

Beware of tax land mines when advising your client



Practitioners should always be mindful of the potential tax consequences of a transaction.

Each year the LPLC sees claims where the practitioner has overlooked the tax implications of a matter or considered that it's not their role to advise on tax issues, or recommend that the client obtain tax advice from a tax lawyer or accountant.

In a recent case, a practitioner failed to advise their client of a prospective capital gains tax liability, which arose on the client entering a life interest arrangement.

They also didn't recommend that the client obtain specialist taxation advice and fell short of the standard of care required of them.

The client instructed the practitioner that they were purchasing a house and wanted to set up a life interest arrangement with their son who would occupy the property during his lifetime. The practitioner prepared a deed of licence to formalise the son's occupation of the property. The deed included a clause to the effect that if the client sold the property, their son was to be paid a specified percentage of the gross sale price. Unknown to the client, a CGT liability or 'CGT event D1' was triggered on execution of the deed.

The client sought to recover the amount of the CGT liability from the practitioner. They alleged that had they been informed of the CGT consequences of executing the deed, they would not have signed it.

Importantly, the claim may also have been avoided if the practitioner had taken proactive steps to understand the client's circumstances and reasons for entering the life interest arrangement. English was the client's second language and they had a limited understanding about purchasing property in the Australian market.

The life interest mechanism had been suggested to the client by another source and they were not aware of other options available to them. Ultimately, the client's objective was simply to purchase a house jointly with their son, and a joint tenancy arrangement would have met their needs and avoided incurring the CGT liability. The practitioner simply did not ask enough questions of the client to determine this.

Key takeaways

- Think critically about your client's instructions and do not make assumptions.
- Be proactive in understanding your client's circumstances and key objectives and explain in writing the relevant options and risks.
- Ensure you maintain sufficient tax knowledge to understand which taxes may impact on a client's matter.
- Alert your client to the possibility of the tax consequences of a transaction which they may not have considered.
- If you do not have the tax expertise to advise fully on the tax issue, confirm in writing that your retainer does not extend to providing tax advice and recommend that your client obtain specialist tax advice from a suitably qualified tax lawyer or accountant. Ask your client to confirm their understanding of the position in writing.
- Use checklists and develop procedures to ensure tax implications are considered and addressed in a matter.

Resources

The LPLC has developed a [checklist](#) to assist practitioners identify the most common tax issues which might arise in the purchase or sale of property or a similar transaction.

To read further about CGT consequences of life interests and granting licences over an asset, the following ATO tax rulings are available:

- [TD 2018/15](#) concerning the CGT consequences of granting a licence, easement or profit à prendre over an asset
- [TR2006/14](#), which deals with the CGT consequences of creating life and remainder interests in property.