Declan Joseph Jarrett- Barrister

Edmund Barton Chambers
Level 44, MLC Centre, 19 Martin Place, Sydney, NSW 2000
DX 736 Sydney
Telephone: (02) 9220 6100 Facsimile: (02) 9232 3949

Presented by Declan Jarrett for the Law Society of New South Wales CPD on Thursday 14 August 2014

TAXATION OF ESTATES AND EXECUTOR'S RESPONSIBILITIES FOR TAX AND DUTY

1. INTRODUCTION

1.1 The purpose of this paper is to broadly cover the taxation issues that relate to administration of an estate. These issues are broken down as follows.

2. Practical aspects

3. Taxation of Estate Income

4. Taxation of Capital gains

5. Taxation of bequests to charitable institutions

6. Taxation of superannuation death benefits

7. Stamp duty

8. Testamentary trusts

-The Income Tax Assessment Act 1936 is referred to herein as the" ITAA 1936"

-The Income Tax Assessment Act 1997 is referred to herein as the" ITAA 1997"

2. PRACTICAL ASPECTS FOR EXECUTORS

2.1 An executor has to lodge a tax return for the estate and attend to any lodgement of the deceased's prior year tax returns that are not lodged as at the date of the passing of the deceased.

2.2 An executor's responsibilities include:

- lodging a final return, and any outstanding prior-year returns, for the deceased person (Form I)
- lodging any trust tax returns for the estate (Form T)

- providing beneficiaries with the information they need to include distributions in their own returns and, in certain cases, paying tax on their behalf.

2.3 The executor of a deceased estate may need to lodge a final tax return on behalf of the departed. If they did not lodge prior-year tax returns, it will need to be determined whether they are necessary. If so, you need to prepare and lodge them.

2.4 If the administration of the deceased estate is completed in the same income year as the date of death, you do not need to lodge a trust tax return for the deceased estate if:

a. no beneficiary is presently entitled to any of the income of the deceased estate (they may receive assets only), and

b. the taxable income of the estate is below the tax-free threshold for that year.

3. TAXATION OF ESTATE INCOME

3.1 A deceased estate is simply another trust estate from a taxation point of view and hence is taxed under the provisions that tax the trust net income of trust estates being Part III Division 6 ITAA 1936, sections 95-102.

3.2 The executor is a trustee for the purposes of the Act under the expanded definition in section 6(1) ITAA 1936 reproduced hereunder.

> ***"trustee"*** in addition to every person appointed or constituted trustee by act of parties, by order, or declaration of a court, or by operation of law, includes:
>
> **(a) an executor or administrator, guardian, committee, receiver, or liquidator;** and
>
> (b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability

3.3 The Executor has personal liability for all matters of the estate including taxation matters.

Income of deceased after death

3.4 The Executor will be taxed on income received after death that would have been assessable to the deceased if they were alive, Section 101A ITAA 1936.

3.5 The Executor could be taxed at the special punitive tax rates under 99A ITAA 1936 (top marginal rate 45%) or in most cases if the Commissioner considers it unreasonable to do so they will be taxed under section 99 ITAA 1936 (normal marginal rates) if the income is earned within 3 three years of the date of death.

3.6 The Commissioner has advised that an estate of an "ordinary and traditional kind" where there is no tax avoidance will be taxed at the normal progressive marginal rates under section 99 ITAA 1936. i.e. an estate where the assets are those of the deceased or purchased for the purposes of the will.

Income of the trust estate to which no beneficiary is presently entitled

3.7 Where no beneficiary is presently entitled the executor can be taxed on the net income of the trust estate at rates under section 99A ITAA 1936 (top marginal rate 45%) or if the commissioner considers it unreasonable section 99 (normal marginal rates) if within 3 three years of date of death.

3.8 The Commissioner has advised that an estate of an "ordinary and traditional kind" where there is no tax avoidance will be taxed at the normal progressive marginal rates under section 99 ITAA 1936. i.e. they will not be taxed at a higher rate than an individual would normally be taxed

Beneficiary presently entitled but under a legal disability

3.9 Where the beneficiary is presently entitled but under a legal disability the trustee will be taxed under Section 98 ITAA 1936 at normal rates for resident beneficiaries.

