

Tax treatment of executor's commission

by *Katerina Peiros, ATI, Hartwell Legal, and Christine Smyth, ATI, Robbins Watson Solicitors*



Executor's commission is income of the personal representative and should be included in their assessable income.

Once upon a time, when family relationships and affairs of deceased persons were vanilla, the appointment of an executor or administrator¹ to manage their estate was regarded as an honour, undertaken on a voluntarily basis without compensation. The appointment of individuals² as a personal representative was akin to a public service, one which involved substantial legal duties, responsibilities and exposure to liabilities. Now the administration of deceased estates involves a significant amount of work and worry, increasing in proportion with the complexities of our modern assets and relationships. Concordantly, we see an increase in the incidence of what is commonly referred to as "executor's commission" paid to personal representatives by way of compensation for the complexity and weight of the task. This article focuses on executor's commission paid to individuals.³

The purpose of executor's commission is to compensate a personal representative for their "pains and trouble" in administering the estate, that is, "for the responsibility, anxiety and worry involved in the discharge of the [personal representatives'] duties and for the actual work done".⁴ "Pains" refers to "responsibility and consequent anxiety and worry undertaken and undergone" and "troubles" refers to "work done".⁵

Commission is discretionary in nature without a definitive set of parameters from which to specifically calculate the amount. It requires an analysis of the applicable statute, case law and factual matrix. Lindsay J in *Re Estate Gowing*⁶ noted that it is very difficult to quantify an allowance for commission. There his Honour was citing the New South Wales provision which requires the court to

assess an allowance of what is "just and reasonable". In Queensland, the court is required to consider what amount it deems "fit" as commission.⁷ However, there appears to be no particular difference by the courts in approach to the question of quantum. Commission may be paid if there is agreement between the personal representative and the beneficiaries (if all are sui juris), through a direction in the will or by court order.

In Australia, the "allowance of commission is the rule not the exception".⁸ An application to the court for an order that commission be assessed and paid is complex and expensive. For this reason, the court recognises and encourages agreements between the personal representatives and the beneficiaries to save the costs and time of making such an application.⁹

"... in the application of the court's probate and equitable jurisdiction, discretionary in character, regard must be had to a range of factors (including the summary nature of the jurisdiction, the size and nature of the deceased's estate, the terms of any will and the rights of beneficiaries) rather than taking refuge in standard rates of remuneration that may guide a common law claim in contract or restitution."

A *value* is placed on the "pains and trouble" taken by a personal representative in the administration of an estate by considering the facts of the matter, the work done by the personal representative and what is a reasonable allowance for that work with reference to the estate accounts.¹⁰

In *Re Hooke*,¹¹ Maguire JA set out the considerations in determining commission. They are the size and extent of the estate, the care and responsibility arising therefrom, the time occupied in undertaking the duties, the skill and

ability displayed, and the success of attending to the administration. Other factors taken into account¹² include the duration of the administration, the capacity of the estate to pay commission, disentitling conduct¹³ and hostility from the beneficiaries.¹⁴

Re Estate of Gowing involved an estate with a net value of over \$39.5m, with the court awarding \$303,677.34 in commission. The court opined that it was a "fairly routine" administration. Lindsay J, awarding commission, said that, in assessing the quantum, the court must consider, on the facts of the particular case, the work done by the executor and what a reasonable allowance is for that work.¹⁵

Where there are multiple personal representatives, unless otherwise agreed or specified by a court, the payment of commission is to them collectively and the decision how to apportion the commission between themselves is left up to the personal representatives.¹⁶

Where the commission is agreed, caution must be exercised if a deed is entered into, as the terminology in the deed could amount to a resettlement of the estate property.

Commission is usually calculated as a percentage of capital of the estate and a percentage of the income received by the estate. A different rate is applied to capital realisations and assets transferred in specie. The percentage is on a sliding scale depending on the size of the estate and complexity of the work undertaken by personal representatives. There is no set scale, the scale is determined on a case-by-case basis.¹⁷

Importantly, clients must be made aware that, pursuant to ID 2014/44, an award

of executor's commission is assessable income of the personal representative. However, its taxable status is not a consideration in the calculation of, or award of, commission. To this end, personal representatives must consider their individual taxation status and the consequences of the receipt of commission.

The receipt¹⁸ is awarded to the individual taxpayer for services they have performed in their capacity as a personal representative of a deceased estate. It is a payment within the meaning of s 15-2 of the *Income Tax Assessment Act 1997* (ITAA97) and is to be included in the taxpayer's assessable income pursuant to s 6-10 ITAA97 as statutory income.

How is executor's commission assessable income?

Taxable income is comprised of all assessable income, less all allowable deductions pursuant to s 4-15(1) ITAA97. But what makes up all assessable income? Assessable income consists of both ordinary and statutory income pursuant to s 6-1 ITAA97.

Pursuant to s 6-5(2) ITAA97, assessable income includes *all ordinary income derived directly or indirectly from all sources* (for an Australian resident). The first stage in considering whether a receipt is assessable income is to establish whether it is ordinary or statutory income. In this instance, the question is whether a personal representative's commission is ordinary income. Section 6-5 provides the definition of ordinary income, that being, *such income according the ordinary concepts*. The second step is to consider the case of *Scott v FCT*,¹⁹ where ordinary is determined within the concepts and usages of mankind. A reasonable person test is also applied. Would a reasonable person consider the receipt to be income — within this second step, you must consider whether the receipt fits under any of the known categories of ordinary income, they are as income from:

- personal services/exertion;
- property; and/or
- carrying on a business.

IT 2639 at para 3 states that “income from personal services is income that an individual taxpayer earns predominately as a direct result from his or her personal efforts by, for example, the provision

of services, exercise of skills or the application of labour”.

