Australian Government
Australian Taxation Office

Public advice and guidance compendium – TR 2019/6

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft TR 2018/D1 *Income tax: the 'in Australia' requirement for certain deductible gift recipients and income tax exempt entities*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	**Authority for the ATO view on the 'deductible gift recipient (DGR) in Australia' condition** There is no authority offered to support the view that a fund authority or institution will be in Australia: • if it is established or legally recognised in Australia, and • operates in Australia. There is also no authority offered which requires managerial and operational decision-making to occur in Australia. It is unclear what level of presence, control or kind of organisational structure is required to exist in Australia, particularly for entities established overseas.	This Ruling has been developed to address the lack of guidance from case law on the meaning of the DGR in Australia condition under Division 30 of the *Income Tax Assessment Act 1997* (ITAA 1997). The final Ruling recognises that a variety of organisational structures may satisfy the DGR 'in Australia' condition – see paragraphs 8, 11, 12 and 34. The Ruling requires Australia to be a focal point of the DGR in a legal or organisational sense; however, this can be achieved by operational or strategic decisions being made mainly in Australia – see paragraphs 6, 7, 13, 19, 35, 36 and 42.
2	**Example 2** Example 2 of the draft Ruling is problematic. A public fund controlled by an executive committee made up of three Australian and two Japanese members. Because the executive committee meets regularly in Japan and makes its decisions there, the public fund does not satisfy the 'in Australia' requirement. What would happen if the meetings were held in Australia or by teleconference?	Example 2 has been revised in the final Ruling.

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3	**Example 5** Example 5 of the draft Ruling is problematic. Is the location of the board the determining factor or is it the location of the Chief Executive Officer and general manager?	Example 4 (previously Example 5 of the draft Ruling) has been revised in the final Ruling. Additionally, Examples 5 and 6 have been added in the final Ruling to provide greater clarity.
4	**Incurs expenditure principally in Australia: location of recipient** Paragraph 54 of the draft Ruling places undue emphasis on the location of the recipient of the expenditure. This is inconsistent with paragraph 73 of the *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 (*Word Investments*): > The decisions to pay were made in Australia, the payments were made in Australia, the payments were made to Australian organisations, and the objects of Word included giving financial assistance to those organisations. The incurring of the expenditure and the pursuit of Word's objectives in this way took nowhere but in Australia.	Paragraphs 54 to 73 have been revised in the final Ruling to provide greater clarity. The analysis draws a distinction between expenditure in the form of a distribution, as considered in *Word Investments*, and expenditure incurred on goods or services.
5	**Incurs expenditure principally in Australia: uncertainty** It is not clear from applying the expenditure test in paragraph 54 of the draft Ruling that an organisation is located in Australia when an organisation: • is formed (whether incorporated or settled) in Australia • is formed in Australia and holds its board meetings (central management and control) in Australia but has all its operations overseas • has central management and control overseas with occasional board meetings in Australia with some operations in Australia • has central management and control overseas with day-to-day management in Australia relating to Australian and overseas operations • has central management and control overseas but conducts its operations through an agent in Australia	Paragraphs 54 to 73 have been revised in the final Ruling to clarify the meaning of 'incurs expenditure and pursue objectives principally in Australia'. The final Ruling does not seek to deal comprehensively with the circumstances in which expenditure is incurred in Australia as ultimately this will be a question of fact for each case. However, we will give consideration to whether further guidance in another form (for example, guidance on ato.gov.au) is required in relation to the circumstances described. See also the response to Issue 4 of this Compendium.

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	• has central management and control overseas with an Australian office which constitutes a permanent establishment in Australia • has central management and control overseas who sends staff to Australia to fundraise or for a public awareness campaign. A suggestion is to discard the test in paragraph 54 of the draft Ruling and substituting a simple and practical 'physical and spatial test'.	
6	**Example 7: uncertainty** Example 7 of the draft Ruling appears to have incorrectly applied the factors in paragraph 54 of the draft Ruling as it places too much weight on the location of the headquarters of XYZ Society in scenario (c) and has not applied the 'whole of the circumstances' approach as outlined in paragraph 54.	See the response to Issue 4 of this Compendium regarding a revised explanation of the requirement to incur expenditure and pursue objectives principally in Australia. We consider the treatment of the distribution to XYZ Society to be correct in Example 7 of the draft Ruling. See paragraph 69 of the final Ruling.
7	**Example 7: gifts with direction** Example 7 of the draft Ruling does not deal with situations where an Australian entity gives a gift with a direction to use it in a particular way overseas. The purposes of the recipient are impressed on the giver – you should not be able to do indirectly what you cannot do directly.	Example 12 of the final Ruling (previously Example A2 in the draft Ruling) deals with a grant made on the condition that funds are spent in Australia. The final Ruling is not able to cover every factual scenario. However, we will give consideration to whether further guidance in another form (for example, guidance on ato.gov.au) is required in relation to circumstances of the kind described.
8	**Examples 8 and 9: services performed overseas** Examples 8 and 9 of the draft Ruling place too much emphasis on where the goods or services are consumed or where funds are received. The expenditure is treated as not being incurred in Australia, even though it comprises payments made in Australia to Australian subcontractors. Examples 8 and 9 of the draft Ruling require the Australian entity to trace expenditure through a third-party contractor to the place where the services are consumed. Paragraph 54 of the draft Ruling is so broad it does not provide any	See the response to Issue 4 of this Compendium on a revised explanation of the requirement to incur expenditure and pursue objectives principally in Australia. Example 10 of the final Ruling (previously Example 8 of the draft Ruling) has been revised accordingly. Paragraph 61 of the final Ruling clarifies in the context of incurring expenditure that the required connection will ordinarily exist where the decision to pay is made in Australia.