Beneficiary presently entitled and resident will be taxed at normal rates under section 97 ITAA 1936

Paying tax on the income of the deceased estate

3.10 The main factors that will determine who pays the tax on the income derived by the deceased estate and the applicable tax rate include:

a. whether the beneficiaries are presently entitled
b. whether they are under a legal disability
c. whether the deceased estate is fully administered.

3.11 While the deceased estate is under administration, it needs to be determined whether the beneficiaries are presently entitled and under any legal disability **at the end of each financial year (30 June)** – this will determine who is liable to pay tax on the income of the deceased estate for the whole of that income year.

3.12 An executor cannot distribute the income or assets of a deceased estate until the debts of the deceased person, including tax liabilities, are determined and probate has been granted.

3.13 The legal personal representative can distribute some of the income or assets to beneficiaries if they are certain that the remainder of the deceased estate is sufficient to cover any outstanding liabilities.

Present entitlement, beneficiary will be taxed under Section 97(1) ITAA 1936

3.14 Beneficiaries are presently entitled to the income of a deceased estate if they have an indefeasible, absolutely vested interest in the income – in other words, the beneficiaries have a claim or interest in the income that cannot be defeated by another person.

3.15 The beneficiaries must also be able to demand immediate payment of the income – this means that beneficiaries can be presently entitled, even though they may not have actually received an income distribution. These are the same principles that apply to the taxation of all trusts estates not just deceased estates They are drawn from the locus classicus *Saunders v Vautier (1841 EWHC ChJ 82).*

3.16 Generally, beneficiaries are not presently entitled to the income of a deceased estate during the administration of the estate. This is because the debtors of the deceased person and any persons contesting the will may be able to defeat the beneficiaries' right to the income. During this period, the income belongs to the deceased estate and not the beneficiaries.

3.17 As administration progresses, it may become clear that part of the net income of the deceased estate will not be required to either pay or provide for debts.

3.18 The legal personal representative may then exercise their discretion and pay some of the income to the beneficiaries. **The beneficiaries in this situation will be presently entitled to the income actually paid to them or actually paid to someone else on their behalf.**

3.19 Beneficiaries can be presently entitled if, under the terms of the will, money (income of the deceased estate) is applied for their benefit and not paid directly to them. An example is the payment of the beneficiary's rent.
No beneficiary is presently entitled to any income accrued by the deceased person at the date of death but only received after death.

3.20 For a full statement of the ATO's administrative position on "present entitlement" see Taxation Ruling IT 2622 - *Income tax: Present entitlement during the stages of administration of deceased estates*

Legal disability of beneficiary then the trustee will be taxed

3.21 People are considered to be under a legal disability if they cannot give a valid discharge for money paid to them. Beneficiaries are under a legal disability if they are:

a. minors – that is, under 18 years old as at 30 June of the relevant year.

b. bankrupt

d. declared legally incapable because of a mental condition.

3.22 When a person under a legal disability becomes presently entitled to income of the deceased estate, executors will be assessed for tax on their behalf. Under Section 98 ITAA 1936 this will be taxed at normal rates for resident beneficiaries and at higher non -resident rates for non -resident beneficiaries. Minors are also taxed at higher rates on the unearned income.

Income year in which the deceased estate is fully administered

3.23 In the income year in which the deceased estate is fully administered, the ATO will accept an apportionment of the net income received. Where the executors and beneficiaries are able to demonstrate the actual amounts of income derived in the periods before and after the day on which the estate was fully administered – through proper accounts at the completion of administration – then an apportionment may be made.

Where no Beneficiary is presently entitled then the trustee will be taxed under section 99 ITAA 1936

3.24 To the extent beneficiaries are not presently entitled to the net income of the deceased estate, the tax liability will rest with the deceased estate.

3.25 Superannuation death benefits and death benefit termination payments received by trustees or executors of deceased estates are taken to be income to which no beneficiary is presently entitled and therefore if they are taxable tax must be paid by the executor.

Taxation for first three income years is generally as for an individual

3.26 For the first three tax returns, the deceased estate income to which no beneficiary is presently entitled is taxed at the general individual rates as long as the estate is of the ordinary and traditional kind by reference to whether there is any avoidance, with the benefit of the full tax-free threshold, but without the tax offsets (concessional rebates), such as the low-income tax offset. No Medicare levy is payable.

