



## Class Ruling

### Income tax: deductibility of donations to Launch Housing Limited under a Payment Direction Deed

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>What this Ruling is about</b>	<b>1</b>
<b>Relevant provisions</b>	<b>2</b>
<b>Class of entities</b>	<b>3</b>
<b>Qualifications</b>	<b>4</b>
<b>Date of effect</b>	<b>7</b>
<b>Scheme</b>	<b>8</b>
<b>Ruling</b>	<b>22</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1: Explanation</b>	<b>24</b>
<b>Appendix 2: Detailed contents list</b>	<b>77</b>

#### **1 This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant provisions

2. The relevant provisions dealt with in this Ruling are:

- subsection 26-55(1) of the Income Tax Assessment Act 1997 (ITAA 1997)
- subsection 26-55(2) of the ITAA 1997
- Division 30 of the ITAA 1997
- Subdivision 30-B of the ITAA 1997
- section 30-15 of the ITAA 1997
- section 30-17 of the ITAA 1997
- section 30-45 of the ITAA 1997
- subsection 30-45(1) of the ITAA 1997

- section 30-120 of the ITAA 1997
- subsection 30-228(1) of the ITAA 1997
- Subdivision 30-DB of the ITAA 1997
- section 30-247 of the ITAA 1997
- section 30-248 of the ITAA 1997, and
- subsection 995-1(1) of the ITAA 1997.

## **Class of entities**

3. The class of entities to which this Ruling applies is Landlords who:

- participate in the Affordable Housing Initiative, and
- make a donation amount to Launch Housing Limited pursuant to a Payment Direction Deed.

## **Qualifications**

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 21 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

## **Date of effect**

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7. This Ruling applies from 22 April 2015. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## **Scheme**

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8. The following description of the scheme is based on information provided by the applicant.

9. Launch Housing Limited was registered on 2 April 2015 as an Australian public company limited by guarantee.

10. Launch Housing Limited is a registered Public Benevolent Institution, registered under the *Australian Charities and Not-for-profits Commission Act 2012* effective from 22 April 2015.

11. Launch Housing Limited is endorsed as a Deductible Gift Recipient (DGR) effective from 22 April 2015.

12. Launch Housing Limited will conduct the Affordable Housing Initiative which is a series of arrangements between Landlords, tenants and Launch Housing Limited.

13. The Affordable Housing Initiative involves Launch Housing Limited coupling Landlords who would like to 'make a difference' with tenants who are on low incomes, are priced out of the market and are at risk of becoming homeless, or are currently experiencing homelessness.

14. Launch Housing Limited will act in at least two capacities. Firstly, Launch Housing Limited will undertake all of its usual DGR activities which includes (but is not limited to) accepting government funding and tax deductible gifts from Landlords and the general public, using those funds to provide services to the homeless and those at risk of homelessness. Secondly, Launch Housing Limited will act as agent for the Landlords under the Affordable Housing Initiative in accordance with a standard agency agreement.

15. Launch Housing Limited will have a real estate department (Launch's real estate department) and a philanthropic department (Launch's philanthropic department). Launch's real estate department will be 'the Agent' in the arrangement and Launch's philanthropic department will provide rental subsidies.

16. A description of the Affordable Housing Initiative is:

- The Landlord enters into a standard agency agreement with Launch's real estate department (the Agent).
- The Agent identifies tenants that meet certain eligibility criteria for participation in the Affordable Housing Initiative.
- The Agent and the prospective tenant agree on how much the tenant can afford to pay as monthly rent.
- The Agent submits a request to Launch's philanthropic department for a rental subsidy, being the difference between what the prospective tenant can afford to pay and typical market rent.
- Launch Housing Limited agrees to enter into a subsidy agreement with the tenant where Launch's philanthropic department will be responsible for providing financial assistance to the tenant (that is, the difference between the market rent and what the tenant has agreed to pay).

