGT assets owned by the deceased & which 'pass' to a beneficiary of the estate
- TR 2006/14 addresses the CGT consequences of creating life & remainder interests in property & of any subsequent dealings in those interests

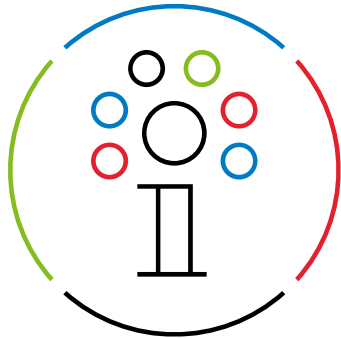
Life tenants and remainderman

- If a life tenant holds their interest for their lifetime – no taxation consequences arise for them on their death
- For a remainderman
 - On death of life tenant, CGT event E5 may happen
 - CGT event E5 will not apply if the asset passes from the deceased in accordance with their Will (section 128-20)
 - Any capital gain or loss arising on the death of a life tenant is disregarded
 - Provided the remainderman has not paid anything to acquire their interest

Poll Question

If a beneficiary of a Will sells a dwelling that was the main residence of the deceased, within 2 years of the date of death, a CGT exemption will apply.

- a) True
- b) False



Testamentary trusts

Testamentary trusts - overview

- an 'express trust' (created by express intention) established under terms of a Will
- not created inter vivos & only comes into existence when testator (whose property is settled on to the testamentary trust) dies
- testamentary trusts have same attributes as other trusts (trustee, trust property, beneficiary etc.)
- may (amongst others) be discretionary, fixed, hybrid and/or bare trusts

Testamentary trusts - characteristics

- established under a testamentary instrument
- funded by either:
 - the assets of a deceased estate or
 - payments to the estate as a consequence of death
- administered by LPR & subject to terms of a Will

Advantages of testamentary trusts

- asset protection
- flexibility of distributing income
- duty and CGT savings where property left by Will to a testamentary trust
- tax advantages for minors
- power to lend & advance funds
- use for surviving spouse who remarries
- protection for/against beneficiaries with issues
- continuance of the main residence exemption

Superannuation benefits

Superannuation benefits

- Payment of member benefits governed by either:
 1. a binding death benefit nomination; or
 - must be in writing, signed, dated & witnessed
 - can only be made in favour of dependants or LPR
 - must state proportion payable to each beneficiary
 - must be renewed every 3 years
 - can only be made if fund deed contains provisions allowing for binding death nominations
 - SIS Reg 6.17A sets out technical requirements
 2. super fund trust deed
 - ultimate recipients restricted by SIS Reg 6.22 (dependants or LPR)
 - dependants defined in s 10 SISA

When must death benefit be paid

- from 10 May 2006, SIS Reg 6.21 stipulates super benefits must be cashed, or rolled over for immediate cashing 'as soon as practicable' after a member dies
- from 1 July 2007, the cashing of a deceased member's benefit under Reg 6.21 is also restricted by Reg 6.21(2A) & 2B
- if a member dies on or after 1 July 2007, member benefits of the deceased can be:
 - cashed as a pension or
 - used to purchase an annuity for entitled recipient, but only if:

When must death benefit be paid

- the entitled recipient (at time of member's death) is:
 - a dependant of the member; and
 - in the case of child of the member
 - is < than 18 years of age or
 - if > than 18 years of age is either financially dependant on the member & < 25 years of age or is permanently disabled

When must death benefit be paid

- if benefits in relation to deceased member are paid to a child of deceased member in form of a pension under Reg 6.21(2A), benefits must be cashed as a lump sum on the earlier of:
 - the day on which the pension is commuted, or the term of the pension expires; and
 - the day on which the child attains the age of 25
 - unless child is permanently disabled

Note:

- If a death benefit is paid on or after 1 July 2007 to a person who is not a dependant for tax purposes (including LPR), the death benefit must be paid as a lump sum.

Tax treatment of death benefits

- for taxed superannuation funds, death benefits paid whether as a lump sum or income stream, can consist of 2 components:
 - a tax-free component
 - a taxable component
- the taxable component is also split into 2 elements:
 - a taxed element
 - an untaxed element

Tax treatment of death benefits

- the death benefit will contain an untaxed element if:
 - the benefit is paid as a lump sum
 - the trustee has claimed a deduction for death insurance for the deceased member
 - the member is aged less than their normal retirement age

Note:

- the death benefit will also contain an untaxed element if the lump sum or pension is paid from an untaxed fund e.g. Commonwealth Superannuation Scheme.

Tax treatment of death benefits - Lump sum death benefits

- If a lump sum death benefit is paid, the rate of tax applicable to the taxed component, depends upon whether the beneficiary is tax dependant & the amount of each element that forms part of the taxed component:

Beneficiary	Tax-free Component	Taxable Component	
		Taxed Element	Untaxed Element
Dependant	Tax free	Tax free	Tax free
Non-dependant	Tax free	17%	32%

Note:

- The taxable component includes Medicare levy

Tax treatment of death benefits - Death benefit pension

- The tax treatment of a death benefit pension depends upon the age of the deceased at the date of death & (if the deceased was under 60 years of age) the age of the beneficiary