The three years with the full tax-free threshold, cannot be extended.

Fourth income year and later

3.27 For deceased estates with prolonged administration that extend beyond the concessionally taxed period, there are special progressive trust tax rates that will apply and no Medicare levy is payable.

Beneficiary presently entitled and not under a legal disability then they are taxed under section 98 ITAA 1936

3.28 If the beneficiary is presently entitled and not under a legal disability, they are liable for tax. Beneficiaries who are presently entitled may need to lodge personal tax returns and disclose their trust distributions.

Non-resident beneficiary

3.29 If the beneficiary is a non-resident of Australia for tax purposes, the executor is liable to pay tax on the beneficiary’s share of the trust income distributed.
No Medicare levy is payable.

3.30 Interest and dividends are not included in the non-resident beneficiary's trust income. These are taxed by having a non-resident withholding tax deducted and paid . The withholding tax rate varies for different countries and between interest and dividends. Fully franked dividends are not subject to withholding tax. The trustee will be taxed on Australian source income and so much of worldwide income as relates to when the beneficiary was a resident.

4. CAPITAL GAINS TAX

4.1 Generally CGT can be triggered when a CGT event occurs. A capital gain occurs when a taxpayer receives an amount greater than the cost base to the taxpayer. A capital loss occurs when a taxpayer receives an amount less than the cost base.

4.2 A capital gain is discounted i.e. reduced by 50% when the taxpayer holds an asset for 12 months or longer. For these reasons the cost base and the date of acquisition are important and in relation to estates are for the most part deemed under the Acts.

4.3 The assets of the deceased becoming part of the estate is not a CGT event

4.4 When a person dies, the assets that make up their estate can pass directly to a beneficiary(ies), or pass directly to their legal personal representative who may dispose of the assets or pass them to the beneficiary (ies). This is either the executor, or an administrator appointed to wind up the estate if the person does not leave a will.

4.5 Capital gain or loss on death is disregarded under section 128-10 ITAA

SECT 128.10

Capital gain or loss when you die is disregarded

When you die, a * capital gain or * capital loss from a * CGT event that results for a * CGT asset you owned just before dying is disregarded.

Note 1: Section 104- 215 sets out an exception to this rule if the CGT asset passes to a beneficiary in your estate who is:

- an exempt entity; or
- the trustee of a complying superannuation entity; or
- a foreign resident.

Date of acquisition of the asset

4.6 The date of acquisition of those assets by the Legal personal representative of the deceased or the beneficiary is the date of death.

Cost base of asset , section 128-15 ITAA 1997 determines the cost base

4.7 If the assets are pre CGT they are deemed to have been acquired for consideration equal to market value as at the date of death.

4.8 If a deceased person acquired their asset on or after 20 September 1985, the cost base is taken to be the cost base (indexed where relevant), of the asset on the day the person died.

CGT on the deceased's principal place of residence

4.9 The principal place of residence of the deceased is treated differently. If it is not used for income producing purposes just prior to death or if this is elected by the beneficiary or legal personal representative then it is deemed to be acquired for consideration equal to market value as at the date of death under section 118-145 ITAA 1997.

Concessional rules do not apply where the beneficiary is a tax advantaged entity or a non-resident

4.10 The exception of no CGT event for deceased estates does not apply if a post-CGT asset owned at the time of death passes from the deceased to a tax-advantaged entity or to a non-resident. In these cases, a CGT event is taken to have happened in relation to the asset just before the person dies.

4.11 The CGT event in these cases will result in a capital gain if the market value of the asset on the day the person dies is more than the cost base of the asset, or a capital loss if the market value is less than the asset's reduced cost base.

Non Resident Beneficiary

4.12 If a non-resident is a beneficiary of a deceased's post-CGT asset, any capital gain or capital loss is not disregarded if the Deceased was an Australian resident when they died and the Asset does not have the necessary connection with Australia.

4.13 Examples of assets that do not have the necessary connection with Australia include:

- Real estate located overseas
- Shares in a non-resident company, and
- Shares in an Australian public company if the total number of shares owned is less than 10% of the value of shares in the company.

