


CR 2003/112 - Income tax: assessable income: Distributions made by ClubBIZ to NSW registered clubs

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Class Ruling

Income tax: assessable income: Distributions made by ClubBIZ to NSW registered clubs

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Preamble

*The number, subject heading, and the **What this Class Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. CR 2001/1 explains **Class Rulings** and **Taxation Rulings** TR 92/1 and TR 97/16 together explain when a **Ruling** is a 'public ruling' and how it is binding on the Commissioner.*

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

What this Class Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax laws' identified below apply to the defined class of persons, who take part in the arrangement to which this Ruling relates.

Tax law(s)

2. The tax laws dealt with in this Ruling are subsection 97(1), sections 99A and 101 of the *Income Tax Assessment Act 1936* (ITAA 1936) and sections 6-5, 15-10 and subdivision 20-A of the *Income Tax Assessment Act 1997* (ITAA 1997).

Class of persons

3. The class of persons to which this Ruling applies are clubs registered under the *Registered Clubs Act 1976* (NSW) who are the objects of the discretionary trust, ClubBIZ, and are not exempt entities for the purposes of Division 50 of the ITAA 1997.

Qualifications

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

5. The class of persons defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangement described in paragraphs 10 to 30.

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

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- this Ruling may be withdrawn or modified.

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Date of effect

8. This Ruling applies from 3 October 2002. However, this Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20). Furthermore this Ruling applies to the extent that the relevant tax laws are not amended.

Withdrawal

9. This Ruling is withdrawn and ceases to have effect after 31 December 2013. The Ruling continues to apply, in respect of the tax laws ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to the withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Arrangement

10. The arrangement that is the subject of the Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- The Application for Class Ruling dated 11 April 2003;
- The ClubBIZ Trust Deed of Settlement;
- Submission for funding under the Club Industry Assistance Scheme.

11. On 27 May 2002, the NSW Government announced a special industry assistance scheme for NSW registered clubs which were experiencing financial difficulty. The scheme provided for a \$9 million grant to be made to the ClubBIZ Trust (ClubBIZ) such that these funds can then be made available to assist clubs.

12. The \$9 million grant was funded from the accumulation of unclaimed prize money in the Keno Prize Fund account, which is governed by the *Public Lotteries Act 1996* (NSW) and its relevant regulations.

13. The Registered Clubs Association of NSW (RCA), acting in its capacity as the representative body of the clubs in NSW, has obtained the support of the NSW Government for the establishment of a separate trust fund for the purposes of the management, administration and distribution of funds under the proposal.

14. On 3 October 2002, a Deed of Settlement between Patrick Allan Rogan (the settlor) and ClubBIZ Holdings (the trustee) was made to establish the ClubBIZ Trust. The Policies and Rules of the ClubBIZ Trust are appended to the Deed.

15. RCA has a wholly owned subsidiary – Clubs NSW Pty Ltd (Clubs NSW).

16. ClubBIZ has one issued share which is held by Clubs NSW.

17. ClubBIZ will manage, administer and distribute funding from the trust in accordance with the Trust Deed.

18. The trust is a discretionary trust with no person having fixed entitlements to income or capital. The class of discretionary objects in relation to both the income and capital of the trust is limited to the registered clubs in NSW from time to time (i.e. clubs holding a

certificate of registration under the *Registered Clubs Act 1976* (NSW))¹.

19. The Trust Deed provides that ClubBIZ may accumulate and retain in the fund so much of the net income derived in a particular year as it, in its discretion, considers appropriate.² In addition, by the means of validly exercising its discretion, ClubBIZ can distribute either income or capital from the trust to registered clubs in NSW.³

20. The distributions provided to the registered clubs will specifically relate to two areas. The first is to fund a 'business health check' designed to review the club's trading performance and financial health, identify potential causes for financial stress and advise on ways to prevent financial difficulties arising. An 'appropriately qualified person' will provide the business health check to the relevant club.

21. Secondly, ClubBIZ may provide distributions to fund certain 'business improvement projects'. These may include capital works, modernisation of the club, amalgamation and resource sharing, training and implementation of new management practices. It is a prerequisite that a registered club undergo a business health check prior to submitting a request for funding for any business improvement project.