- The Agent identifies a suitable Landlord for the proposed tenancy.
- A standard residential lease agreement between the Landlord and the tenant is entered into.
- The rent stipulated under the lease agreement is market rent.
- Just prior to the tenant entering into the lease agreement, Launch Housing Limited furnishes a signed letter to the tenant confirming the details of the subsidy agreement. The letter stipulates the amount Launch's philanthropic department will fund by way of a subsidy to the tenant and the amount that the tenant is required to pay. In both cases these amounts are payable to the Agent.
- During the lease period, the tenant pays their share of the rent obligation to the Agent. Launch's philanthropic department pays the subsidy to the Agent in accordance with the subsidy agreement.
- The Agent collects the rent, deducts various outgoings (such as, council rates, insurance, and management fees) and remits the net rent amount (rent under the lease agreement less outgoings) to the Landlord in accordance with the agency agreement.
- Commissions levied to the Landlord by the Agent are calculated on the gross rental income (that is market rent) less any donation made.
- During the terms of the tenancy, the Landlord may enter into a Payment Direction Deed under which the Agent deducts donations from the Landlord's gross rental receipts and pays them to Launch's philanthropic department periodically.
- Launch Housing Limited issues the Landlord a receipt for the donation amount.
- The Landlord's right to receive market rent is created by the lease agreement with rent being payable irrespective of whether the Landlord decides to make a donation or not.

17. Landlords are not required to enter into a Payment Direction Deed.

18. The purpose of the Payment Direction Deed is to facilitate payment of the donation without the need for the cash flow to occur on a monthly basis and for administrative efficiency.

19. Under the Payment Direction Deed:

- The Landlord directs the Agent, Launch's real estate department, to deduct the donation amount from each

monthly rental payment and pay the donation amount to Launch's philanthropic department within 5 business days of the Agent receiving the monthly rental payment.

- Launch Housing Limited agrees to accept the donation amount as a donation to further its charitable purposes and issue a receipt in the name of the Landlord for the donation amount received.
- The Payment Direction is revocable at the option of the Landlord by giving the Agent and Launch Housing Limited 5 business days' written notice.
- Launch Housing Limited acknowledges that the Payment Direction Deed does not constitute an ongoing promise to donate donation amounts and that the payment direction is revocable.
- The Landlord acknowledges that:
  - each donation amount is a donation to Launch Housing Limited
  - a donation amount may be used for any purpose at the absolute discretion of Launch Housing Limited which is consistent with its obligations under the ITAA 1997
  - Launch Housing Limited has not made any representations with respect to the allocation of any particular donation amount to a particular purpose or property, and
  - by paying each donation amount in accordance with the Payment Direction Deed the Agent will have discharged all of its obligations under the Payment Direction Deed in respect of deducting the donation amounts from the Landlord's rent and paying the donation amounts to Launch's philanthropic department.

20. The Landlord, or associate of the Landlord, does not receive any advantage or benefit from Launch Housing Limited, Launch Housing Limited in its capacity as the Landlord's agent, the tenant or any other party as a consequence of making the donation to Launch Housing Limited.

21. Donations by the Landlord do not reduce or discharge any liability or obligation owing to Launch Housing Limited.

## **Ruling**

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22. Amounts deducted from the Landlord's gross rental receipts and paid to Launch Housing Limited, in accordance with a valid and executed Payment Direction Deed under the Affordable Housing

Initiative, are tax deductible gifts under section 30-15 of the ITAA 1997.

23. Landlords can claim a tax deduction for their donation amounts, however the donation amounts cannot add to or create a tax loss under subsection 26-55(2) of the ITAA 1997.

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**Commissioner of Taxation**

22 June 2016

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## Appendix 1 – Explanation

**!** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### **Donation amounts are gifts**

24. The issue of what is a gift for the purposes of Division 30 of the ITAA 1997 is dealt with in Taxation Ruling TR 2005/13 *Income tax: tax deductible gifts*.

25. The word 'gift' is not defined in the ITAA 1997. For the purposes of Division 30 of the ITAA 1997 the word 'gift' has its ordinary meaning as established by case law.

26. The courts have determined that a payment is a gift if it has the following characteristics and features:

- the donor transfers money or property
- the donor makes the transfer voluntarily
- the transfer arises by way of benefaction, and
- there is no material benefit or advantage for the donor.

27. These characteristics are not absolute and may involve a matter of degree. In determining whether a transfer is a gift it is necessary to consider the whole set of circumstances that provide context and explanation for the transfer.

### ***Transfer of money or property***

28. The making of a gift involves the transfer of a beneficial interest in property to the recipient of the gift.

29. In each case it is necessary to ascertain whether a transfer has occurred, what property has been transferred and when the transfer took place. This is to ensure that ownership of identifiable property has been divested and transferred to the recipient.

