

Legal update

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Estate duty, executor fees and death benefits

Introduction

Estate duty refers to a tax of 20% that is levied on the estate of a deceased person in accordance with the provision of the Estate Duty Act (the "Act"). Estate duty is levied on the *dutiable* portion of the deceased estate.

The Act lists the assets that will attract estate duty and therefore must form part of the dutiable estate and those assets which are excluded from the estate for the purposes of calculating estate duty.

This legal update will focus on whether or not approved and unapproved death benefits form part of the estate of a deceased member for the purposes of calculating estate duty.

What constitutes an "estate" for the purposes of calculating estate duty?

In terms of the Act, all property belonging to a person at the date of his death, together with all property *deemed* to belong to that person as at the date of his death, forms part of his estate for the purposes of calculating estate duty.

"Deemed property" is any benefit received because of the death of the deceased. Domestic policies on the life of the deceased are deemed to be the property of the deceased and form part of the deceased estate for the purposes of estate duty.

Estate duty is payable on the estate of every person who dies and whose *net estate* is in excess of R3.5 million.

"Net estate" refers to the amount that remains after deducting all allowable deductions and an amount of R3.5 million

When is estate duty due?

Estate duty is due within one year of date of death or 30 days from date of assessment, if assessment is issued within 1 year of date of death. Currently, interest is levied at 6% p.a. on late payments.

Unapproved death benefits

Unapproved group life policies are life policies grouped together and owned by the employer. The benefits provided by these policies will become due and payable on the death of the person insured. For this reason; the proceeds of an unapproved group life policy will form part of the estate of the deceased member for the purposes of calculating estate duty.

Deduction if surviving spouse is the beneficiary of the unapproved GLA

The value of any benefit received by the surviving spouse as a result of the death of the deceased is deducted from the estate before estate duty is calculated. So, if the surviving spouse is the beneficiary of the unapproved GLA policy or a portion thereof, that amount will not form part of the dutiable estate.

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Approved death benefits

These policies are held in the name of the retirement fund to which the member belongs and are subject to the rules of the fund. In terms of section 37C of the Pension Funds Act, the trustees of the fund must determine who becomes entitled to the proceeds of a member's death benefit.

Section 3(2)(c)(i) of the Estate Duty Act states that a death benefit paid from a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund does not form part of a person's property for purposes of determining what constitutes his estate. This effectively exempts an approved death benefit from estate duty.

Section 37C provides that in the absence of dependants and nominees, the trustees may pay a death benefit into the deceased estate. For tax purposes, this benefit will be taxed as a retirement fund lump sum before it is paid into the estate. The executor must ensure that this benefit is kept separately and not included in the dutiable portion of the estate to prevent it from being taxed twice.

Executor Fees

Executor fees are regulated by the Master of the High Court.

The Department of Justice has published certain guidelines for executors on their website. With regard to the fees that an executor may levy against a deceased estate, the Department of Justice has stated that the executor is entitled to the following fee:

- 3.5% on the gross value of assets *in* an estate;
- 6% on income accrued and collected after death of the deceased,

provided that the remuneration in respect of any deceased estate shall not be less than R350. The executor is also entitled to charge VAT on this fee, if he is registered as a VAT vendor, or if the agent appointed to assist in administering the estate, is registered as a VAT vendor.

From the above it is clear that an executor is only entitled to levy his fees on the assets that form part of the estate of the deceased or are paid into the estate.

Section 37C of the Pension Funds Act specifically excludes an approved death benefit from forming part of a deceased estate, unless the trustees are unable to trace any dependents and / or nominees, in which case the benefit can be paid into the deceased's estate. Section 37C serves an important social function i.e. to ensure that beneficiaries are paid out as soon as possible and to protect the death benefit from being reduced by taxes and other fees.

This means that if the trustees are able to trace the dependents and nominees, the death benefit will be paid directly to those beneficiaries and will not at any time be paid into the estate. Since an executor can only calculate his fee in relation to the assets that are in the estate, he will not be able to include the amount of this death benefit when calculating his fee. In any case, it is the trustees that are charged with the duty of tracing beneficiaries, investigating the extent of their financial dependency and deciding how to distribute the benefit. This duty can be labour intensive and time consuming. It is hard to imagine what an executor will be charging for, if he never actually deals with the approved death benefit in any way.

It is important to note that SARS does not charge estate duty on an approved death benefit because this benefit is not considered to be part of the estate. The same principle applies to executor fees.

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