

10 November 2023

Klarence Lim
Australian Taxation Office

By email: IAITLA@ato.gov.au

Dear Mr Lim

Comments on Practical Compliance Guideline PCG 2018/4DC1

We, the Society of Trust & Estate Practitioners Australia Pty Limited (STEP Australia) represent professionals from across Australia who are specialists in trusts, estate planning and in supporting the needs of families (young and old, wealthy and modest). The objective of a STEP Professional is to advance the interests of families across generations. This often involves us in identifying issues of relative importance to families and bringing these to the attention of those who can make a positive difference. This is the purpose of this submission.

STEP Australia's membership includes lawyers, accountants, financial wealth advisors and trustee company professionals from across Australia; our members bring a multi-disciplinary approach to the benefit of their clients. It is this unique multi-disciplinary approach that supports this submission.

We have been handed a copy of a submission drawn by *BNR Partners*. That submission concerns the income tax liability of a legal personal representative of a deceased person.

We endorse wholly the submission by *BNR Partners* and make the following specific comments:

- we support the submission that, although the increase in the monetary threshold to \$10m in paragraph 9 is a welcome change, the other limitations provided for by that paragraph make a monetary threshold redundant. We also agree that the removal of the monetary threshold will remove the need to adjust the PCG in future which allows for the longevity for the PCG;
- the suggestion addition of the words “that is not a DGR” after “tax exempt entity” in the last dot point of paragraph 9 is a practical suggestion that ensures that when a deceased person leaves funds to a charity from a small estate, the PCG may be applied.



For your ease of reference, we have **attached** what we have been handed, the letter addressed to you dated 2 November 2023 and the submission enclosed therein.

If you would like to discuss any of the above, please contact Jennifer Sheean TEP, STEP Australia National Policy Committee Chair, on email sheean@qldbar.asn.au

Yours sincerely

Jennifer Sheean TEP

Chair of STEP Australia National Policy Committee

CC: Ian Raspin TEP, Managing Director, BNR Partners

E: iraspin@bnrpartners.com.au

Klarence Lim
Australian Taxation Office

2 November 2023

By email: IAITLA@ato.gov.au

Dear Klarence

Comments on Practical Compliance Guideline PCG 2018/4DC1

Earlier this year BNR Partners provided feedback on a number of preliminary questions the ATO had asked regarding the proposed review of PCG 2018/4. A copy is attached for your information.

We are not going to repeat in this response the comments that we made then. However we trust that you will incorporate all of our previous issues in the compendium of comments for PCG 2018/4DC1 so that we can understand the ATO's position in respect of those matters. We have had no other feedback.

Personally, I would like to place on record my general disappointment in current ATO consultation processes. There is never an opportunity to discuss issues with relevant ATO stakeholders. This is a completely different approach for example to consultation on the initial PCG. In that instance, a number of meetings were held with practitioners and their issues were addressed one way or another. Even if the ATO could not adopt a practitioner suggestion we understood why that was the case. We felt that we part of a genuine consultation process and not simply a box to be ticked by the ATO.

Our comments on PCG 2018/4DC1 are included in the **Attachment**.

Yours sincerely

Ian Raspin TEP, FCPA, FCA, CTA
Managing Director

Attachment

- **Para-9** – we welcome the increase in the monetary threshold to \$10m. However, given the other limitations we think that a monetary threshold is not necessary. The removal of the threshold would mean that the PCG would not need to be adjusted in future as values increased.
- **Para 9 last dot point** – this requirement was inserted to ensure that CGT event K3 gains did not escape tax simply because of the PCG. However, there is no assessable gain if an asset passes to a tax exempt entity that is a DGR (section 118-60). Therefore the dot point should be amended by adding ‘that is not a DGR’ after ‘tax exempt entity’.

There are many small estates where assets are left to charities that are DGRs, they should not be precluded from applying the PCG for no tax reason.

- **Para 15** - the references to the ‘affairs of a deceased estate’ and ‘estate assets’ should be changed to the ‘affairs of the deceased person’ and ‘assets of the deceased’. That is, as per para 7, this PCG is not about the estate.
- **Para 15** – this para should contain some restriction regarding liability if the LPR. For example if the deceased had lodged all returns except for the date of death return and the LPR has lodged that and not identified any material irregularity, the ATO should be required to give notice within 6 months of the lodgement of the last return. Some examples would be useful.
- **Para 15** – the reference to ‘returns’ being amended should be to ‘assessments’.

Suggested replacement paragraph 15

Where during the estate administration the ATO notifies the LPR that it has decided to review the affairs of the deceased person, it will undertake that review promptly and amend any relevant assessments. The LPR will have notice of liabilities that may arise from the review but will only be liable to the extent of assets on hand when it received the notification from the ATO.