Net Capital Losses of the deceased

4.14 If the deceased had any unapplied net capital losses when they died, these cannot be passed on to the beneficiary or legal personal representative to offset against any net capital gains. They can only be used to offset against any capital gains of the deceased prior to death.

Assets passing to a Beneficiary or Legal Representative

4.15 If an executor sells a CGT asset of the deceased estate and then distributes the proceeds to the beneficiaries, the sale is subject to the normal CGT rules and a tax liability may arise. The cost base for a pre CGT asset will be the market value at date of death, for a post CGT asset it will be the deceased's cost base as at date of death (including indexation where applicable)

Passing of an asset to the beneficiary

4.16 Where the asset is passed by the legal personal representative to the beneficiary, in most cases, the transfer of CGT assets into a deceased estate and then out to their beneficiaries should not incur an income tax liability but a subsequent sale by the beneficiary generally will using an "inherited" cost base of the deceased if it is a post CGT asset and using a market value as at date of death cost base if it is a pre CGT asset of the deceased.

4.17 Passing includes:

- Under a will or will varied by court order
- By operation of intestacy law
- By appropriation to a beneficiary
- Under a deed of arrangement
- By absolute entitlement

Assets acquired by the Legal Personal Representative are subject to CGT in the normal way

4.18 If the legal personal representative acquires an asset (for example, to satisfy a specific legacy made) any capital gain or capital loss they make on disposal of that asset to the

beneficiary is subject to the normal CGT rules and there is no concessional treatment because it occurs in an estate .

No Separate Assets after death

4.19 If, before they died, a person made a major improvement to a pre-CGT asset on or after 20 September 1985, the improvement is not treated as a separate asset for CGT purposes as it would have been for the deceased taxpayer. I.e. the previously separate asset for CGT purposes merges on death to become one asset in the hands of the legal personal representative or beneficiary. Examples of separate assets are buildings on land and for which capital works deductions apply. I.e. generally not principal places of residence.

4.20 The beneficiary or legal personal representative is taken to have acquired the improved asset when the person died and it is one asset even though the deceased treated them as separate.

Expenditure is included in the cost base

4.21 Expenditure of the legal personal representative in relation to the property forms part of the cost base of the executor or for the beneficiary if it is transferred to them e.g. expenses on the validity of the will or in relation to say a property that would form part of the cost base and not be deductible are part of the cost base of the assets in the estate.

Collectables and personal use assets

4.22 A post-CGT asset that is a collectable or personal use asset maintains that status when acquired by the beneficiary or the legal personal representative. A capital gain on a personal use asset is exempt where it cost less than $10,000. Capital losses from personal use assets are disregarded. In relation to collectables capital losses from collectables can only be offset against capital gains from collectables.

Calculating capital gains tax on assets acquired from a deceased estate, the use of CGT discounting

4.23 If you receive an asset from a deceased estate, the 12-month period of asset ownership required to qualify for discounting is calculated from the time the deceased acquired the asset, not from the date of their death. For the CGT discount to apply, you must have acquired the asset at least 12 months before disposing of it. For the purposes of this

12-month ownership test, you are taken to have acquired the asset at one of the following times for:

-Pre-CGT assets, the date the deceased died, and this is as previously discussed at market value as at that date.

-Post-CGT assets, the date the deceased acquired it. Again this is part of an “inheriting” the cost base of the deceased.

Joint Tenancy/ Survivorship and Tenants in Common ITAA 1997 section 128-50

4.24 When a joint tenant dies, their interest in the property passes to the surviving joint tenants and it does not from part of the deceased estate. This is the operation of the law of survivorship.

4.25 When a tenant in common dies, their interest in the property is an asset of their deceased estate. This means it can be transferred only to a beneficiary of the estate or be sold (or otherwise dealt with) by the legal personal representative of the estate and the rules in relation to CGT assets and estates apply.

4.26 If one of the other joint tenants dies, on that date their interest in the asset is taken to pass in equal shares to the remaining joint tenants, as if their interest is an asset of their deceased estate and the remaining joint tenants are beneficiaries. The cost base rules relating to other assets of the deceased estate apply to the interest in the asset or the equal share of it, which passes to the surviving joint tenants. This is different to the normal CGT treatment of treating joint tenancy interests as tenants in common interests as a separate share and separate interest and asset for CGT purposes.

