



Estates Administration Tax Act Regulations

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Submitted by: OBA EATA Working Group



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Contents

Introduction.....	2
The OBA.....	2
Background.....	2
Specific Comments	2
General Policy/Process Questions	11



Introduction

We very much appreciate the extensive consultation opportunities that you have provided to the OBA on this issue. As a final note, we wanted to again raise important access to justice considerations. As discussed, for smaller estates, the cost of complying with the EATA may be prohibitive. People will be deterred from getting the legal advice they may need and may even be deterred from settling an estate in an organized and official way, leading to problems down the road.

The OBA

This submission was prepared by the OBA EATA Working Group. Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents 16,000 lawyers, judges, law professors and law students. The OBA is pleased to analyze and assist the government with dozens of legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

Background

We cannot measure at this stage whether the enforcement and revenue integrity gains will be significant, particularly when balanced against the access to justice concerns. Some practitioners believe they will not. In order to ensure that the relevant considerations are balanced, we suggest a review of the legislation in 3-5 years. At that time, we can take a more educated look at whether an exclusion for small estates may be justified and whether, in fact, there are revenue or enforcement gains that justify the access to justice concerns. We appreciate the opportunity to work with you and look forward to continued engagement as the EATA rolls out.

Specific Comments

Issue	Notes	Documents
30 Day filing period for original return	<p>This does not provide sufficient time</p> <ul style="list-style-type: none">- Representatives acting without a Will, will require a certificate before being able to access necessary information regarding an estate. Unrealistic to collect information 30 days after issuance of the certificate- Other court-issued documentation requirements that may precede ability to file return (eg. Ancillary Grant) make the timing unrealistic- Will lead to inefficiencies for the estate and the government as information will not be complete	Estate Information Return (EIR) p.1.



	<p>and multiple amended returns will have to be filed</p> <ul style="list-style-type: none"> - 60-90 days is a more realistic timeline 	
30 day period for filing an amended return	Inconsistent with subsection 32(2) of the <i>Estates Act</i> and ss. 2(7) <i>Estate Administration Tax Act</i> which allows six months for statement disclosing subsequently delivered property	EIR p. 1
Assessment and Reassessment of Returns	What about the 4 year limitation on assessments? Presumably, the 4 year assessment period commences upon the date of filing	Guide, p. 3
Requirement for Actual Receipt by MOF within Timeframe	The requirement for actual receipt of the filing is inconsistent with similar filing requirements (eg. ITA). An envelope post-marked by the deadline would be more consistent	Regulation s. 2 Guide "Filing Requirements" p.1
Processing Timeframes	Will the Ministry set firm timelines for the processing of EATA filings so that the administration of estates are not held up by new processes	
Assets Reportable on a Limited Grant of Probate	<ul style="list-style-type: none"> - Subsection 32(3) of the <i>Estates Act</i> and ss. 1(1) of the <i>EATA</i> require the estate representative to disclose only the assets covered by the will where a Certificate of Appointment of Estate Trustee with a Will Limited to the Assets Referred to in the Will has been granted. - The Information Return does not allow for this situation when asking for details of all assets of the deceased - In that situation, the Estate Representative should only be 	EIR p. 3 Guide, "Definition of Terms", p.12



	<p>required to list the assets dealt with in the will. He/she has no obligation to know and deal with other assets</p> <p>“Value of the Estate -The value of the estate is the value which is required to be disclosed under section 32 of the Estates Act of all the property that belonged to the deceased person at the time of his or her death less the actual value of any encumbrance on real property that is included in the property of the deceased person. <u>Where a Certificate of Appointment of Estate Trustee with a Will Limited to the Assets Referred to in the Will was granted, list only the value of all assets and the balance of all bank accounts of the deceased at the date of death which are intended to be affected by such grant.</u>”</p> <p>Or</p> <p>The regulation asks for a “complete list of assets of the deceased person used to determine the value of the estate”. The words “value of the estate” should be replaced by the “value of personality, if any, and the value of the realty, if any, contained in the application for the certificate of appointment of estate trustee whose issuance gave rise to the obligation to file the return.”</p>	<p>Regulation and supporting documents</p>
<p>No Requirement for Filing where ancillary Grant or resealing</p>	<ul style="list-style-type: none"> - There are some instances where an application for an ancillary grant or for a resealing does not require payment of EAT. This would be the case where the ancillary grant or resealing was a second or subsequent 	<p>Regulations</p>



