

### [19.3.9] Death (S.573)

- 9.1** When assets pass on a death they are not deemed to have been disposed of by the deceased and, thus, death is not an occasion of charge for Capital Gains Tax purposes. The assets of which the deceased person was “competent to dispose” (**Par. 3**) are deemed to be acquired by the personal representatives or other person on whom they devolve for a consideration equal to their value at the date of death.
- 9.2** When in the course of administration, the personal representatives dispose of assets of the estate (other than by transfer to legatees - see **Par. 10**), they are liable on any gains in the normal way, i.e., as a “body of persons” (see **Par. 5**).
- 9.3** **Section 573(1)** defines “assets of which a deceased person was competent to dispose”. These are assets which, if he were of full age and capacity, he would have been able to dispose of by will, on the assumption that all the assets were situated in the State and that he was domiciled in the State. Such assets include assets in which immediately before death he had a severable share of a joint interest.

In some countries immovable property cannot be transferred by will. For the purpose, therefore, of deciding what assets pass on death, the assumption is made that all the assets were situated in the State.

- 9.4** On the death of a person the assets comprised in his estate pass to his personal representatives (i.e., his executors or administrators) who deal with them in accordance with the terms of his will or the rules of intestacy or the special rules relating to a surviving spouse or children contained in the Succession Act, 1965.

The personal representatives may -

- (a) distribute assets to specific legatees or other beneficiaries;
- (b) realise assets and distribute the proceeds;
- (c) hold assets in trust (as trustees) for beneficiaries who because they are minors or are otherwise subject to legal disability are not absolutely entitled to the assets, in which case they are assessable as bare trustees of the beneficiary (see [Tax Instruction 19.3.3 Par. 1](#));
- (d) hold assets (settled property) in trust for life tenants or for specific purposes, in which case they are assessable as trustees and not personal representatives.

The personal representatives of a deceased person should be treated for Capital Gains Tax purposes as if they were a single and continuing body of persons regardless of the fact that they may change from time to time. They should also be treated as having the same residence, ordinary residence and domicile as the deceased had at his death.

- 9.5** Except in a case where a legatee is absolutely entitled as against the personal representatives (see [Tax Instruction 19.3.3 Par. 1 and 4](#)) to the property disposed of, the gains on disposal of property during the period of administration are the gains of the personal representatives and are not to be regarded as the gains of any other person.

**Section 568(2)** also denies to personal representatives the remittance basis on gains accruing on the disposal of assets situated outside the State and the United Kingdom ([Tax Instruction 2.3.1 Par. 2](#)).

- 9.6** A donatio mortis causa is a gift made in contemplation of the death of the donor, to take effect only in that event, and to be void if the donor recovers from his illness or if the donee dies first. If the gift is made in contemplation of death, it is presumed to be a donatio mortis causa, even if the donor does not say that it is intended to be conditional.

Assets disposed of in this way are not “assets of which a deceased person was competent to dispose” because he had already given them away in anticipation of death.

**Sections 5(1) and 573(5)** ensure that -

- (a) on the date of death which is the occasion of the gift, there is no gain chargeable to Capital Gains Tax on the deceased nor is there any allowable loss;
  - (b) a person acquiring an asset in these circumstances is treated in exactly the same way as a legatee acquiring an asset on death, i.e. the “cost” upon a subsequent disposal by the acquirer is the market value at the date of death (**Par. 1**).
- 9.7** Where property has been transferred to a legatee who has become absolutely entitled to it as against the personal representatives, then on a subsequent disposal of the property -
- (a) the legatee may be allowed a deduction for the costs of the transfer if he has borne them; and
  - (b) if those costs have been borne by the personal representatives, the legatee can claim a deduction for them.
- 9.8** In the computation of gains accruing to personal representatives on the disposal, as distinct from the transfer (**Par. 7**), of assets, the allowable expenditure includes the expenses or a due proportion of the expenses, incurred in obtaining a grant of probate or letters of administration.

- 9.9** If losses sustained by an individual in the year in which death occurs cannot be allowed against gains accruing to him in the same year, such losses may be deducted from the gains of the three years preceding that year. Because gains accruing in different years may be chargeable at different rates, **Section 573(3)** provides that the carry-back of losses is to be effected by taking a later year rather than an earlier year.

**Example:**

A dies on 1 February, 2006. In 2005 he made disposals on which there was a net loss of €10,500. In earlier years he had made, and been assessed on, net chargeable gains (after the €1,270 exemption ([Tax Instruction 19.7.1 Par. 1](#))) -

	€
2005	2000
2004	2500
2003	3500

Relief in respect of the loss of €10,500 should be given as to -

2005	€3,270	(€2000 plus exemption €1,270)
2004	€3,770	(€2,500 plus exemption €1,270)
2003	€3,460	(balance)

The relief may be given without a formal claim.

If there had been no gains in 2003, a loss of €3,460 would remain unrelieved.

- 9.10** No chargeable gain is deemed to accrue to the personal representatives on the transfer to a legatee (see **Par. 14**) of an asset bequeathed to him by the deceased. Any gain which the legatee may make on a later disposal of the asset should be computed on the basis that the acquisition of the asset by the personal representatives was the legatee's acquisition of the asset.