Example

Doug the LPR of Jeff's estate lodged all of his outstanding tax returns. He did not identify any material irregularity.

Five months after the lodgement of the last return, the ATO notified the Doug that it intended to review Jeff's tax affairs for a number of years before he died.

The LPR has notice of the liabilities and will be liable up to the value of the estate assets that came into its hands.

Example

Same facts as above except that the ATO notified Doug one year after the last return was lodged that it intended to review Jeff's tax affairs for a number of years before he died..

Doug had no reason to suspect that the ATO would review Jeff's affairs as he had not identified any material irregularity Nor could he reasonably be expected to have done so.

Doug started distributing the estate assets after six months had passed from the lodgement of the last return.

Doug has notice of the liabilities that may arise from the review but will be liable only up to the value of the estate assets that still form part of the estate.

- **Para 17** – the reference to ‘written legal advice’ should be to ‘written advice from an advisor’. That is, the advice will often be from an accountant and that should be sufficient.
- **Para 18** – there should be a dedicated process by which notifications can be made, notifications could be sent to a particular post box or email address. It is our experience that many paper documents that we send to the ATO get lost. We don’t want to get into an unnecessary dispute about whether something was ever sent.
- **Para 20** – we are concerned by the change to paragraph 19 and the inclusion of paragraph 20. Six months is more than enough time for the ATO to either tell the LPR that they intend to review the matter **or** to issue an assessment. Note that the existing test does not require both matters to be done in six months. There should not be an onus on the LPR to keep following up with the ATO about what it intends to do with the disclosure.
- If the ATO has had to seek further information, then that is covered by the existing wording of the paragraph – that is, the ATO has notified the LPR that it intends to review the matter. An example would be better than the change contemplated

Example

On 1 April, the LPR of Maria’s estate notified the ATO of an irregularity in a number of income tax returns she had lodged. In August, the ATO requested further information that it needed to amend the assessments for those years.

The LPR is on notice that the ATO is reviewing Maria’s tax affairs. The LPR provides the information on 20 September. By 1 October, the ATO has not issued the relevant amended assessments. The LPR cannot rely on the absence of these assessments to avoid personal liability as they had prior notice that the ATO was investigating the matter.

Example 2 – *legal personal representative acting reasonably to complete tax affairs*

- **Para 27** – this paragraph should perhaps follow paragraph 9. That is, this is an issue relevant to determining whether the estate is less complex (para 9) than whether the LPR has acted reasonably in respect of the deceased’s tax position.
- **Para 27** – it is often the case that a relevant individual will have been the trustee of their family trust. So that when they die enquiries cannot be made of the trustee directly, what should the LPR do in that instance?

Example 5 - *immaterial irregularity*

- This example is not particularly helpful. What if they found that her income was understated by \$100? Is that material – particularly given cost of amendment for LPR and ATO?
- **Para 46** – the fact that there may have been incorrect information provided does not mean that there was an ‘*error in the assessment*’; as it turned out the correct amount of taxable income had been disclosed so the assessment was correct (this is what paragraph 47 is all about). Should be clarified to ‘error in information disclosed to the ATO’.

**The Secretariat
Tax Practitioner Stewardship and Forums
Australian Taxation Office**

27 February 2023

By email: TPSG@ato.gov.au

Dear Secretariat

Consultation on Practical Compliance Guideline PCG 2018/4

I am writing in response to your email of 2 February 2023 seeking comments on a number of questions arising in the context of your review of PCG 2018/4 (about the liabilities of a legal personal representative (LPR) in respect of the tax liabilities of a deceased person.)

Background

At the outset, I note that I was a member of a small group of practitioners who liaised extensively with the ATO in the development of this PCG.¹ The PCG was developed in response to practitioners' concerns arising from the removal of Chapter 32 from the ATO Receivables Policy document.

The PCG was a first and measured attempt to provide certainty to LPRs whilst balancing the risk to the revenue. It was always intended that the scope of the PCG be reconsidered once the ATO had gained a better understanding of the risk it faced in light of the disclosures that it received.

Response to issues raised by ATO

Sufficient certainty

1. *In your experience, given the current scope of PCG 2018/4, does it operate appropriately in practice? Do you have any issues in applying the PCG?*

A practical issue that we face is that the PCG does not specify how the disclosures it contemplates are to be made to the ATO.

