ATO to re-examine “double death” CGT exemptions

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In a move that could have significant consequences for grieving families, the Australian Taxation Office (ATO) has indicated that it is re-examining capital gains tax (CGT) implications for deceased estates in a specific and unfortunate scenario: when a beneficiary of an estate dies before the assets are formally transferred to them.

The crux of the Issue: a question of ownership

The ATO's proposed draft determination (*Draft Taxation Determination: Income tax: capital gains: application of Division 128 of the Income Tax Assessment Act 1997 when a beneficiary of a deceased estate dies before a CGT asset of the deceased estate passes to them (TD 2025/DX)*) centres on the application of Division 128 of the *Income Tax Assessment Act 1997 (Cth)* (ITAA 1997), a provision designed to provide CGT relief when assets pass from deceased people to their beneficiaries. The core of the ATO's position is that if a beneficiary (the "second deceased") dies before an asset from the initial estate (the "first deceased estate") is formally transferred to them, the CGT rollover relief under Division 128 does not apply to the subsequent transfer to the second deceased's own beneficiaries.

The justification for this position lies in a narrow interpretation of "ownership." The ATO contends that the second deceased did not own the asset "just before they died," as required by the legislation. Until the administration of an estate is complete, a beneficiary does not have an ownership interest in specific assets. Instead, they hold a right to the due administration of the estate. The ATO justifies this approach based on its interpretation of *Commissioner of Stamp Duties (Qld) v Livingston* (1964) 112 CLR 12. Interestingly, Centrelink takes the opposite position.

Consequences for the Bereaved

This interpretation is more than a technicality. It has tangible and potentially costly consequences:

- **A new taxing point**: The legal personal representative (LPR) of the second deceased's estate faces a capital gain upon transferring the asset to the final beneficiary. This gain is calculated based on the asset's market value at the time of transfer, with the cost base determined by its value at the date of the first deceased's death.
- **Loss of the main residence exemption**: The draft determination explicitly states that the main residence exemption under section 118-195 is not available to the second deceased's estate. This is because the second deceased did not have an ownership interest in the dwelling at their time of death, which is a prerequisite for the exemption to apply.
- **Increased complexity**: Grieving families are faced with the burden of obtaining valuations and navigating CGT liabilities at a time of significant emotional distress.

An alternative view: recognising equitable interests

The ATO's stance appears to favour a strict legal interpretation over the equitable reality. The better view is that the beneficiary of a will has a vested equitable interest in the assets of the estate, even before the legal title is transferred. This equitable ownership is a substantial interest that allows the beneficiary to compel the proper administration of the estate.

While *Livingston* is useful for the administration of deceased estates, other legal principles recognise the significance of equitable interests. Cases such as *Horton v Jones* (1935) 53 CLR 475 and *Official*

Receiver in Bankruptcy v Schultz (1990) 170 CLR 306 directly affirm that equitable ownership arises and is a transmissible interest, even if legal ownership has not yet passed.

The legislation itself, specifically section 128-15(3) of the ITAA 1997, refers to an asset "owned by a deceased person just before their death." A broader interpretation that encompasses equitable ownership would align more closely with the intended purpose of the rollover relief, which is to prevent tax liabilities from arising simply due to the death of an individual.

The unintended tax on the family home

The following practical example demonstrates the tax implication on the family home:

John dies, leaving his family home to his wife, Maria. Tragically, Maria dies years later, never having finished administering John's estate because she was stricken by grief. At her death, the title had not yet been transferred to her. Under her will, everything goes to their children.

Under the ATO's proposed determination, because Maria did not technically "own" the house at her death, the transfer from her estate to the children is not protected by Division 128 rollover relief. Furthermore, her estate could not claim the main residence exemption. The result is a CGT liability for Maria's estate, calculated on any increase in the home's value since John's death. While the children inherit the home with a higher cost base (its market value at the time of transfer from Maria's LPR), this is of little comfort to a family navigating a double bereavement and an unexpected tax bill.

A call for reconsideration

The ATO's draft determination is a significant and punitive interpretation of the law. It penalises families based on the unfortunate timing of a subsequent death during the often-protracted period of estate administration. A principled approach is to:

- acknowledge that a vested equitable interest constitutes ownership for Division 128.
- prioritise the intent of the CGT rollover provisions over a rigid adherence to legal formalities.

Without a change in this interpretation, practitioners and their clients face a new unlegislated tax trap. The ATO must reconsider its position to avoid transforming a relief provision into a source of undue hardship for grieving Australians.

Note: *Draft Taxation Determination: Income tax: capital gains: application of Division 128 of the Income Tax Assessment Act 1997 when a beneficiary of a deceased estate dies before a CGT asset of the deceased estate passes to them (TD 2025/DX)* has been provided to the author but is not yet available to the public. It is expected to be publicly available in late 2025

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