Age of deceased at date of death	Age of recipient on payment	Tax-free Component	Taxable Component	
			Taxed Element	Untaxed Element
Under 60	Under age 60	Tax free	MTR less 15% offset	MTR
	60 and above	Tax free	Tax free	MTR less 10% offset
60 and above	Any age	Tax free	Tax free	MTR less 10% offset

Tax treatment of death benefits - Death benefit pension

- taxable component applies if beneficiary is a dependant or reversionary pension commenced to be paid before 1 July 2007
- marginal tax rate (MTR) applied to untaxed element of taxable component includes Medicare levy
- if MTR of beneficiary < rates shown - tax on taxable component will reduce to MTR of beneficiary
- a death benefit pension cannot commence to be paid on or after 1 July 2007 to a beneficiary who was not a dependant of deceased member for tax purposes
- if death benefit pension paid to a tax non-dependant began before 1 July 2007, the pension is taxed as if it is being paid to a dependant beneficiary

Employer payments made after death of employee

- general rule is that a payment made by an employer after an employee's death will form part of employee's estate (beneficiary determined by Will)
- employer payments for unused annual leave, leave loading & unused LSL made after death of employee are not subject to tax [s 101A(2) ITAA 1936]
- a benefit paid by employer for an employee who has died is treated as a death benefit termination payment, which can consist of two components:
 - a tax-free component
 - a taxable component

Employer payments made after death of employee

- tax-free component comprises pre-July 1983 segment & invalid segment of the payment
- taxable component comprises the balance
- each component taxed depending on whether beneficiary is considered dependant or non-dependant for tax purposes

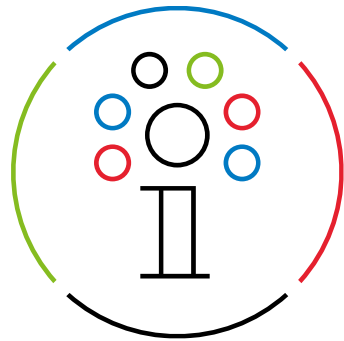
Employer payments made after death of employee

Beneficiary	Tax-free Component	Taxable Component
Dependant	Tax free	First \$195,000: Tax free Excess: 47%
Non-dependant	Tax free	First \$195,000: 32% Excess: 47%

Note:

- the tax rate applied to taxable component includes Medicare levy
- if the MTR of the beneficiary is less than the rates shown, the tax on the taxable component will reduce to the MTR of the beneficiary

Key Takeaways from today's session



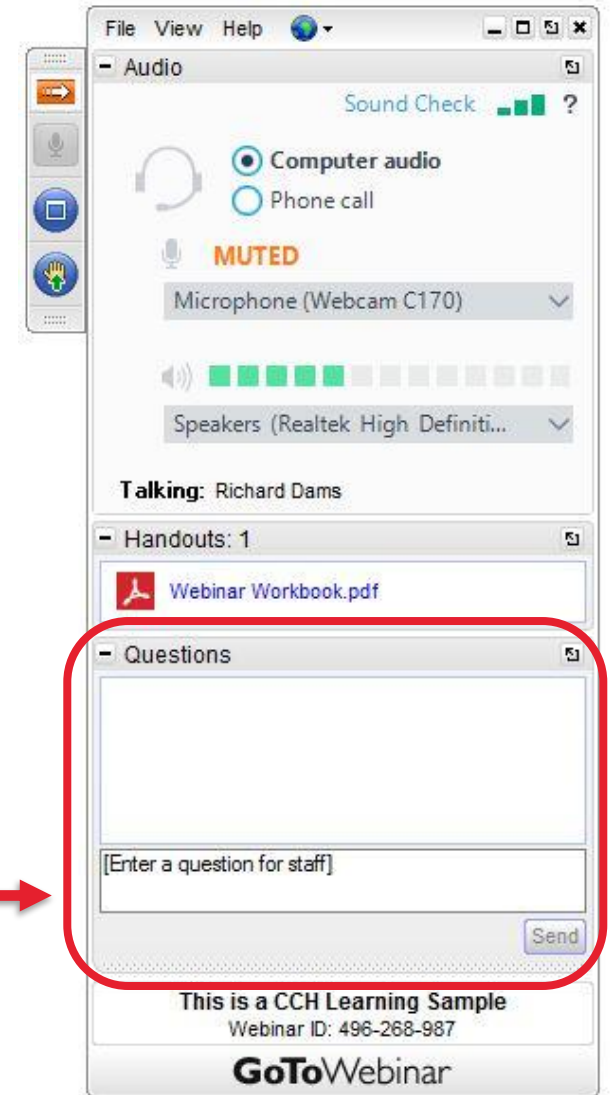
- The tax implications arising from the death of a client are complex
- A structured approach is needed
- Understanding the process of administration of an estate is critical in determining the taxation consequences
- All assets of an estate need to be reviewed to determine if Division 128 applies
- Testamentary trusts can be a valuable succession planning tool
- Superannuation and employer benefits are complex – a detailed review of these arrangements is needed

Questions?

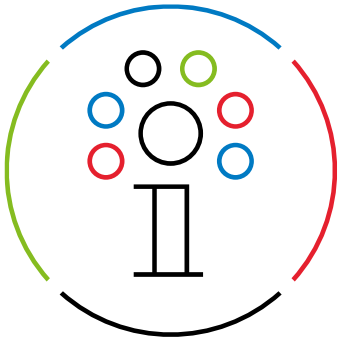


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Questions?



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