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	useful guidance in practice and the examples serve to confuse the issue. The test for determining whether the objects are pursued principally in Australia should be whether all strategic decisions are made in Australia (by a local board and management team). This position should not be altered because of a separate concept of activities or where those activities take place – where objectives are pursued and where activities take place are two separate issues that require separate analysis and should not be conflated.	
9	**Examples for the 'Division 50 in Australia' condition** It would be helpful if the Division 50 examples dealt with situations where the services of the charity are consumed outside of Australia, particularly: • a cultural organisation which regularly performs overseas • an education charity whose principal method of education is online.	The final Ruling now contains guidance on common factual scenarios: • Example 8 of the final Ruling considers an entity which distributes educational material online. • Example 12 of the final Ruling considers a cultural organisation with some offshore activities. The final Ruling is not able to cover every factual scenario; however, we will give consideration to whether further guidance in another form (for example, guidance on ato.gov.au) is required in relation to any additional common factual scenarios.
10	**Disregarded amounts: government grants** Further clarification should be given to the meaning of 'government grants' in paragraph 59 of the draft Ruling. The distinction between government grants and payments for services provided under contract is not clear and too difficult to discern in practice. A suggestion is to replace the words 'but do not include payments made by government for services provided under contract' with 'payments made by government by way of fee for service'.	Whether an amount is a government grant is a question of fact which is beyond the scope of this Ruling. The reference to 'services provided under contract' has been removed from the final Ruling. Example 12 of the final Ruling (previously Example A2 of the draft Ruling) deals with a government grant made on the condition that funds are spent in Australia.
11	**Disregarded amounts: meaning of gift** Paragraphs 57 to 60 of the draft Ruling make reference to the meaning of 'gift' which may affect the interpretation of 'what is a gift' in Taxation Ruling TR 2005/13 *Income tax: tax deductible gifts –*	Footnote 34 of the final Ruling clarifies that the Ruling does not consider the ordinary meaning of the word 'gift' which applies in other contexts.

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	what is a gift. In TR 2005/13 a 'conditional grant' received by a charity (which maintains a gift fund with DGR status) is not considered to be a 'gift' for the purposes of TR 2005/13. However, paragraphs 58 to 60 of the draft Ruling indicate that the meaning of 'gift' is extended depending on the context.	
12	**Disregarded amounts: identifying gifts** It may be difficult in practice for non-DGR entities to determine whether amounts received from an anonymous source are gifts. There may be situations where these amounts are in fact family trust distributions.	The final Ruling does not seek to deal comprehensively with the circumstances in which an amount is received as a gift. This is a question of fact, to be determined in the circumstances of each case. However, we will give consideration to whether further guidance in another form (for example, guidance on ato.gov.au) is required in order to clarify the treatment in these circumstances.
13	**Distributions from DGRs** There should be more explanation for the condition in subsection 50-75(2) of the ITAA 1997 – where an entity makes a distribution from a fund that it operates which is a DGR.	In most instances it will be a straightforward application of the law to the facts. This is a question of fact, to be determined in the circumstances of each case.
14	**Compliance approach** It would be useful to clarify whether the compliance treatment in paragraph 102 of the draft Ruling depends on whether the gift or grant has only been distributed in the way described in footnote 48 of the draft Ruling.	The compliance approach outlined in the draft Ruling has been replaced by paragraph 79 and Example 12 in the final Ruling (previously Example A2 in the draft Ruling). The final Ruling clarifies that the treatment of disregarded amounts must be consistent with any conditions attaching to the amount received by way of gift or grant.
15	**Disregarded amounts: example A2** In Example A2 of the draft Ruling, it would be helpful to state that the entity is on the register of cultural organisations, and have it receive a distribution from a DGR (for example, a public fund).	These changes have been reflected in Example 12 of the final Ruling (previously Example A2 in the draft Ruling).

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16	**Disregarded amounts: further example** An example should be included which illustrates what happens if the entity only undertakes fundraising or awareness activities in Australia and only distributes disregarded amounts for their overseas purpose.	The final Ruling is not able to cover every factual scenario, however Example 12 of the final Ruling (previously Example A2 in the draft Ruling), illustrates a situation where a disregarded amount is distributed offshore. We will give consideration to whether further guidance in another form (for example, guidance on ato.gov.au) is required in relation to circumstances of the kind described.
17	**Refund of franking credits condition** It is unclear what is meant by the reference to disregarded amounts in paragraph 94 of the draft Ruling.	Footnote 42 of the final Ruling clarifies that disregarded amounts do not apply in the context of the conditions relating to the refund of franking credits in section 207-117 of the ITAA 1997.