As there is no single ATO area coordinating responses to voluntary disclosures, we find that we get inconsistent responses from the various business lines which ultimately

¹ Other members of the group were Michael Flynn and Miranda Stewart, authors of the highly regarded text, *Death & Taxes and Tony Riordan*.

process them. We think that an area with overarching responsibility for responding to PCG 2018/4 disclosures would assist both the ATO and practitioners:

- that area would have ready access to all disclosures which among other things would assist in future reviews and expedite processing of disclosures resulting in fewer complaint cases,
- it would result in cost savings for taxpayers as practitioners would only have to deal with one area that understands the context in which issues are being raised. Currently we 'reinvent the wheel' whenever we make a disclosure because for each case officer it is a novel issue. We anticipate that it would also lead to consistent responses from relevant business lines.
 - By way of simple example, some BSLs have responded to disclosures by saying that they will not devote compliance resources to the issues disclosed. Others say that LPRs will be protected from penalty and interest charges should the ATO later review the matter – clearly this approach is less than satisfactory in terms of the LPR's exposure to liability.

2. *In what way can the PCG be improved in order to provide greater certainty to LPRs to whom the PCG applies (as per paragraph 6 of the Guideline) when finalising estates?*

- See response above. The PCG should identify a mailbox or area to which all disclosures should be sent.
- The PCG, or some other document, should establish a practice about the reinstatement of debts after death that were written off as 'uneconomical to pursue' prior to death. The current practice is unclear as debts are reinstated for some taxpayers and not others.

Information about written off debts is not included in the information pack provided to LPRs. While it is available to tax agents who undertake necessary searches of the deceased's Accounts and payment it does not appear in the front page summary.²

We have seen cases where debts are reinstated after lodgement of tax returns by the LPR and sometimes months after an assessment has been issued and the estate finalised. The LPR is exposed to liability for tax and charges that it had not anticipated when making distributions to beneficiaries. These amounts are not necessarily small and can be in the thousands of dollars.

In other cases, anxious LPRs have sought to have written off debts reinstated so that they can pay them. This has taken considerable time and energy on our part and cost on the part of the estate.

We suggest that the ATO should indicate in the PCG something to the effect that it will not seek to collect debts that are reinstated after a person's death. This will put all estates on a similar footing. If a debt happens to be reinstated after death (and the system should prevent this) it should then be a simple matter of contacting an area dedicated to rectifying this issue.

² See Attachment

Alternatively, information about written - off debts should be readily accessible by all LPRs at an early stage in the administration. With the resources available to the ATO, it should be relatively easy to reinstate debts automatically on receipt of a notification of death.

3. *Are there any additional examples the ATO can include in the PCG to illustrate the most common scenarios faced by LPRs to whom the Guideline applies? Please specify.*

- We see cases where a deceased person has many outstanding tax returns, one recent case involves about 30 years of undisclosed rental income derived by a non-resident. You will appreciate the difficulties that LPRs face in establishing the amount of taxable income in these cases. One issue that you might consider is whether you could set a limit on the number of returns that you require the LPR to lodge (for example, the date of death return and the preceding four years).

In these cases in particular, but also more broadly, LPRs are unwilling to declare that the information contained in the return is correct despite using their best endeavours to work out the deceased's taxable income. Perhaps the ATO might consider raising default assessments in response to a voluntary disclosure as a matter of course in these cases.

- The making of a default assessment by the ATO presumably would alleviate the need for the LPR to apply for a TFN where the deceased did not have one.³

Scope of PCG

4. *In light of the improved access to information by LPRs is the issue previously raised in the Compendium to PCG 2018/4 still current (items 2, 3 and 4 suggesting that the scope of the PCG needs to be extended to larger estates)? If so, what are some ways the ATO*

³ As we have observed in previous submissions to the ATO:

While one might think that obtaining a TFN should be a relatively straightforward/low cost activity, that is not necessarily the case particularly if the LPR is a foreign resident. A foreign LPR must pass the same identification process as if he/she were applying for a personal TFN.

The LPR must:

- provide at least two proof of identity documents of which one must be primary.
- the documents must be certified by a notary public or staff at the nearest Australian embassy.

Australian consulates and embassies aren't widely available and are not necessarily easy to get to (especially in a pandemic). Further as the ATO will accept only original paper copies of the certified documents there can be significant delays in the documentation being received in Australia and then being processed by the ATO.

We have also previously raised issues regarding the TFN of a deceased person that has been suppressed on the basis that they have not been required to lodge income tax returns for a number of years before 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. A default assessment process would mean that this issue similarly should be able to be avoided.

can expand PCG 2018/4 beyond smaller and less complex estates?