	<p>requirement because of a change in the identity of the estate trustees under the original foreign grant. The language of the regulation should be amended to make it clear that a return is not required if no EAT is payable on the application in question.</p> <ul style="list-style-type: none"> - Exception should be reflected in Guide, Landing Page as well 	
<p>Assets Passing outside the Estate</p>	<p>Assets that pass outside the estate by virtue of a beneficiary designation/declaration should be listed as examples of excluded assets rather than listing only assets that pass by right of survivorship or</p> <ul style="list-style-type: none"> - All assets in which the deceased had an interest before death but not at time of death (survivorship and beneficiary designation/declaration) are not to be included - The answer to question 16 is confusing. It asks broadly what is included in calculating the EAT and then only names one type of excluded assets (those that pass by right of survivorship- and does not address other excluded assets like Registered plans that pass outside the estate to a named beneficiary or joint subscriber. The general question should refer generally to the exclusions (ie assets that pass outside the estate) - The regulation asks for a “complete list of assets of the 	<p>Landing Page, p.1.</p> <p>FAQ's Question 16</p> <p>Regulation</p>



	<p>deceased person used to determine the value of the estate”. The words “value of the estate” should be replaced by the “value of personality, if any, and the value of the realty, if any, contained in the application for the certificate of appointment of estate trustee whose issuance gave rise to the obligation to file the return.”</p>	
<p>The Value of Encumbrances</p>	<p>It is the amount owing rather than the actual value of the encumbrance that is relevant</p> <p>Note that there are at least 3 possible candidates for “actual value of any encumbrances on the real property”:</p> <ul style="list-style-type: none">- The mortgage would be registered showing a principal amount of \$A, which is the maximum amount of present and future indebtedness the registered charge could secure.- The client could have entered into a line of credit agreement for a maximum principal amount of \$B, which could be a smaller amount than \$A.- At any particular point in time, the amount outstanding under the line could be amount \$C, a smaller amount than either \$A or \$B.	<p>FAQ's Question 16,</p> <p>Guide Section D and “Definition of Terms”</p> <p>EIR, p.3</p>
<p>Calculating RESP and RDSP value for the Deceased/Estate</p>	<p>If there is no surviving joint subscriber, only the value of the RESP to which the deceased was entitled should be brought into the value of the estate (grant/bonds paid into the plan did not belong to the deceased and don't</p>	<p>FAQ's Question 22 and 25</p>



	<p>belong to the estate)</p> <p>22. If an RESP owner dies without a surviving joint subscriber, that part of the RESP that the subscriber is entitled to becomes part of the estate. It does not belong to the RESP beneficiary. In this case, that part of the RESP that the subscriber is entitled to is included in the value of the deceased's estate. [AEA: Note that the subscriber can never get the grants/bonds that were paid into the plan. Thus, those should not form part of the value of the estate]</p> <p>25. What happens if the beneficiary of a Registered Disability Savings Plan (RDSP) dies? RDSPs are different from Registered Education Savings Plans (RESPs). With RESPs, the plan is actually an asset of the subscriber/contributor. The RDSP, however, is for the benefit of the beneficiary and any funds contributed into the plan as well as income earned on those contributions and on government grants and bonds paid into the plan become part of the beneficiary's estate when the beneficiary dies.</p>	
<p>"Actual Value" should be replaced with "Fair Market Value"</p>	<p>The FAQ's state that "actual value" is "fair market value" - why don't they use this in the forms – it takes away some of the ambiguity relating to "actual" versus "estimated" since FMV is always a judgment. Actual makes it seem different and is really only "actual" if you are looking at cash.</p>	<p>FAQ's 16, Regulation, Guide pp. 3, 5 and Return</p>
<p>Requirement to Report Assets with no Value</p>	<p>It is unclear whether the return would have to include an asset of the deceased</p>	