30. The giver must have proprietary rights in the property just prior to its transfer. When money or property is transferred to the recipient, the recipient must receive full title, custody and control of the property so that the recipient is entitled to deal with the property in its own right.

31. The transfer may still be a gift when it is made by way of an agent. In an agency relationship, an agent has an authority or capacity to create or affect legal relations between a principal and third parties. Generally speaking, what a person may do themselves, the person may do by an agent. If an agent discloses his principal's name (or at least the existence of a principal) to the third party with whom he is dealing, the agent himself is not normally entitled to the

benefit of, or be liable on, the contract. Therefore, an agent does not have beneficial interest in the property being transferred.

32. Under the terms of the Payment Direction Deed, the Landlord directs Launch's real estate department, in its capacity as agent for the Landlord, to deduct a specified donation amount from each monthly rental payment and pay it directly to Launch's philanthropic department. Nothing prevents a transfer from being a gift where it is made through agent, as long as the beneficial interest remains with the donor just prior to the transfer and beneficial interest transfers to the recipient. This is the case with this arrangement. The Landlord retains beneficial interest in the money just before it is paid to Launch's philanthropic department.

33. When the money is transferred, Launch Housing Limited has full beneficial ownership and control of the money. Launch Housing Limited has absolute discretion on how the amount may be used, consistent with its purposes. The amount does not have to be used to pay subsidies on that Landlord's particular property. It forms part of the general funds used to finance the operations of the organisation, including payment of rental subsidies to tenants generally.

34. The gift is made by the Landlord when Launch's rental department transfers the donation amount to Launch's philanthropic department.

### ***Transfer made voluntarily***

35. A transfer must be made voluntarily in order for it to be a gift. It must be the act and will of the giver and there must be nothing to interfere with or control the exercise of that will. However, a transfer made under a sense of moral obligation is still made voluntarily.

36. A transfer is not made voluntarily if it is made for consideration or because of a prior obligation imposed on the giver by statute or by contract. Nonetheless, a transfer that has the other attributes of a gift will not fail to be considered a voluntary transfer merely because the means used to give effect to the benefaction have contractual or similar features.

37. Even though the arrangement for the donation to Launch Housing Limited under the Payment Direction Deed has a contractual nature, the donation is voluntary.

38. A Landlord is under no obligation to enter into the Payment Direction Deed and the Payment Direction Deed is revocable. The Payment Direction Deed does not constitute an ongoing promise to make donations to Launch Housing Limited.

### ***Arises by way of benefaction***

39. A gift should intend and confer benefaction on the recipient. Benefaction means that the recipient is advantaged materially without any detriment arising from the terms of the transfer.



40. Where the giver is aware that the transfer will result in detriments, disadvantages, obligations, liabilities or limitations to the recipient, benefaction may be missing.

41. A gift ordinarily proceeds from detached and disinterested generosity. There may be a variety of reasons and motivations behind the giver making a gift. However, the fact that the giver has a personal motive for making the gift, such as a strong interest or emotional involvement in the work of the recipient, will not disqualify a transfer from being a gift.

42. In cases where the giver gives a gift for self-interested commercial or fiscal reasons rather than conferring benefaction on the recipient, it contradicts any objective to confer benefaction. However, a motive of seeking a tax deduction does not, by itself, disqualify a transfer from being a gift.

43. The donation by the Landlord is a transfer of money which materially benefits Launch Housing Limited with no detriment.

44. There is little commercial reason for the Landlord to provide the donation. The donation has no link with management fees owing to Launch's rental department by the Landlord; as such fees are required and paid under the terms of the leasing and managing authority. Additionally, the Landlord has the right to receive market rent under the lease agreement, which is payable irrespective of whether the Landlord decides to make a gift or not. Therefore, the gift confers benefaction to Launch Housing Limited.

### ***No material benefit or advantage***

45. To constitute a gift, the giver or an associate of the giver must not receive a material benefit or advantage from the transfer. It does not matter whether the material benefit or advantage comes from the recipient or another party.

46. It is a question of fact in each case whether any benefit or advantage is considered material. A benefit or advantage can be material if there is a link between the benefit and the transfer, and the benefit is sufficiently significant in relation to the value of the transfer.