4.27 For the indexation and discount methods to apply, the survivors must have owned the asset, or their share of it, for at least 12 months. As a surviving joint tenant, for the purposes of this 12-month test, they are taken to have acquired the deceased's interest in the asset, or their share of it, at the time that the deceased person acquired it.

Example 1, CGT & Joint Tenants, pre CGT asset

4.28 Jack and Jill acquired land as joint tenants before 20 September 1985. So it is a pre CGT asset. Jack dies on 1 July 2005. For CGT purposes, Jill is taken to have acquired Jack's interest in the land at its market value at the date of his death.

4.29 Jill holds her original 50% interest as a pre-CGT asset, and the inherited 50% interest as a post-CGT asset, which she is taken to have acquired at its market value at the date of Jack's death.

4.30 If Jill sold the land within 12 months of Jack's death, she would still qualify for the CGT discount on any capital gains she makes on her post-CGT interest. She qualifies for the CGT discount because, for the purposes of the 12-month ownership test, she is taken to have acquired Jack's interest at the time when he acquired it, which was before 20 September 1985.

Example 2, CGT & Joint Tenants, post CGT asset

4.31 Dave and Barry buy land in 2002 for $100,000 as joint tenants. On 1 February 2014 Dave dies. For CGT purposes Barry has acquired Dave's interest on the date of death and inherits Dave's cost base as at the date of death in relation to Dave's share of the property. If Dave's cost base was $64,000 then that is the cost base of Dave's interest for Barry.

Passing of asset to remainder beneficiary on the death of a life tenant

4.32 The cost base of the remainder beneficiary on death of a life tenant is taken to be the market value as at the date of death of the deceased. TR 2006/14.

5. Superannuation death benefits ITAA 1997 Division 302

5.1 If there is a nominated beneficiary in the superannuation trust deed the superannuation fund will pay their remaining super to the person they have chosen as their nominated beneficiary. Super paid after a person's death is called a **'super death benefit'.**

5.2 If there are no binding death nominations, then the trustee of the super fund will decide how the benefit will be paid. Depending upon the trust deed, rules and regulations of superannuation, the trustee may pay it to the deceased estate, then the executor will deal with it accordingly as it is part of the estate.

5.3 Taxation of a super death benefit depends on:

- whether the person receiving the benefit is a dependant or non-dependant of the deceased person
- whether the benefit is paid as a lump sum or superannuation income stream
- whether the super is taxable or tax-free, and whether the super fund has already paid tax on the taxable component
- the age of the person receiving the benefit
- the age of the deceased person when they died.

There is no tax on the tax-free component of a death benefit.

5.4 If you receive a death benefit as the trustee of a deceased estate, the estate pays tax on behalf of the beneficiaries of the super. The amount of tax that the estate must pay is the same as it would have been if the payment was paid directly to the beneficiary, excluding the Medicare levy.

Death benefit dependants as defined in INCOME TAX ASSESSMENT ACT 1997 - SECT 302.195

5.5 You are a dependant of the deceased if, at the time of their death, you were one of the following:

- a surviving spouse or de facto spouse
- a former spouse or de facto spouse
- a child of the deceased who is under 18 years old
- any other person who was financially dependent on the deceased
- any person who had an ***interdependency relationship*** with the deceased.

5.6 If you are a non-dependant of a member of the Australian Defence Force or police force who died in the line of duty, the lump sum super death benefits you receive have the same tax treatment as a benefit paid to a dependant.

Interdependency relationship under INCOME TAX ASSESSMENT ACT 1997 - SECT 302.200

5.7 An interdependency relationship exists between two people where:

- they have a close personal relationship
- they live together, even if they are not related by family, and
- one or each of them provides the other with financial and domestic support and personal care.

5.8 There are a number of ATO rulings on this issue and if there is doubt a Private Binding Ruling should be sought relating to the particular facts.

Lump sum death benefit

5.9 A dependant of the deceased does not need to pay tax on any component of a superannuation death benefit if you receive it as a lump sum.

