

7.3 Letter to Share Registrars

Dear Sirs,

Re: Estate of name, deceased
Shares in company name

We write to inform you that the Grant of Letters of Administration in respect of the above estate was made to our client *name* on the *day of month 20 year* under Grant No *number* of 20 *year*. A copy of the grant is enclosed for your registration and return.

In this connection, please let us have the specimen signature form covering the shares for our client's signature; and release to our client the accrued dividends of the shares at your earliest convenience.

Thank you for your assistance.

Yours faithfully,

CHAPTER 8

PAYING THE DEBTS

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1. INTRODUCTION

It is the first duty of a personal representative to pay all just debts, expenses and liabilities incurred by the estate and to use the assets of the estate primarily for this purpose. The trust for sale, imposed by s.62 of the Probate and Administration Ordinance (Cap.10) (PAO) on intestate property, and the analogous trust usually expressly included in wills, will facilitate the realisation of property in order to raise cash to pay debts. In the absence of such a trust for sale, the personal representatives have an implicit power to sell assets in order to pay debts (see para.7.067).

8.001

2. SOLVENT OR INSOLVENT?

At an early stage of the administration, the executor or the legal adviser will have formed an impression of whether the estate is solvent, i.e. the value of the assets in the estate equals or exceeds the value of the debts and liabilities of the estate; or insolvent, i.e. the value of the debts and liabilities exceeds the value of the assets available to pay them. The completion of the Schedule of Assets and Liabilities will confirm whether the assets exceed the liabilities or not. This is a vital consideration, because the manner of payment of the debts will vary depending upon whether the estate is solvent or insolvent.

8.002

3. FUNERAL EXPENSES

It is technically the responsibility of the executor to bury the deceased, in the sense of arranging for the burial or the cremation and assuming responsibility either personally or on behalf of the estate for the burial expenses, i.e. the undertaker's bill. In practice, the relatives usually carry out these functions and the executor is often not involved, until at a later stage he might be asked by the relatives to reimburse them for the cost of the funeral.

8.003

However, a personal representative who orders or arranges the funeral becomes personally liable for the contract price of the funeral. In such circumstances, the personal representatives would have a right of indemnity from the estate. Even if the personal representative does not personally order or arrange the funeral, if there is no other person liable in contract for the payment, there is an obligation on the personal representative to pay reasonable funeral expenses. What is reasonable will be considered in the next section, but is basically what is deemed to be suitable for the deceased's position and circumstances in life. The personal representatives, again, would appear to have a right of indemnity from the estate and their liability in this respect is limited to the extent of the available assets of the deceased to meet such funeral expenses.

8.004

The personal representatives should only incur reasonable funeral expenses, and

8.005

indemnity for the full cost. What is reasonable depends in all cases on the situation in life of the deceased: a wealthy person accustomed to a high, possibly extravagant style of living is perhaps entitled to a more lavish funeral than a person of more modest means. Other relevant circumstances are whether the estate is solvent or insolvent, and the value and extent of the assets in the estate. Even if the estate is insolvent, reasonable—which in cases of insolvency probably means minimal—funeral expenses can still be incurred. It is deemed to be essential that the deceased is buried, although this will obviously increase the indebtedness of the estate to the disadvantage of the existing creditors.

- 8.006 As to the manner of the funeral, the deceased's wishes, either burial or cremation, whether expressed in the will or in a separate document or *inter vivos* orally, should be honoured by the personal representative insofar as that is practicable. There appears, however, to be no liability on the personal representatives if they knowingly or unknowingly do not carry out the deceased's wishes regarding the mode of funeral desired. In general, however, a personal representative will follow such wishes and will also be cognisant of the deceased's religious beliefs, and it will usually be thought appropriate to arrange a funeral according to such beliefs.

4. TESTAMENTARY AND ADMINISTRATION EXPENSES

- 8.007 Testamentary expenses clearly relate to those costs which are essentially incurred in connection with the proving of the will—in other words, the obtaining of the grant of probate, which includes all the preliminary work regarding the estate duty clearance (where now applicable) and the drawing up of the required affidavit. Reasonable testamentary expenses can be paid by the personal representatives and, if paid personally, can be reimbursed out of the estate in connection with them.
- 8.008 Administration expenses clearly refer to the costs of the administration of the estate. Such expenses are diverse, can be considerable in value, and can include the following:
- (1) the cost of collecting in, preserving, insuring and safeguarding the assets of the estate;
 - (2) the cost of any legal advice, including payments to a solicitor who has been retained by the personal representatives to assist in the administration of the estate;
 - (3) the cost of any civil actions or contested issues, such as an action to recover possession of a property from a tenant;
 - (4) the cost of ascertaining the creditors and beneficiaries of the estate, e.g. by advertisement or by other forms of enquiry.
 - (5) Any estate duty payable on the estate should be regarded as a separate item of priority but can also for this purpose be regarded as an administration