Further factors include whether there is an expectation of, reliance on, recurrence of and regularity in the payment. Some may argue that a receipt of such commission is not always expected, relied on, recurrent or regular as per ordinary concepts and, therefore, not assessable income. However, as well as ordinary income, receipts can also be captured under a number of statutory provisions, and if they are so captured, they are, then, called statutory income and are included in assessable income.

If there are instances where a receipt falls under both ordinary and statutory income, the legislation will prevail pursuant to s 6-25(2) ITAA97, unless otherwise stated.

Section 15-2(1) ITAA97 provides that the assessable income includes all allowances, gratuities, compensation, benefits, bonuses and premiums provided to the individual in respect of, or for, or in relation, directly or indirectly to, any employment of, or services rendered by, the taxpayer.²⁰

The receipt of commission is captured by s 15-2(1) as it can be characterised as a benefit granted in respect of services rendered by the individual in their capacity as a personal representative. Accordingly, commission paid, in respect of, or for, or in relation, directly or indirectly, to services rendered by them in their capacity as a personal representative must be included in their assessable income pursuant to s 6-10 as the receipt is assessable income as determined under s 15-2(1).

It is also worthwhile to note that the payment of commission by the estate does not attract any deductions to the estate as the payment is capital in nature.

Conclusion

Increasingly, as our population ages and we see second and subsequent relationships resulting in blended families and the willmaker outliving their relatives and peers, such willmakers are turning to professional advisers, such as accountants, lawyers and financial planners to take up the role of personal representative. The appointment of professionals as personal representatives does not, of itself, invalidate an entitlement to commission. Nor does the fact that the will may contain a direction that the trusted

adviser may charge professional fees for services undertaken by them or their firm.²¹ Further, unless otherwise specified, the provision in a will of a gift to the personal representative does not invalidate the personal representative's entitlement to commission.²²

Commission should be carefully considered by the willmaker when providing instructions for their will, by the personal representative before taking up their appointment and when acting in the role, as well as by professional advisers to the willmaker and personal representative at all times.

Katerina Peiros, ATI
Incapacity, Wills and Estates Lawyer
Accredited Specialist – Wills & Estates (Vic)
Hartwell Legal

Christine Smyth, ATI
Partner
Accredited Specialist – Succession Law (Qld)
Robbins Watson Solicitors

References

- 1 Collectively referred to as “personal representative”.
- 2 As opposed to trustee companies, public trustees or statutory corporations.
- 3 Commercial and statutory organisations which charge a fee for commission are not considered in this article.
- 4 *Luck v Fogerty*, unreported, Supreme Court of Tasmania, Zeeman J, 22 March 1996.
- 5 *In Re Allan McLean (dec'd)* (1911) 31 NZLR 139 at 144; *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247 at [77].
- 6 *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247.
- 7 Provisions vary between Australian jurisdictions, but are broadly similar. However, there does appear to be a difference as to the approach to entitlement, with the Queensland courts generally accepting that commission is granted as a general rule. The rules around the granting of commission differ between the Australian jurisdictions and are outside the scope of this article.
- 8 R Geddes, C Rowland and P Studdert, *Will, probate and administration law in New South Wales*, 1996, at para 86.02. See also *Re Lack* [1983] 2 Qd R 613, 614 (McPherson J).
- 9 *Re Estate Gowing; Application for Executor's Commission* [2014] NSWSC 247 at [62].
- 10 *In the estate of Stone (dec'd); Patterson v Halliday* [2003] VSC 298; *Richards v Richards* [2015] VSC 335.
- 11 (1970) 2 NDLR (3d) 525 at 527.
- 12 *Atkins v Godfrey* [2006] WASC 83; see also Helsham J in *Re Sheppard* (1972) 2 NSWLR 714 at 721.
- 13 *Re Lack* [1983] 2 Qd R 613.
- 14 *Hawkins v Barkley-Brown* [2010] NSWSC 48 at [73] where Slattery J referred to the stress that arose “from the ambient general hostility existing between the various parties”.
- 15 *Watters, Re Estate of Dibbs* [2006] NSWSC 1277 at [16].
- 16 *Hawkins v Barkley-Brown [No. 2]* [2010] NSWSC 395 at 28.

- 17 *Re Barr Smith* [1920] SALawRp 36; *Phillips, Re Estate of Joel* [2007] NSWSC 639.
- 18 The term "receipt" is a revenue law term used for funds received by a taxpayer. In this instance, receipt refers to the award of commission granted to the executor.
- 19 (1935) 35 SR (NSW) 215.
- 20 Section 15-2 ITAA97 is the re-written provision, with equivalent meaning, of the former s 26(e) of the *Income Tax Assessment Act 1936* (Cth). Section 15-2 commenced operation from 14 September 2006 and s 26(e) ceased to have effect from the same date (*Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth)).
- 21 *Re Estate Gowing*; however, compliance with professional rules such as the Australian Solicitors Conduct Rules 2012 (for a comparative table of jurisdictions, see https://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj154SursrRAhVJGZQKHTfkDsIQFggZMAA&url=http%3A%2F%2Fwww.qls.com.au%2Ffiles%2F2403d618-5c7c-445c-a191-a42200ad0cd4%2Fdoc20150317_QLS_Australian_Solicitors_Conduct_Rules_2012_FNL.pdf&usq=AFQjCNG7oN8JYBdOwnCsY318MVG2i7S2pg) must be complied with. See also *Legal Services Commissioner v Bone* [2013] QCAT 550; and C Smyth, Succession law: What's new in succession law: LSC wins costs appeal, (2014) 34(9) *Proctor* 49.
- 22 *In the Will of Shannon* (1977) 1 NSWLR 201 at 210D-218D.

HP
WA Super