47. The Landlord or an associate of the Landlord does not receive a material benefit or advantage from making the donation to Launch Housing Limited under the Payment Direction Deed.

48. The Landlord has the right to receive market rent for their property under the standard residential lease agreement, which is payable irrespective of whether the Landlord decides to make a gift or not. Further, the Landlord enters a standard agency agreement with Launch's real estate department whereby management fees owing to Launch's rental department by the Landlord are required and paid, regardless of whether the Landlord decides to make a gift or not.

## ***Donation amounts are gifts***

49. Donation amounts paid by the Landlord to Launch Housing Limited under the Payment Direction Deed have the characteristics and features of a gift. The Landlord is making a voluntary transfer of money, which confers benefaction on Launch Housing Limited and there is no material benefit or advantage for the Landlord.

## **Tax deduction on donation amounts**

50. A donor can claim a tax deduction for a gift if the requirements in section 30-15 of the ITAA 1997 are satisfied. The table in section 30-15 specifies the type of gift that can be made, who the recipient of the gift can be, how much can be deducted for the gift, and any special conditions that apply.

## ***Type of gift***

51. Item 1 of the table in section 30-15 of the ITAA 1997 lists the type of gifts that can be made and includes gifts of money. Money includes foreign currency and can be paid in various ways, including by cash, cheque, credit card or electronically.

52. Under the Payment Direction Deed the Landlord directs the Agent, Launch's real estate department, to deduct the donation amount from each monthly rental payment and to pay the donation amount to Launch's philanthropic department.

53. Donation amounts made by Landlords under the Payment Direction Deed are a gift of money.

## ***Gift Recipient***

54. Item 1 of the table in section 30-15 of the ITAA 1997 states that gifts of money can be made to recipients who are included in the tables in Subdivision 30-B of the ITAA 1997.

55. Subdivision 30-B of the ITAA 1997 includes section 30-45 of the ITAA 1997. Item 4.1.1 of the table in subsection 30-45(1) of the ITAA 1997 includes recipients who are 'a registered public benevolent institution'.

56. Gifts of money can therefore be made to a recipient that is a registered public benevolent institution.

57. 'A registered public benevolent institution' is defined in subsection 995-1(1) of the ITAA 1997:

***registered public benevolent institution*** means an institution that is:

(a) a \*registered charity; and

(b) registered under the *Australian Charities and Not-for-profits Commission Act 2012* as the subtype of entity mentioned in

column 2 of item 14 of the table in subsection 25-5(5) of that Act.

58. Gifts to a registered public benevolent institution will however only be deductible if the registered public benevolent institution is also endorsed as a deductible gift recipient, or is named in Subdivision 30-B of the ITAA 1997. This is required by the special conditions in Item 1 of the table in section 30-15 of the ITAA 1997 and by section 30-17 of the ITAA 1997.

59. Launch Housing Limited is:

- a registered public benevolent institution as defined in subsection 995-1(1) of the ITAA 1997
- a recipient described in Item 4.1.1 of the table in subsection 30-45(1) of the ITAA 1997
- a recipient to whom gifts may be made, as specified in section 30-15 of the ITAA 1997, and
- endorsed as a deductible gift recipient pursuant to section 30-120 of the ITAA 1997.

60. Donation amounts paid by Landlords participating in the Affordable Housing Initiative to Launch Housing Limited under a Payment Direction Deed are gifts to a registered public benevolent institution that is endorsed as a deductible gift recipient.

61. Gifts made to Launch Housing Limited by the Landlords whilst it is endorsed as a deductible gift recipient will be tax deductible.

### ***Amount of gift that can be deducted***

62. Item 1 of the table in section 30-15 of the ITAA 1997 states the amount you can deduct for a gift of money is the amount you are giving.

63. The value of the gift must however be \$2 or more, as specified in the special conditions in Item 1 of the table in section 30-15 of the ITAA 1997. A donor can add together a series of gifts in an income year to work out whether the gift is \$2 or more.

64. However, a deduction for a gift cannot add to or create a tax loss for the donor.

65. Subsection 26-55(1) of the ITAA 1997 states there is a limit on the total amount you can deduct for the income year under section 30-15 of the ITAA 1997. The limit is calculated pursuant to subsection 26-55(2) of the ITAA 1997 and in effect means the deduction can reduce the donor's assessable income to nil in the tax year in which the gift is made, but any excess cannot be claimed in that year or carried forward to a later year as a tax loss.