Personal representatives should estimate the amount needed to pay the above expenses and should set aside a fund to pay the testamentary and administration expenses at the outset of the administration. 8.009

5. TIME TO PAY DEBTS

It is usually said that a personal representative has one year from the date of death during which the debts should be paid, the so-called "executors' year". It does not appear that executors are liable to pay any form of interest on outstanding debts until at least 12 months have elapsed since the deceased's death. In fact, the rule regarding the time when debts should be paid is probably better expressed by saying that all debts should be paid with due diligence. In straightforward cases, this will require the payment of the debt well within the so-called year. In other cases where there is difficulty in ascertaining the exact amount of the debt, or where the existence of the debt is not known until some time after the death, and in other similar circumstances, it could be that the executors would be justified in paying the debt later than one year from the death. 8.010

The other crucial circumstance will be whether the estate is solvent or insolvent, and in some cases this can take some time to finalise. Certainly, the executors will not pay any debt where they fear there is an insolvency or a possible insolvency situation, and they will be permitted to delay making such payments while they investigate the asset value and total liability of the estate. 8.011

In most estates the funeral expenses will be paid very shortly after the death. Then an amount, estimated to cover testamentary and administration expenses, will be set aside. The other forms of debts or liabilities against the estate will then be identified and paid in accordance with the priorities that will be referred to later. 8.012

6. INCOME TAX RETURN

It is the responsibility of the personal representatives to contact the deceased's tax office and to make an income tax return on his behalf. Failure to do so will result in liability to the income tax authorities for non-payment, and to the beneficiaries for not obtaining any refund due. The tax office will make an assessment of the amount of tax due up to the death, and this should be paid as soon as possible. Arrears of income tax are a preferred debt in insolvent estates and so can be safely paid immediately. The personal representatives should also take steps to recover any overpayment of tax by the deceased. 8.013

7. ASCERTAINING THE DEBTS

CHAPTER 4

OBTAINING ESTATE DUTY CLEARANCE

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I. DEATHS BEFORE 11 FEBRUARY 2006

(a) Introduction

Estate duty has been abolished in respect of the estates of persons dying on or after 11 February 2006 but remains applicable to the estates of persons dying before that date. Thus the obtaining of estate duty clearance, once a prominent feature of probate practice, was often the main task required of a legal adviser instructed to act in a deceased's estate. This will now rarely be a necessary prelude to applying for a grant. But it is still possible for the practitioner to be instructed in respect of deaths before that date when estate duty clearance will be necessary. This can arise, for example, where the estate has been embroiled in litigation, thus delaying the application for the grant, or where the family have simply omitted to go through the proper formalities on the previous death of a property-owning member of the family. This sometimes comes to light when the solicitor is instructed to act on the death of a person, say a widow, and it is discovered that her "estate" includes a flat which she "inherited" under the will or intestacy of her husband several years ago but which was never made the subject of a formal probate or assent. Similarly, in a conveyancing transaction when it emerges that the vendor "inherited" the property years ago but was never declared for estate duty and where there is no probate or assent in respect of that "inheritance". In such cases, the position under the previous death must be formalised, and if that death occurred before 11 February 2006, then estate duty clearance will have to be obtained. This can result in an unpleasant shock because penalty interest will be charged on unpaid estate duty which could amount to a considerable sum.

For these reasons, it is necessary to briefly consider deaths before 11 February 2006 and the process of obtaining estate duty clearance, whilst recognising of course that this has no application to deaths after that date. Thus the following text in this chapter should be read as applicable only to the estates of persons who died before that date. None of the "old" Estate Duty Ordinance (Cap.111) (EDO) forms will be included here as Sample Documents.