	<p>person if it has no value (such as, for example, a promissory note that can no longer be enforced because of the lapse of the relevant limitation period). From my reading of the regulation, I would say the answer is no. However, clarification is required.</p>	
<p>General Biographical Information and Notifications Unnecessary</p>	<ul style="list-style-type: none">- The deceased's date of birth, date of death, marital status, or even the date of the last is not relevant to the EAT or to an auditor reviewing the filing- Notification of Death of an Estate Trustee – necessary?	
<p>Service Ontario Offices</p>	<p>The Guide says that delivery to a Service Ontario Centre is sufficient delivery. We should clarify that this means only a government-staffed office and not a franchisee of a ServiceOntario desk run by third parties (for example, the one newly opened in Canadian Tire store at Yonge and Davenport, which is operated by Canadian Tire staff). The latter could not possibly be satisfactory from a confidentiality standpoint.</p>	
<p>Information Regarding Securities</p>	<p>Too much information is required regarding securities and it is required to be listed in a way most people do not record/understand their investments</p> <ul style="list-style-type: none">- People understand/record investments by account or broker not by investment and should be allowed to list them accordingly- The actual listing of shares, the amount and the value of each	<p>EIT, p. 5</p>



	<p>position, and contact information are not really necessary. At the very least, the return should indicate that a summary in the return with a more detailed list attached is sufficient. In many cases there will be no specific contact person.</p>	
<p>Definition of Estate Representative</p>	<p>Estate representatives do not include:</p> <ul style="list-style-type: none"> - those “entitled to act” as Executors or Administrators; or - Beneficiaries or their guardians <p>Estate Representatives are those who have taken on the role of executor or have been appointed as an administrator by the court</p> <p>Note - this is an issue with the Legislation itself that has just been tracked in the regulation and supporting materials</p>	<p>FAQ's Question 3</p> <p>Guide “Definition of Terms”</p>
<p>Substantiating value of Personal Effects</p>	<ul style="list-style-type: none"> - Some guidance regarding a reasonable substantiating requirement for household goods, clothes and other personal effects is necessary. Most methods of official evaluation would not be economically sensible for these type of items 	<p>FAQ's Question 13</p> <p>Guide Section H</p>
<p>Certificate of Appointment of an Estate Trustee</p>	<p>4. What is a certificate of appointment of estate trustee? A certificate of appointment of estate trustee is a document issued by the court that proves the authority of the estate trustee to administer the provisions of the deceased's will if there is a will and that estate trustee is named</p>	<p>FAQ's Question 4</p>



	<p>in the will, or appoints someone and gives them the authority as estate trustee to manage and distribute the estate of the deceased who died without having made a will or having made a will, did not name an estate trustee in the will who is able and willing to act. [AEA: An executor takes authority from being named in the will. Where no will or no one named in will able and willing to act, the exercising of those rights which ordinarily belong to executors, must be committed by the Court to persons appointed by the Court for that purpose, called administrators. (Probate Practice Hull, 4th ed., p. 199)</p> <p>It is important to understand that an administrator has no authority until appointed by the court.</p>	
Beneficiary designations and Declarations	References to Beneficiary designations should refer to beneficiary declarations as well to cover life insurance proceeds	FAQ's Question 23
Bank Accounts	Cash in an investment account is not to the lay person considered a bank account "Cash components of accounts" may be clearer	Guide Section E EIR, p.4
Date of the Last Will – unclear and unnecessary	The regulation and Guide refer to the date of the last will. While this is irrelevant and should not be required information, if it is included there needs to be clarification (eg. What if there are codicils or multiple wills that do not revoke one another and are dated the same day). Some clarity might be injected in the reference here – and anywhere else the term is used – by replacing the phrase "last will" with something along the following lines: "the will in respect of	Regulation Guide Section A EIR, p.2