22. In the case of a business health check, the maximum distribution to be provided by ClubBIZ is \$5,000 for each individual club. It is expected that each club meet at least 10% of the cost of the health check from its own resources.

23. The maximum distribution for business improvement projects is limited to \$50,000 and it is expected that each club meet at least 20% of the cost of that project from its own resources.

24. The \$9 million NSW government grant paid to the trustee of ClubBIZ does not form part of the net income of the trust as calculated under section 95 of the ITAA 1936.

Submission process

25. A club may make a submission to the trustee seeking a distribution of funds from the ClubBIZ Trust Fund (the Trust) to benefit the club.

26. A submission must be made in the form approved by the trustee and contain certain relevant financial information.

¹ ClubBIZ Trust Deed of Settlement Clause 1.1.

² ClubBIZ Trust Deed of Settlement Clause 2.3.

³ ClubBIZ Trust Deed of Settlement Clauses 2.2 and 3.1.

27. The trustee will consider the submission and in accordance with the discretion vested in it under the Trust Deed, determine whether a distribution from the Trust should be made to the particular club based upon its circumstances. In the event that a submission is rejected for whatever reason, the registered club has no rights or remedies against the trustee in relation to its request for distribution.

28. In the event that ClubBIZ, in its discretion, decides to make a trust distribution to a particular club to support the project submitted, ClubBIZ will issue a Letter of Intent to the club advising of the exercise of its discretion and the resolution passed by the trustee to make the distribution for the benefit of the club.

29. The distribution by ClubBIZ is made by way of direct payment to the supplier of the business health check or business improvement. ClubBIZ will only pay a supplier of these goods and or services if the club:

- (i) provides to ClubBIZ a valid tax invoice issued from the supplier; and
- (ii) provides confirmation that the work or project has been completed in accordance with the agreement between the club and the supplier.

30. Each club is free not to proceed with a particular project. In such a case, ClubBIZ has no obligation to make a distribution of funds in accordance with the Letter of Intent issued to the club and the resolution made in relation to the distribution.

Ruling

Distribution of income of the trust

31. Where the trustee of ClubBIZ exercises its discretion to pay or apply income of the trust estate in favour of a particular club, the club shall be deemed to be presently entitled to that amount under section 101 of the ITAA 1936.

32. In these circumstances the assessable income of the club shall include, in accordance with section 97 of the ITAA 1936, an amount equal to the sum paid to the supplier of goods and services to the club, in the year of income the payment is made to the supplier.

Trust income retained

33. Should the trustee not exercise its discretion to pay or apply certain income in favour of a particular beneficiary and retain or accumulate that income within the trust, the trustee shall be assessed

and liable to pay tax on the net income of the trust under subsection 99A(4) or 99A(4A) of the ITAA 1936.

Distribution of trust corpus to fund revenue expenditures of a club

34. Where a distribution of corpus is paid or applied in favour of a particular beneficiary by the trustee of ClubBIZ to fund revenue expenditures incurred by a club, the distribution is ordinary income.

Distribution of trust corpus to fund capital expenditures of a club

35. Where the trustee of ClubBIZ exercises its discretion to pay or apply corpus of the trust estate in favour of a particular beneficiary for the purpose of funding capital expenditure incurred by a club, the distribution does not constitute a payment which is derived by the beneficiary as ordinary income.

Distribution of trust corpus to fund Division 40 capital works

36. If a distribution of corpus does not constitute ordinary income or statutory income, outside of Subdivision 20-A of the ITAA 1997 and is used to fund capital works by a club which qualifies for a deduction under Division 40 of ITAA 1997, the distribution is an assessable recoupment. Assessable recoupments may be included in assessable income over one or more years of income depending upon the time period over which the capital allowances are claimed.

Explanation

Section 97 income

37. The main provisions of the ITAA 1936 which relate to trust income are found in Division 6 of Part III. In broad terms the purpose of Division 6 is to tax trust income in the year of income in which it is derived by the trust at the level of either trustee or beneficiary.

38. The taxing point of a trust depends on whether the beneficiary is or is not presently entitled and where present entitlement exists, whether the beneficiary is under a legal disability. Generally, the trustee will be taxed on income it retains.

39. Subsection 95(1) of the ITAA 1936 provides the definition of what constitutes the 'net income' of a trust. In essence, the 'net income' of a trust means the total assessable income of the trust calculated under the ITAA 1936 as if the trustee were a taxpayer in

respect of that income and were a resident, less all allowable deductions.