Where estate duty is applicable, the first priority for the executors or the person entitled to apply for a grant of administration will be to obtain estate duty clearance. This is because the personal representatives are liable to pay the estate duty in respect of the deceased's own estate. Until this has been done, it is not possible to apply for the grant and thus to proceed with the administration. Thus the solicitor acting for the deceased estate on which estate duty is payable will need to go through the detailed procedures for obtaining estate duty clearance which will be signified by obtaining one of the following documents:

- (1) Certificate of Receipt of Estate Duty enclosing Schedule of Property;
- (2) Certificate of Exemption from Estate Duty enclosing Schedule of Property;
- (3) Certificate of Exemption from Estate Duty enclosing Statement in lieu of

- 4.004 Three practical points can be emphasised at the outset. First, the time limits should be strictly observed. The affidavit or account must be filed within six months of the death and duty is required to be paid at the time of delivery. Interest is charged at four per cent per annum for the first six months after the death and at eight per cent per annum after that. If the period of delay exceeds 12 months without reasonable excuse, double rates of duty are chargeable.
- 4.005 Second, the relatives should be told (diplomatically!) that they must be absolutely frank and honest about disclosing the deceased's assets and any *inter vivos* gifts within three years of the death. The Estate Duty Office will make very thorough investigations into the deceased's affairs, and failure to disclose everything at the outset will incur delay and possible penalties. They should also be warned that filing the estate duty affidavit on death can lead to an income tax investigation.
- 4.006 A third point to emphasise, by way of caution, is that solicitors should be careful not to intermeddle with the estate, i.e. take possession or benefit from the assets of the deceased without lawful authority. Such an intermeddler will become personally liable to pay duty.
- 4.007 The process of obtaining estate duty clearance is largely a form-filling exercise but must be done precisely and with maximum care if the matter is to proceed smoothly and expeditiously. Mistakes and omissions or incorrect procedures will be punished by delay in obtaining clearance. It is essential that the forms be fully understood and this requires a sound knowledge of the law relating to estate duty. A useful summary of the law, and an explanation of the procedures for obtaining clearance, can be found in the pamphlet on estate duty issued by the Deputy Commissioner of Estate Duty on 1 June 1991. Further details of the law can be found in the EDO and in specialist texts.
- 4.008 The legal adviser should go through the basic Form ED1, item by item with the client, explaining what is chargeable and on whom the liability to pay falls.

(b) The procedures

- 4.009 Most estates subject to estate duty will be dealt with under one of the following two procedures:
- (1) summary administration of a small estate; or
 - (2) a formal estate duty affidavit.

A third possibility is to lodge an estate duty account where there is property passing on death for which the executor is not liable.

(c) Safe deposit box

- 4.010 Where estate duty is applicable, the first step is to find out if the deceased had any safe deposit boxes in a local bank. Ask the relatives and family for information, and with

A record of the official inspection of the safe deposit will be recorded on Form ED74 (Sample Document 4.1). Any property or documents of title to property found in the box will then be declared on Form ED1 or the Statement in Lieu of Affidavit. Note that in the case of deaths after 11 February 2006, a different procedure applies to safe deposit boxes involving the Home Affairs Department (see para. 1.009).

(d) The simplified "small estates" procedure

Where the value of the estate does not exceed HK\$400,000, a simplified procedure not involving the completion of the full Form ED1, the estate duty affidavit, can be followed. This procedure cannot be used where the estate includes land, houses, businesses, unquoted shares or litigation. Under the small estates procedure, a Statement in Lieu of Affidavit will be submitted and an exemption certificate issued. Most such cases will be completed by a lay relative in person at the Estate Duty Office. Assistance in completing the forms will be given if necessary by the estate duty officers. 4.011

Where the estate is liable to estate duty, the following forms and documents should be obtained and completed: a Statement in Lieu of Affidavit (Form ED63A). This is a statement giving information about the deceased and the applicant, and which lists the assets. The statement will be supported by copies of the death certificate, identity card and such other details as the Estate Duty Office may specify. Once this has been verified, a Certificate of Exemption from Estate Duty will be issued with a copy of the completed form. No duty will be payable in these cases because of the low value of the estate. 4.012

(e) Estate Duty Affidavit (Form ED1)

In a more substantial estate, Form ED1 will be submitted, and a demand for payment on account will be made and paid. After examination of Form ED1, a final assessment of duty will be raised and, when fully settled, clearance papers will be issued for the application of grants of representation. Solicitors and executors proceeding under the full Form ED1 procedure can conduct the application by post, completing the forms and making the affirmation in their own office. 4.013

Where the estate, which is liable to estate duty, exceeds HK\$400,000 in value, all the property of the deceased which "passes on death" must be identified, listed and valued in order to compute the duty, if any is payable. It is good practice to draw up an inventory as soon as possible and to set in motion the process of valuation. The initial drafts will be provisional but can be finalised as more information regarding the estate becomes available. Only property in Hong Kong will be taken into account. However, shares where the principal registration is in Hong Kong, such as shares in HSBC, will be included. In addition to property which ordinarily vests in the personal representative as assets, certain other property—such as life interests, and some transfers and gifts of property made within three years of the death—will have to be included in the estate duty valuation. Any liabilities of the estate must also be quantified, since it is the net value of the estate that is chargeable to estate duty. 4.014

6 per cent to 18 per cent. If the form was submitted late without reasonable excuse, double duty was payable.