If, under the terms of a will, the personal representatives have power to satisfy a pecuniary legacy by the appropriation of assets to the value of that legacy, the legatee who takes such an asset should be dealt with in the same way as the personal representatives, i.e., he should be deemed to have acquired the asset on the basis set out in the preceding subparagraph. If, on the other hand, there is no such power of appropriation, a person who is offered by the personal representatives (and accepts) an asset in satisfaction of a legacy is not regarded as acquiring the asset as legatee unless both he and the personal representatives agree that he should be deemed to have acquired it as the personal representatives acquired it (or, where the asset was acquired during the course of administration by the personal representatives acting as such, at its cost to the personal representatives) and that any future chargeable gain or allowable loss will therefore be deemed to accrue to him. In the absence of

this agreement, the personal representatives should be regarded as having disposed of the asset at market value in the course of administration of the estate with a consequent chargeable gain or allowable loss.

See also **Par. 11** where assets are appropriated during the course of the administration to a residuary legatee.

- 9.11** The residuary legatee or legatees should be regarded as becoming absolutely entitled to property as against the personal representatives (see **Par. 14**) when the net residue has been ascertained. It may, however, happen that particular property is appropriated during the course of the administration by the personal representatives assenting to particular assets being vested in a residuary legatee or residuary legatees jointly. If the personal representatives then dispose of assets which have been so appropriated, e.g., because a legatee prefers to receive cash rather than an asset, they will do so as “bare trustees” (see [Tax Instruction 19.3.3 Par. 1](#)) and not as personal representatives. If property is disposed of by personal representatives (other than on transfer to legatees or after appropriation to legatees) during the period of administration, any gain or loss which may arise accrues to the personal representatives. The date of ascertainment of the net residue is essentially a question of fact, but claims that disposals of assets have been made by personal representatives not in their capacity as such but as “bare trustees” for the legatees should be supported by evidence to show that the assets were appropriated to a legatee or legatees prior to the disposal.
- 9.12** When settled property becomes distributable on the death of a life tenant, the property is not taken by the remainderman (or remaindermen) as legatee (notwithstanding that his title derives from a will) but as a beneficiary under a trust (see [Tax Instruction 19.3.5 Par. 3 & 4](#)).
- 9.13** Where, on the death of one spouse a residence which has qualified for relief under **Section 604** (see [Tax Instruction 19.7.3 Par. 2](#)) passes to the other spouse as legatee, the period of ownership should be treated for the purposes of that Section as running back to the date of acquisition by the deceased.
- 19.14** **Section 5(1)** defines “legatee” as including any person taking property under a will or intestacy or partial intestacy, or by virtue of the Succession Act, 1965, whether he takes it beneficially or as trustee, and provides that a donatio mortis causa (**Par. 6**) should be treated as a testamentary disposition, i.e., legacy, and not as a gift. The definition also includes cases where:

- (a) assets are appropriated in satisfaction of a pecuniary legacy;
- (b) a residuary legatee, instead of taking his share in cash, takes assets.

A person who under the terms of a will takes property directly from the personal representatives acting as such takes the property as legatee; if he takes the property from trustees of assets left by the deceased, he takes it as one absolutely entitled as against the trustee, and not as legatee.

- 9.15** Where, within two years of death (or such longer period as the Revenue Commissioners may allow) the disposition of a property under a will or intestacy is varied by a deed of family arrangement or similar instrument, the deed is deemed to have retroactive effect from the date of death. The arrangement is not, therefore, to be treated as constituting a disposal and is not the occasion of a charge to Capital Gains Tax.

In practice, the term “deed of family arrangement” may be regarded as covering any situation (including a gift by a legatee) as a result of which property disposed of by the deceased (whether by will or in an intestacy) is, by some form of deed, redistributed within the family.

The provision allowing the Revenue Commissioners to extend the period beyond two years is to cater for cases in which it is not possible for the beneficiaries to complete a deed of family arrangement within two years of death. This would occur for example where there is delay due to difficulty of proving title or where there is a large family with some members living abroad.

- 9.16** An assessment in respect of gains which accrued up to the date of death of a person chargeable to Capital Gains tax should be made on his personal representative, that is, on his executor or administrator, as, for example -

“A.B., executor of the will of C.D., deceased”

or

“A.B., administrator of the estate of C.D., deceased”.

Where there is more than one personal representative, all the executors or administrators, as the case may be, should be named in the assessment and a notice of assessment should be issued to each of them.

- 9.17** **Section 913** adopts, for Capital Gains Tax purposes, **Section 1048** which provides the time limits within which assessments to Income Tax are to be made on the personal representatives of a deceased person. The time limits for Capital Gains Tax are, therefore, identical with those for Income Tax, so that the assessment must be made not later than -

three years after the expiration of the year of assessment in which the deceased person died, in a case where the grant of probate or letters of administration was made in that year, or

in any other case, two years after the expiration of the year of assessment in which the grant was made or in which a corrective affidavit was lodged.

These time limits do not apply to gains accruing during her lifetime to a deceased wife who is survived by her husband ([Tax Instruction 44.2.1 Par. 3](#)).

- 9.18** Where an individual dies any exemption or relief in respect of the chargeable gains which accrued before death is allowable to the personal representative in the year of assessment in which death occurs.