40. The assessable income of the ClubBIZ trust may include interest or dividends derived from the investment of trust corpus. The Trust Deed gives the trustee of ClubBIZ an express discretion to pay or apply income of the trust for the benefit of specified beneficiaries, i.e. clubs registered under the *Registered Clubs Act 1976* (NSW). Section 101 of the ITAA 1936 provides that a beneficiary under a discretionary trust will be deemed to be presently entitled to trust income where there is an effective payment or application of income for the benefit of that beneficiary.

41. When the trustee of ClubBIZ decides to make a trust distribution to a club, the trustee issues a Letter of Intent to the club advising the club of the exercise of its discretion and the resolution passed by the trustee to make the distribution for the benefit of that club.

42. However, the trustee does not actually pay the distribution to the club until the club presents the trustee with a valid tax invoice from the contractor engaged for the particular project. Furthermore, the club must provide confirmation that the project has been completed.

43. At the time of the trustee making the resolution to make the distribution, the club does not have an indefeasible vested interest in the income. An effective payment or application of income for the benefit of a particular club will not be considered to have arisen until the trustee makes the actual payment to the supplier of the goods or services provided to the club, following the presentation of the valid tax invoice. It is only on actual payment of the distribution that the club will be deemed to be presently entitled to the trust income under section 101 of the ITAA 1936.

44. Section 97 of the ITAA 1936 applies where the income of a trust is dealt with in such a way as to make the beneficiary of a trust 'presently entitled' within the income year. As discussed above a club will be presently entitled to a distribution of income from ClubBIZ when ClubBIZ makes the actual payment and therefore, the payment of that share of net income of the trust will be assessable income in the hands of the club under subsection 97(1) of the ITAA 1936, in the year the supplier receives a payment from ClubBIZ.

45. Section 99A of the ITAA 1936 applies where all or part of the net income of a trust represents income to which no beneficiary is presently entitled and that income is retained or accumulated by the trustee. In these circumstances, the trustee shall be assessed and liable to pay tax on all or that part of the net income of the trust at a rate of 47%.

46. Where the trustee of ClubBIZ does not distribute to a club any or part of the net income of the trust in a particular income year and retains or accumulates that income, the trustee will be assessed on that income under subsection 99A(4) or 99A(4A) of the ITAA 1936.

Division 6 is not an exclusive code for taxing trust distributions

47. The Trust Deed also provides the trustee of ClubBIZ with an express discretion to pay or apply corpus of the trust for the benefit of specified beneficiaries, i.e. clubs registered under the *Registered Clubs Act 1976* (NSW).

48. The scheme of Division 6 of the ITAA 1936 is to tax the assessable income of the trust in a given income year at the level of trustee or beneficiary. The \$9 million State Government grant paid to the trustee is considered a receipt of a capital nature and not assessable income. The grant forms the initial corpus of the trust. As the grant is not included in the 'net income' of the trust, any distribution of that corpus to a beneficiary falls outside the scope of Division 6 of the ITAA 1936.

49. Division 6 of the ITAA 1936 is not an exclusive code for taxing a beneficiary's share of the income of a trust estate (also see paragraph 20 of IT 2512). The taxation of distributions of corpus similarly has to be considered in the light of other provisions of the ITAA 1936 and ITAA 1997.

Ordinary Income

50. Under subsection 6-5(1) of the ITAA 1997 an amount is assessable income if it is income according to ordinary concepts (ordinary income).

51. There is no definition of ordinary income in income tax legislation. Therefore it is necessary to turn to judicial consideration of the concept. In determining whether an amount is ordinary income, the courts have considered the following factors relevant:

- Whether the payment is the product of any employment, services rendered, or any business;
- The quality or character of the payment in the hands of the recipient;
- The form of the receipt, that is, whether it is received as a lump sum or periodically; and
- The motive of the person making the payment. Motive, however is rarely decisive as in many cases a mixture of motives may exist.

52. The courts have also established that not all payments received by a taxpayer carrying on a business will be income: *FC of T v. Spedley Securities Ltd* 88 ATC 4126; (1988) 19 ATR 938; *Westfield Limited v. FC of T* 91 ATC 4234 at 4241; (1991) 28 FCR 333 at 342 and *FC of T v. Hyteco Hiring Pty Ltd* 92 ATC 4694; (1992) 39 FCR 502.

