

Administration Tax Act

As of May 12, 2011, the Government of Ontario made a number of amendments to the Estate Administration Tax Act (EATA). The EATA is the statute that governs Estate Administration Tax in Ontario.

What is Estate Administration Tax

Estate Administration Tax, commonly referred to as probate tax or probate fees, is payable on the gross value of a deceased's worldwide estate (less any mortgages on real estate located in Ontario) other than real estate located outside of Ontario. The tax is payable by the estate upon application by the appointed Executor to the estates court for probate.

Who Determines the Value of the Estate for Probate Tax purposes?

The value of the deceased's worldwide estate (other than real estate located outside Ontario) is provided by the Executor in the application for probate, accompanied by the executor's sworn Affidavit and an undertaking to inform the Minister of Revenue in the future if the value has been underestimated, with appropriate payment.

What are the Changes to the EATA?

The legislative amendments require an Executor who applies for probate after May 12, 2011 to provide information about the deceased person as may be requested by the Minister of Finance. The nature of the information that may be requested is not yet known.

The new amendments to the EATA give the Minister authority to inquire and receive information about the deceased (and assets owned at death) which perhaps were not declared in the application for probate, for example where Multiple Wills were used by the deceased. Furthermore, the Minister has authority to

inquire about valuations of assets which were declared in the application, and whose values are being reassessed by the Minister for probate tax purposes.

This is called the "audit and verification" and is a power never before granted to the Minister of Finance, with respect to probate matters. Accordingly, the amendments to the EATA may compel the Executor to keep books and records of the estate's accounts to a far greater extent than in the past. Even for estates which are meant to be distributed outright immediately after death, accurate information will need to be available and accessible to the Minister, if requested, to enable the Minister to assess and/or reassess, the probate tax payable under the EATA.

Finally, the Act added provisions which permit the Minister of Finance to assess and reassess an estate in respect of its tax payable under the EATA for a period of four years from date of death. That is a long window of time. The Minister of Revenue has the power to reassess an estate's tax payable at any time if the Minister establishes that any person failed to give the appropriate prescribed information about the deceased or the estate. Non compliance with requests by the Minister for prescribed information is an offence which carries a penalty of fine and/or imprisonment. While the audit and verification elements of the amendments are in effect as of May 2011, the penalty aspect does not come into effect until January 1, 2013.

What is the Impact of the New Amendments?

It is not yet known the extent to which, if any, the Minister will exercise the new powers. Some speculate that this is merely a "dog barking" but

which will not bite, while others theorize that this may be an attempt by the Ontario government to enhance probate tax collection in light of the tremendous probate tax reduction realized by using the “multiple Wills” strategy.

For more information on this strategy, please ask your BMO Nesbitt Burns Investment Advisor for a copy of our publication *Probate Fees and Taxes*.

Who Bears Liability for Additional Probate Tax Payable Upon Assessment?

The EATA states that probate tax is payable by the Executor in “his, her or its representative capacity only”. The amendments are silent as to who is responsible for the payment of additional probate tax on an assessment or reassessment, where the estate has been distributed entirely. There is no mechanism for a Clearance Certificate (akin the one granted by the CRA with respect to income tax), to release the Executor from liability regarding the reassessed probate tax amount. Therefore, it is speculated that the Minister will likely trace funds to the beneficiaries who have received their share of the estate, in order to

satisfy probate tax owing upon an assessment or reassessment. For this reason, Executors may decide to delay the distribution of an estate for four years to avoid any negative consequences for the beneficiaries, should there be a reassessment.

Conclusion

The impact of the EATA amendments is to add onerous and time consuming responsibilities to the Executors’ already long list of complicated tasks. Executors will now be required to support valuations of the estate, keep books and records supporting such valuations, and be subject to potential reassessments for a 4-year period and perhaps longer if the Minister determines that there has been a misrepresentation due to neglect, carelessness or wilful default or fraud. Ultimately, this may drive individuals to implement new and creative probate planning strategies which they otherwise would not have considered, such as out-of-province strategies.

For more information on the potential impact of the EATA amendments, please consult with your estate lawyer.