	which a certificate of appointment of estate trustee has been issued, giving rise to the obligation to file the return.”	
Deceptive versus misleading Statement	Return states on page 7 that it is an offence to make a false or “deceptive” statement. Offence as stated in subsection 5(2) of the statute uses the word “misleading”. The word should be changed to match the statute.	Return, page 7 EATA s. 5(2)
“Living” Beneficiaries	Two issues with use of this term: <ul style="list-style-type: none"> - “living” is not appropriate description where beneficiary is a charity - It is not necessary to say “living beneficiaries other than the estate”, as the estate is not “living” 	FAQ’s question 16 and Guide Section B
Typos	<ul style="list-style-type: none"> - Bequethes should be bequeaths - Certificate of Appointment as of Succeeding Estate Trustee without a Will - Page 5 of the Guide incorrectly states the location on the certificate indicating the court where the application for the certificate was filed. It is in the bottom right corner, not the bottom left corner. 	Guide “Definition of Terms” Landing Page p. 2 of 4 Guide Section A, p.5

General Policy/Process Questions

1. Return on page 7 indicates some uses of this information but excludes “use in the administration or enforcement of an Act that imposes a tax or confers a benefit.” This omission is misleading and should be corrected on the return.



2. Subsection 4(2) of the act is sufficiently broad to allow the Minister of Finance to issue a nil assessment in a case where he does not disagree with the values declared. Since there is no other signal available to the estate trustee that (s)he is no longer at risk if the estate is distributed, can the Ministry of Finance publicly commit to adopting a practice of issuing a nil assessment?

FAQ 27, 28, assessments – it looks like no assessment is to be issued unless they do an audit. Is this correct? Will assessments be issued routinely so at least the personal representative has some assurance the return has been received and accepted for the time being?

3. In the interest of “access to justice”, will the Ministry of Finance commit to a *de minimis* principle that it will not assess an estate for additional EAT where that amount is below a specified threshold – say, \$10,000 -- that is high enough so as to minimize the instances where the estate trustee will decide to pay the assessed amount, even if (s)he believes that the declared values are defensible – or even that the Minister of Finance’s position is indefensible – because it would be less expensive than objecting to the assessment and, if necessary, filing an appeal to the Superior Court of Justice?
4. When the 2011 Budget Bill was being reviewed by the Standing Committee on Finance and Economic Affairs, the government rejected a proposed amendment to include a clearance certificate. It did so on the basis that subsection 2(8) of the statute says, “Tax is payable by the estate representative in his, her or its representative capacity.” This evidently means that the Ministry of Finance will be obliged to recover additional EAT from the beneficiaries to whom the estate assets have been distributed. In such circumstances, will the Ministry of Finance regard the beneficiaries as being jointly and severally liable for the additional EAT or liable only on a pro rata basis in accordance with their respective distributions?
5. Regarding a succeeding estate trustee – what if the original ET fails to file the return. That should be provided for.
6. No return required if apply before January 1, 2015 – no receipt is issued when the application is filed, that I am aware. What comfort will the applicant have that the return is not required if filed before this date?
7. In FAQ 7 and 9 – It seems only one ET need file, and only the one who files is subject to sanctions – this is an incentive not to be the one who files. WT
8. Refunds – this section in the draft webpage is confusing. More detail could be provided explaining what this is about. WT



Other Issues

9. Is the “property identifier” understood or easily found by a lay person looking at the transfer?

10. Paragraph 15 of subsection 3(2) asks for the copies of material submitted to the court in support of the request for an order made under subsection 4(1) of the statute. Since the Ministry of Finance is not in a position to have that order set aside, why does it require that material?

11. The return should specify that each estate representative’s name be the same as it is shown on the certificate of appointment.