53. In *Brisbane Amateur Turf v. Federal Commissioner of Taxation* (1968) 118 CLR 300 payments were made by the Queensland TAB out of its profits to a galloping racing club pursuant to a formula. Owen J concluded that the payments were income under paragraph 26(g) of the ITAA 1936, which includes a subsidy or bounty in assessable income. His honour concluded that the periodical payments were also income according to ordinary concepts as the payments were ‘received in or in relation to the carrying on by it of its business of conducting race meetings.’⁴

54. Although the distributions by ClubBIZ may not technically constitute a subsidy⁵ they are very similar to a subsidy, and case law in relation to subsidies is of assistance in determining whether the payments are ordinary income.

55. In *First Provincial Building Society Limited v. FC of T* (1995) 56 FCR 320; 95 ATC 4145; (1995) 30 ATR 207 (*First Provincial*) the Full Federal Court examined the assessability of an ex gratia payment made by the Government in consequence of the establishment of a national regulatory scheme for building societies and the winding up of the 1985 Contingency fund. Hill J made the following apposite statements:

In my opinion, the payment lacks the necessary connection with the business activities of the applicant to constitute income in ordinary concepts. It is an *ex gratia* payment made by the Government not being consideration (even in a practical sense) for some trading activities of the applicant, but made consequent upon the establishment of a national regulatory scheme for building societies and the winding up of the 1985 Contingency Fund.

The purpose which may be attributed to the Government, that one advantage of the payment would be to enable each building society to satisfy the capital adequacy requirements, is of some assistance in reaching the conclusion that the payment is capital although it is not, in my opinion, as the applicant submits, determinative. No doubt if the statute itself provided, as in *FCT v Slaven* (1984) 1 FCR 11 that a payment was to be made to compensate the recipient for a particular head of damage, such as loss of earning capacity that would be, as it was in *Slaven* (at 22), a “powerful, though not conclusive, aid to the determination of the character of the payment . . .” But the 1993 Act

⁴*Brisbane Amateur Turf v. Federal Commissioner of Taxation* (1968) 118 CLR 300 at 304.

⁵ See discussion at paragraphs 74 – 86.

itself makes no purpose known by its terms, although the surrounding circumstances and the fact that the payment is to become a 'statutory reserve' lend some assistance to the applicant.

Whether each of the factors relied upon by the Commissioner is considered alone or separately, the result is the same. The payment was in the hands of the applicant of a capital nature.⁶

56. In the course of subsequently addressing whether the amount paid in *First Provincial* was a bounty or subsidy within paragraph 26(g) of the ITAA 1936, Hill J made the following observation:

Ordinarily, a subsidy or bounty received by a taxpayer in relation to its business activities would constitute income in ordinary concepts.⁷

57. His Honour concluded that the payment in *First Provincial* was assessable within paragraph 26(g) of the ITAA 1936 due to the wider import of the words 'in relation to' in paragraph 26(g). The following principles can therefore be extracted from *First Provincial*:

- (i) a payment of a subsidy in relation to a taxpayer's business activities is income; and
- (ii) the words 'in relation to' in paragraph 26(g) give the paragraph 'wide import' and result in a broader test than that provided for in determining whether a subsidy is ordinary income.

58. Accordingly it is necessary to determine whether the payment made by ClubBIZ is in relation to the business activities of the relevant club being assisted. The most appropriate way to assess this is to examine the purpose of the payment and circumstances surrounding the making of the payment.

Distribution in relation to business activities

59. For an applicant to qualify for assistance from ClubBIZ the club must demonstrate financial need or hardship (paragraph 2.2 of the application form). Financial and commercial information must be provided to ClubBIZ, including whether the club owns the relevant premises and the land on which they stand is mortgage free (paragraph 2.4 of the application form); summary of matters before licensing court or the Liquor Administration Board (LAB) and details of any proposal for amalgamation with another club (paragraph 2.6 of the application form).

60. Details of the proposed service to be received from a supplier are to be provided by a club seeking financial assistance from

⁶ *First Provincial Building Society Limited v. FC of T* (1995) 56 FCR 320 at 326 - 327; 95 ATC 4145 at 4149 - 4150; (1995) 30 ATR 207 at 212 - 213.

