

# Estate Administration Tax (Probate Tax)

Sunita D. Doobay, LL.B., LL.M.(Tax)NYU, TEP

# What is probate?

- Grant of Letters of Probate / Certificate of Appointment of Estate Trustee with or without a will
  - Required by financial institutions and brokerages holding assets of the deceased;
    - Protects institutions from litigation if the probated will is challenged;
  - Required for land situated in Ontario and registered under the *Land Titles Act*.
  - Not required for land registered under the *Registry Act*.
  - Probate tax is imposed when Letters of Probate granted

# Estate Administration Tax Background

- Ontario's history – problematic
- 1992 – Ontario tripled the then probate rate to 1.5% on estate assets over \$50,000;
- This led to practitioners to focus their energy on the minimization of exposure of estate to the tax;
  - Very successful as revenue collected after 1992 was less than prior to 1992;

# Estate Administration Tax Background

- 1998 – *Granovsky Estate* upheld the dual wills structure allowing only assets requiring probate to be listed in the first will and assets not requiring probate to be set out in the second will;
- 1998 - *Eurig Estate (Re)* the SCC ruled the then probate fee to be unconstitutional;
  - Ontario was given a six months window to rectify;
    - Estate Administration Tax Act came into force

# Estate Administration Tax Act Amended

- Amended by Bill 173, *Better Tomorrow for Ontario Act (Budget Measures)*, 2011
- In effect January 1, 2013.
- Amendments are contained in section 4.1
- The Minister of Revenue now has jurisdiction to enforce the EATA.

# Dual wills under threat?

- Although regulations have not as yet been issued – it does not appear that the EATA invalidates Dual Wills planning;
- Dual wills: estate divided up into two parts – primary estate will and secondary estate will;
  - Only primary is admitted to probate resulting in probate fees calculated only on assets contained in the primary will

# Dual wills under threat?

- Secondary will contains assets that do not need to be probated such as shares of a private corporation.
- Concern about subsection 4.1(2) the duty to give information.
  - “if an estate representative makes an application for an estate certificate, the estate representative shall give the Minister of Revenue such information about the deceased person as may be prescribed by the Minister of Finance”.
- So far no regulations have been released on this section.

# Dual wills under threat?

- However even if information is sought on the entire estate, such information does not invalidate the dual wills structure as the estate administration tax is levied on the “value of an estate”.
- EATA refers to the section 32 of the *Estate Tax Act* for definition of “value of an estate”



# Dual wills under threat?

- Section 32 the same as when it was considered in *Granovsky*.
- Section 32(3) of the *Estate Act* expressly allows the separation of assets into the first will containing assets for which a grant of probate is necessary and the second will containing assets for which a grant of probate is not necessary.
- The *Estate Act* and the EATA does not contain wording similar to its counterpart in provinces such as Nova Scotia which have expressly disallowed dual wills.

# Assessment & Re-assessment under the EATA

- Subsection 4.5(1) – EATA now has the assessment power allocated to the Minister of Revenue under the Ontario *Retail Sales Tax Act*.
- The Minister has up to four year to assess or re-assess the estate from the date the estate administration tax was due.
  - Alarming is that the EATA does not contain a clearance certificate similar to that of the *Income Tax Act*.
- Although an estate trustee will only be liable in representative capacity thus not liable personally, in the absence of a clearance certificate the Minister can still assess and seek to collect estate administration tax from the beneficiaries.
- Beneficiaries in such a situation may have legal recourse against the trustee of the estate as trust law enables the beneficiaries to hold the trustee personally liable .

# Personal liability of the trustee/executor

- Estate trustee only be liable in representative capacity thus not liable personally;
- In the absence of clearance certificate Minister can still assess and seek to collect estate administration tax from beneficiaries.
- Beneficiaries in such a situation may have legal recourse against the trustee/executor of the estate as trust law enables the beneficiaries to hold the trustee personally liable .