4.016 In these cases where estate duty is applicable, the solicitor will obtain copies of Form ED1 and questionnaire, and will complete this form (and such other supplementary forms as are required) in consultation with the client. The form can be sworn or affirmed by the applicant for the grant to the estate, either in the Estate Duty Office or, more usually, in the solicitor's office. Form ED1 is in the form of a booklet in that all the pages are joined in one continuous document. If the estate exceeds the exemption limit, the affidavit must be submitted, together with the duty apparently payable, within the six-month period following the death. Penalties in the form of increased interest charges and double duty apply for late submission. The affidavit will be sent or delivered to the Estate Duty Office, who will check the figures submitted and may raise queries or requisitions on valuations or property. When this process has been finalised to the satisfaction of the Estate Duty Office, an assessment—initially provisional, subsequently final—of the duty payable will be issued.

(i) Supporting documents

4.017 Form ED1 should be submitted with other supporting documents, such as copies of the death certificate, bank statements for the last three years and, where the estate includes unquoted shares or a business, copies of the accounts for the last three years. These documents will be demanded by the Estate Duty Office at some time, so they might as well be sent with the form in order to ensure as prompt a clearance as possible.

(ii) Form ED1

4.018 The assets with their value will be listed under appropriate headings on the estate duty affidavit. This form has five parts:

- (1) Affidavit, which identifies the deceased and the applicant as the person entitled to a grant and swears as to the accuracy of the whole document.
- (2) Questionnaire, which requires the applicant to reply to questions relating to assets, including those which do not form part of the beneficial estate at death but which are liable to a charge to estate duty.
- (3) Four Accounts, which list, with values, the assets and the liabilities of the estate.
- (4) Statements, which identify the persons entitled on intestacy to the estate and the name or aliases of the deceased; and
- (5) Summary, which states the value of the estate for duty and the amount of duty payable.

for probate or letters of administration, and the entitlement of the applicant to do so. Statement X will substantiate an applicant for letters of administration by stating the persons entitled on intestacy and identifying the applicant as the person with the priority to apply. In addition to this information, there are 12 paragraphs of statements which are sworn to. If any of these paragraphs are inapplicable, they can be deleted.

Questionnaire

Some property or interests in property which do not form part of the estate of the deceased at death must still be identified as being subject to the estate duty charge. The questionnaire seeks to ascertain such property. If there is property of the description specified, it must be detailed; if not, write "none". These answers must be comprehensive, accurate, and honest. The Estate Duty Office will check all the entries and raise requisitions or queries on anything that they are not happy with. **4.020**

Land and buildings

This is an important category, since many estates will include some land or buildings. These will be included under para.12 of Account 1 and further details will be entered on Form ED30, which will be attached to the affidavit. If the property is let, details of the rent, for example, are included. **4.021**

In order to ensure the proper description of real property, it is advisable to enter the full description of the land as recorded in the land search record. This can be checked against the titles deeds. It is important to include all the particulars of the property, including the number of shares and the lot number. Simply entering the address will not be sufficient and will result in a requisition from the Estate Duty Office or subsequent amendments to the Schedule. Remember that the Estate Duty Schedule will form part of the title to the property in due course, so the description in the Schedule must be correct. **4.022**

Matrimonial home

The nature and extent of the deceased's beneficial ownership of any flat or house that has been used as the principal matrimonial home needs to be precisely ascertained. Many such homes are owned in some form of co-ownership with the surviving spouse, as to which see paras.7.017–7.022. **4.023**

Matrimonial homes enjoy an exemption from duty under s.10A of the EDO. For the exemption to be claimed, the house has to be occupied by the deceased and his spouse as their matrimonial home, and it must pass on death by will, intestacy or survivorship to the other spouse. Information sufficient to establish the claim to the exemption must be stated on the form and sent with the affidavit. **4.024**

The procedure for claiming the exemption is as follows: **4.025**

- (1) The value of the matrimonial home will be completely excluded when determining the value of the estate subject to estate duty.