Death benefit income stream

5.10 A dependant pays tax on the taxable component of a death benefit received as an income stream at the rates shown in this table:

Age of beneficiary and deceased	Type of super	Effective tax rate (including Medicare levy)
Beneficiary is more than 60 years old **or** the deceased is more than 60 years old	Taxable component: taxed element	0%
	Taxable component: untaxed element	Your marginal tax rate less 10% tax offset
The beneficiary and the deceased are both under 60 years old	Taxable component: taxed element	Your marginal tax rate less 15% tax offset
	Taxable component: untaxed element	Your marginal tax rate

5.11 If you are under 25 years old and started receiving a death benefit as an income stream after 1 July 2007, you must stop the income stream and take the remaining benefit as a lump sum on or before the date you turn 25. The lump sum is tax free.

Non-dependants

5.12 To work out how your super payment will be taxed, you need to know how much of the money is a:

- tax-free component
- taxable component that the fund has paid tax on (the 'taxed element')
- taxable component that the fund has not paid tax on (the 'untaxed element').

5.13 If you are not a dependant of the deceased and you receive a death benefit as a lump sum, the taxable component of the payment will be taxed at your marginal tax rate. However, the amount of tax that you must pay may be reduced by tax offsets. The 'effective tax rate' that you will pay after these offsets are applied is described in this table:

Type of super	Effective tax rate
Taxable component: taxed element	Your marginal tax rate or 15%, whichever is lower, plus the Medicare levy
Taxable component: untaxed element	Your marginal tax rate or 30%, whichever is lower, plus the Medicare levy

6. TAXATION OF BEQUESTS TO CHARITIES and other like bodies (tax advantaged entities)

6.1 If you leave an asset to a tax exempt body it is prima facie a CGT event under 104.215 ITAA 1997 extracted hereunder

INCOME TAX ASSESSMENT ACT 1997 - SECT 104.215
Asset passing to tax-advantaged entity: CGT event K3

(1) ***CGT event*** ***K3*** happens if you die and a * CGT asset you owned just before dying * passes to a beneficiary in your estate who (when the asset passes):

(a) is an * exempt entity; or

6.2 Often all or part of an estate is left to a tax-exempt body. These are organisations that do not have to pay income tax; they include:

- public hospitals
- religious or charitable institutions
- superannuation funds
- approved deposit funds.

6.3 Capital gains tax can be payable on assets left to tax-exempt bodies where the assets were acquired by the deceased on or after 20 September 1985. The deceased is considered to have disposed of the assets to the tax-exempt body for current market value immediately before death. Any capital gain or loss is taken into account in the tax return, which declares income up to the date of death. The deceased's estate bears tax on any capital gain on assets. This is an exception to the general rule that there is no deemed disposal of an asset on the death of a person

6.4 **However, any capital gain or capital loss from a testamentary gift of property can be disregarded if the gift is made:**

Under the **Cultural Bequests Program** (which applies to certain gifts of property-not land or buildings-to a library, museum or art gallery) section 118-60 ITAA 1997, or

To a **deductible gift recipient ("DGR") or a registered political party** and the gift would have been income tax deductible if it had not been a testamentary gift. see Section 30-15 ITAA 1997 for what is deductible gift recipient

SECT 118.60

(1) A * capital gain or * capital loss made from a testamentary gift of property that would have been deductible under section 30-15 if it had not been a testamentary gift is disregarded

7. STAMP DUTY

7.1 **Nominal duty of $50 only** is payable on the transfer of dutiable property to a beneficiary by the legal personal representative of a deceased person if it is conformity with the will under *section 63 of Duties Act 1997 NSW*. This applies to land related property.

7.2 Section 163A(d) Duties Act 1997 achieves the same result generally for intestacy and Family Provision Act orders.

8.TESTAMENTARY TRUSTS

8.1 A Testamentary Trust is simply a trust written into a will or taking effect under a will.

8.2 For capital Gains Tax Trustees of testamentary trusts are treated in the same way as the legal personal representative under ATO administrative guidance being PS LA 2003/12 and TR 2006/14.

8.3 Apart from other benefits from a taxation perspective it can have the following advantages:

1) Income Splitting

2) Transfers in accordance with the trust are CGT and stamp duty exempt.

3) Tax effective gifts to charities that would otherwise be taxable as they are tax exempt but not part of the exception for charitable bequests or DGR's as dealt with above. For example a particular Church or School

Declan Joseph Jarrett

Edmund Barton Chambers

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Jarrett@ebc44.com

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