# Inspection power under EATA

- Section 4.7 - inspectors appointed under the Minister have the same powers as provided in subsection 31(1) to (2.2) of the *Retail Sales Tax Act* inspect books, records and property at any premise where the estate goods, books and records are kept.
- As the assessment period is four years, it is unclear how this provision will be enforced where distribution of assets has already taken place.

# Inspection power under EATA

- This section mandates careful record keeping by the trustee. Record keeping will also be essential in the event a due diligence defence which is provided in the EATA is needed against an action against the trustee by the Minister.
- Trustees will be reluctant to distribute all assets prior to the run of the potential assessment four year period.

# Exchange of Information

- Amended EATA includes an exchange of information agreement clause allowing for exchange of information between governmental entities at the provincial level and with governmental entities at the Federal level.

# False or Misleading Statements

- A trustee who provides a false or misleading statement may be subject to imprisonment or a fine.
- A trustee who makes a false or misleading statement is able to rely on the due diligence defence where “the statement or omission was false or misleading and in the exercise of reasonable diligence could not have known that the statement or omission was false or misleading”.

# Probate Planning

- Dual Wills;
- Insurance Policies, RRIFs, RRSPs, Pension Plans
  - Ensure valid designation has been made or else probate tax will apply to the proceeds and note Income Tax does apply on registered plans;
- Trusts;
  - Assets held by a trust are not subject to probate;
- Joint Tenancies;
  - A joint tenant's interest does not form part of his/her estate



# Probate Planning Trusts

- *Inter vivos* trusts
  - Not subject to probate;
  - Deemed disposition on transfer to trust and every 21 years thereafter;
  - Taxed at the highest marginal rate;
- *Inter vivos trusts* allowing for rollover to trust and not subject to probate:
  - Alter ego trust, Joint partner Trust, Self-benefit trust and Qualifying Disposition Trusts

# Joint Tenancy

- Real estate term but is used with other assets such as bank accounts;
- Joint tenancy provides each joint tenant with an equal right to the property and right to survivorship;
  - on the death of a joint owner, that person`s interest in the property will automatically pass to the remaining (surviving) joint owners.

# Joint Tenancy

- Problematic where principal residence is transferred to a relative;
  - Principal residence exemption is lost on the portion transferred;
- Often overlooked by advisors is the deemed disposition rule of the Income Tax Act (Para. 69(1)(b)) with resulting capital gain on transfer of properties other than a principal residence

# Joint Tenancy

- Transfer of real property may trigger land transfer tax where property is subject to a mortgage;
- Adding a joint tenant is giving up control of the property –unable to sell/ mortgage without permission of all joint tenants;
- Property is now subject to potential creditors of the joint tenant. Potential down the road divorces

# Joint Tenancy Joint Accounts

- See the 2007 SCC cases *Pecore v. Pecore* and *Madsen Estate v. Saylor* – In both cases:
- Elderly father added adult daughter to bank account.
- On death, the balance in the remaining joint accounts passed to the daughter by right of survivorship.
- This right of survivorship was disputed in both cases by the beneficiaries of the estate.

# Joint Accounts

- At issue was whether the father intended beneficial ownership to pass to the daughter or whether the daughter was to hold the assets in trust for the benefit of the estate.
- A resulting trust arises when legal title to a property is transferred to another person with the expectation that the property will be transferred to the beneficial owner.

# Joint Accounts

- In *Pecore* the SCC ruled in favor of the daughter.
- Different conclusions reached due to the difference in facts. Focus was on the intent of the father.

# Joint Accounts

- In *Pecore* the father did not mention the account to the lawyer drafting his will. This was one fact of the many facts the SCC found in support that the father in *Pecore* never meant for the account to be part of the estate.
- Careful drafting will have to be undertaken to ensure intent is clear that the addition of a name on a bank account reflects the desire to establish a joint tenancy.



# Contact Information

**TaxChambers**  
**144 Front St. West**  
**Suite 400**  
**Toronto ON M5J 2L7**

**(p) 416-847-7300**  
**(f) 1-866-285-6527**

**[sunita.doobay@taxchambers.ca](mailto:sunita.doobay@taxchambers.ca)**

**[www.taxchambers.ca](http://www.taxchambers.ca)**

