Changes to Ontario's Estate Administration Tax Act

Various changes proposed in Ontario's 2011 budget relating to the Estate Administration Tax Act are not yet effective, but they're coming.

Background

While these changes (contained in Bill 173, which received Royal Assent on May 12, 2011) seem administrative in nature, a deeper look reveals they can make estate administration and the probate process more onerous, costly and time-consuming. It's critical Ontario residents carefully plan their financial affairs to help minimize or avoid estate administration tax. This article discusses the changes, their impact and some thoughts on financial security planning.

Currently, there's no set date for the changes; a date will be specified in the legislation, when released. The Ministry will provide sufficient notice of the estate information requirements before the regulation takes effect.

The changes

1. Duty to give information

This change requires anyone applying for (i) the grant of probate, administration or testamentary guardianship or (ii) a certificate of appointment of estate trustee, from the Ontario court, to provide such information about the deceased person as may be required by the Minister of Finance. The information must be provided within the time and in the manner as may be prescribed by the Minister. The estate representative is also required to provide all reasonable assistance, and answer all questions, during a subsequent audit. Third parties are also required to provide the required information to the Minister.

2. Assessments and re-assessments

This change gives powers to the Minister of Revenue to assess or reassess the estate in respect of the tax payable. Generally, the Minster may assess or reassess the estate within four years after the day the tax became payable. There is no time limit if the person has failed to provide the information required or made a misrepresentation.

3. **Audit and inspection**
   This change authorizes the Minister of Revenue to appoint inspectors to exercise the powers and perform the duties under the Estate Administration Tax Act.

4. **Offences**
   This change makes failure to provide the information, or providing false or misleading information, an offence punishable by fine, imprisonment or both. The minimum fine is $1,000, and maximum is twice the tax payable. The term of imprisonment may be up to two years.

The impact

While these changes seem simple, the impact can be far reaching.

The "duty to give information" in and of itself doesn't appear burdensome. However, when it's read with the increased power of assessment/reassessment and penalties, it's clear much more effort and due diligence is required by the person applying for probate or a certificate of appointment of estate trustee.

The inventory of the estate assets and their values are to be provided to the Minister. It's now more important than ever the applicant ensures all the assets are reported and proper valuations are done. Depending on the valuation issues and financial affairs of the deceased, it may require significant time before the application is made to the Ontario court for probate or a certificate of appointment of estate trustee. In many cases, no distribution of the estate may be possible without probate or the certificate of appointment of the trustee, resulting in a delay in administering the estate.

The enhanced audit and verification powers means the Minister may review the asset valuations. What if the valuation is higher – resulting in increased estate administration tax liability, but all the assets of the estate are already distributed? As mentioned, the Minister may asses or reassess within four years, so there's a possibility an auditor may come back on the estate trustee. Does this mean trustees should wait for at least four years before distributing all the assets of the estate? If so, this further adds to delay in estate administration. If not, the trustee may be assuming the uncertainty and risk.

The solution

A very simple solution is provided in the Estate Administration Tax Act itself – i.e., no tax is payable if the value of the estate does not exceed $1,000. Obviously, this solution does not apply to most individuals, and highlights the need for estate planning.

Different planning opportunities such as an alter ego trust or joint tenancy for the ownership of property (particularly for spouses or common-law partners) are available to maintain the assets outside of one's estate, thereby minimizing the estate and resulting estate administration tax.

These opportunities have their own complexities and may require annual maintenance costs, not to mention potential income tax consequences, so a tax professional should be involved.

Another practical solution – **segregated fund policies**.

In Ontario, like other provinces, the proceeds of a segregated fund policy don't form part of the estate, unless the estate is the beneficiary. If the proper beneficiary designation is made, the proceeds of the policy flow directly to the beneficiary outside of the estate, resulting in no estate tax. Segregated fund policies include guaranteed interest options, which may be attractive to conservative clients.

Depending on the named beneficiary, there may also be the potential for creditor protection[1]

A description of the key features of the segregated fund policy is contained in the information folder. **Any amount that is allocated to a segregated fund is invested at the risk of the policyowner and may increase or decrease in value.**

[1] Creditor protection depends on court decisions and applicable legislations, which can be subject to change and can vary from each province; it can never be guaranteed. Clients should talk to their lawyer to find out more about the potential creditor protection for their specific situation.