5. *What amount would be appropriate to uplift the threshold for total market value of assets in the PCG (currently \$5 million, see paragraph 6 of the Guideline) in light of current inflation and Australian real property prices?*
- As noted above, it was always expected that the scope of the PCG would be expanded once the ATO had a better appreciation of the risks involved. We had asked as part of the review that the ATO give us its insights based on the disclosures that it has received. This would assist practitioners to respond to this question.
 - The \$5 million threshold was a starting point for scoping the concession afforded by the PCG. Further exclusions were added as the PCG was developed including just before the time of publishing. In hindsight, the other exclusions effectively make the \$5 million threshold redundant. That is, the most significant risks to the revenue are likely to arise in respect of a deceased person's interactions with entities that they control.

Since the publication of the PCG, there have been and will continue to be significant improvements in collection, reporting and matching of data in relation to property, exchange-traded securities, superannuation, certain personal assets such as cars as well as cash. Information-exchange with foreign jurisdictions is also increasingly digitised and enables identification and matching of foreign holdings and income. As a result, the visibility of these transactions, regardless of value, and ability for the ATO to assure the tax returns lodged by the LPR has significantly increased.

We therefore suggest that the \$5 million threshold should be removed. This would obviate the need for the PCG to be amended as a result of the factors that you have identified in Q5. Also, valuations bring with them unnecessary compliance costs. Removal of this requirement would avoid an argument with the ATO about valuation methodologies.

- The ATO should also consider whether the continued exclusion for members of self-managed super funds is warranted. Liabilities under Divisions 291, 292 and 293 would generally not be significant.⁴

Other

6. We would appreciate your feedback on any other aspects of PCG 2018/4.
 7. Suggestions for improvements are welcome.
- We have a suggestion that does not relate to the PCG. It is about estates that are not formally administered (that is, probate or letters of administration are not obtained).

⁴ See item 12 in Compendium

The PCG does not apply to these estates because under 260- 140 of the TAA 1953 an LPR is only liable for a deceased person's tax liabilities where probate or letters of administration are obtained. An executor who does not have probate is not liable.⁵

Nonetheless these people are generally keen to ensure that the deceased's tax liabilities are paid. However, the ATO's approach to dealings with them discourages this. That is, the ATO is reluctant to disclose information to anyone other than a formally appointed LPR.

While the law differentiates between estates where a grant had been obtained and those where it hasn't in terms of imposing a personal liability on the LPR, there is no such distinction in the law when it comes to disclosing the deceased's tax information. That distinction is read into the law by the ATO.

The ATO's approach is actively discouraging collection of tax in respect of these estates.

We suggest that the ATO should institute a practice of disclosing information to an executor where a legal practitioner confirms on letterhead stationery that they are acting for the LPR and that probate will not be obtained. Action could be taken against practitioners who make false assertions.⁶

The practice should also extend to the issuing of an estate TFN to these people in the usual way and the making of, and distribution of a notice of assessment. The ATO website information does not contain information about how a TFN should be obtained in these circumstances. It is also unclear what is meant by the following sentence:

We will assess the trust returns to determine the appropriate treatment within the law and our internal policies.

Our clients' frustrations with delays and expense caused by the ATO's existing practice in these cases is such that our firm is instituting a practice of advising the ATO that our clients will rely on section 260-145 (which requires the ATO to take action to collect the deceased's debts) unless the deceased's tax information is made available as in other cases.

- We also ask that you consider the possibility of a similar PCG in respect of the liability of LPRs for estate tax. While the LPR will be able to work out the things like interest, dividends and rental income that they have derived, there are often many factors outside the scope of the LPR's knowledge that will affect the calculation of the net income.

For example, the LPR won't necessarily have knowledge about the use of a dwelling relevant to the calculation of a partial main residence exemption, nor might they records relevant to determining the cost base of an asset (though this can be estimated often

⁵ Note that an administrator can only act where a grant of Letters of Administration has been obtained, so this issue is only relevant to executors.

⁶ Appropriate adjustments would be required to the portal so that agents can add the deceased as a client.

I confirm I am aware this client is deceased, and that I am the estate executor or administrator with grant of probate or letters of administration, or I am authorised to act on their behalf. *

fairly closely). Would the ATO be prepared to set out some parameters that it would accept in relation to these types of issues

Thank you for the opportunity to provide feedback. As ever, BNR Partners would welcome the opportunity to discuss these issues and others that may be raised by others with those officers undertaking the review (as occurred in relation to the development of the PCG). A free -flowing exchange of ideas will generally result in a better product. Nuances are often lost when reliance is placed solely on written comments and the approach you decide to take in respect of a particular issue may generate further ideas in respect of other issues.

Yours sincerely

Ian Raspin TEP, FCPA, FCA, CTA
Managing Director