66. Whilst a deduction for a gift cannot add to or create a tax loss for the donor, Subdivision 30-DB of the ITAA 1997, and in particular section 247 of the ITAA 1997, allows donors to elect to spread a tax

deduction for a gift of money of \$2 or more, over up to 5 years where the gift was made to a deductible gift recipient that is a registered public benevolent institution.

67. If a donor chooses to spread a deduction the election must be made as specified in section 30-248 of the ITAA 1997, including:

- the election must be in the approved form and must be made before lodging the tax return for the year in which the gift was made
- the election must start in the year the gift was made and can continue up to four of the years immediately following, and
- the election must contain the percentage to be claimed each year, which may be different in each year, but the total percentage must not exceed 100% over the years.

68. Landlords participating in the Affordable Housing Initiative, who enter into a Payment Direction Deed with Launch Housing Limited, can claim a tax deduction for their donation amount, where the donation amount is \$2 or more. However, the amount claimed as a deduction by the Landlord cannot add to or create a loss. The Landlord may elect to spread the tax deduction over up to 5 years.

## ***Record Keeping***

69. Donors should keep records of all tax deductible gifts they make including the date the gift was made, the name of the deductible gift recipient to which the gift was made, the amount of the gift, a description of the gift and any election to spread the gift.

70. Deductible gift recipients are not required by the tax law to issue receipts for gifts, but when they do issue receipts they must include the information specified in subsection 30-228(1) of the ITAA 1997.

71. A receipt issued by a deductible gift recipient for a gift must include:

- the name of the deductible gift recipient
- the ABN of the deductible gift recipient, and
- that the receipt is for a gift.

72. Other useful information that deductible gift recipients can include in a receipt for a gift includes:

- the amount of money donated
- a description of any gifts of property, and
- the date of the gift.

73. If a donor does not have a receipt, they should keep any other statement or record with details of their gift.

74. Under the Affordable Housing Initiative and the Payment Direction Deed Launch Housing Limited will issue a receipt for a tax deductible gift to the Landlord for the donation amount.

75. Receipts issued by Launch Housing Limited for gifts must include its name, and ABN, and that the receipt is for a gift. Other useful information that Launch Housing Limited could include in the receipt is the amount of money donated and the date of the gift.

76. Landlords should keep records of all donation amounts paid to Launch Housing Limited. This includes receipts issued by Launch Housing Limited for the donation amounts, the Payment Direction Deed and any other records or statements that provide details of the gift. If an election has been made to spread the deduction for the gift, the election, and any variations to the election, should also be kept by the Landlord.

## **Appendix 2 – Detailed contents list**

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77. The following is a detailed contents list for this Ruling:

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
Relevant provisions	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>7</b>
<b>Scheme</b>	<b>8</b>
<b>Ruling</b>	<b>22</b>
<b>Appendix 1 – Explanation</b>	<b>24</b>
<i>Donation amounts are gifts</i>	24
<i>Transfer of money or property</i>	28
<i>Transfer made voluntarily</i>	35
<i>Arises by way of benefaction</i>	39
<i>No material benefit or advantage</i>	45
<i>Donation amounts are gifts</i>	49
<i>Tax deduction</i>	50
<i>Type of gift</i>	51
<i>Gift Recipient</i>	54
<i>Amount of gift that can be deducted</i>	62
<i>Record keeping</i>	69
<b>Appendix 2 – Detailed contents list</b>	<b>77</b>

## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2005/13, TR 2006/10

*Legislative references:*

- ITAA 1997
- ITAA 1997 26-55(1)
- ITAA 1997 26-55(2)
- ITAA 1997 Div 30
- ITAA 1997 Subdiv 30-B

- ITAA 1997 30-15
  - ITAA 1997 30-17
  - ITAA 1997 30-45
  - ITAA 1997 30-45(1)
  - ITAA 1997 30-120
  - ITAA 1997 30-228(1)
  - ITAA 1997 Subdiv 30-DB
  - ITAA 1997 30-247
  - ITAA 1997 30-248
  - ITAA 1997 995-1(1)
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ATO references

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