⁷ *First Provincial Building Society Limited v. FC of T* (1995) 56 FCR 320 at 327; 95 ATC 4145 at 4150; (1995) 30 ATR 207 at 213.

ClubBIZ, including the business qualifications and club industry experience of the chosen supplier.

61. Attachments to the submission for assistance must include:

- (i) the club's latest published annual financial accounts and reports (with comparative figures for the previous year), demonstrating the club's financial need or hardship;
- (ii) each of the club's quarterly statements of receipts and payments received by the club's board since the latest published statements, demonstrating the club's financial need or hardship;
- (iii) a copy of the Club's current Certificate of Registration under the *Registered Clubs Act 1976* (NSW);
- (iv) a copy of the Club's Constitution or equivalent document, including all amendments to date;
- (v) any hardship applications for poker machines, made by the club and the status/outcome; and
- (vi) a copy of the 'Business Health Check' recommendations.

62. Distributions will be made to fund either business health checks or business improvement projects. The reference to business is not merely one of nomenclature as demonstrated by the examples of business improvement projects that may be funded as listed in Annexure A of the Trust Deed:

- (i) capital works that
 - (a) reduce recurrent operating costs (for example, replacing a bowling green turf with a synthetic surface); or
 - (b) improve club patronage
- (ii) implementation of new management practices or systems (for example, an occupational health and safety plan to reduce workers' compensation costs or risk management plan to shrink other insurance expenses);
- (iii) amalgamation with another club, facilities management or resource sharing initiatives;
- (iv) assistance in the trading of gaming machine entitlements;
- (v) the training education of club directors, management and staff;

- (vi) costs of compliance eg signage, RSG/RSA/OHS courses; and
- (vii) support for ongoing business advice.

63. Expenditures in relation to the above activities are incurred for the purpose of improving the performance of a club's business. We consider that the financial assistance provided in meeting these expenditures is directed at helping an ailing business turnaround and ultimately become profitable. The information that a club must provide demonstrates that a thorough independent assessment of its financial status and business is undertaken before the application is approved. The examples of the type of activities or acquisitions which will be supported further demonstrate that the assistance being provided constitutes an ordinary incident of a club's income producing activities.

Section 97 income and ordinary income

64. ClubBIZ trust income, which is paid to a supplier of goods or services to a club, is a payment made in relation to the business activities of the club. ClubBIZ trust income distributed to suppliers of clubs constitutes ordinary income of the club. As previously discussed ClubBIZ trust income is in any event assessable to the club as a consequence of the application of section 97 of the ITAA 1936.

Amount paid from corpus to fund revenue expenditure

65. The provisions of Division 6 of the ITAA 1936, which include section 97, do not apply when the distribution to a club is made from the corpus of a trust. In circumstances where ClubBIZ makes a payment to a supplier on behalf of a club, the payment is assessable under section 6-5 of the ITAA 1997, provided the payment is made to fund revenue expenditures of the club. The payment by ClubBIZ is ordinary income because it is made in relation to the club's business activities as discussed above.

66. Examples of revenue expenditures which may be incurred by a club include consulting fees paid in relation to business health checks, amounts paid in relation to the training of directors and management, costs of advertising and promotion and consulting fees in relation to the preparation of business and marketing plans.

Amount paid from corpus to fund capital expenditure

67. In circumstances where ClubBIZ makes a payment from corpus to a supplier for the purpose of funding capital expenditures of the club, case law requires examination to determine the assessability

of the payment. The High Court in *G.P. International Pipecoaters Pty Ltd v. FC of T* 90 ATC 4413; (1990) 21 ATR 1 (*International Pipecoaters*) stated that a subsidy to replenish or augment the payee's capital is not a product or incident of the payee's income producing activity:

Next, it is necessary to consider the taxpayer's submission that the cases show that a receipt of moneys intended by payer and payee to recoup a recipient's capital expenditure is a receipt of a capital nature. That proposition can be accepted when the amount is received by way of gift or subsidy to replenish or augment the payee's capital, for in such a case the receipt cannot fairly be said to be a product or incident of the payee's income-producing activity: see *Hayes v FCT* (1956) 96 CLR 47 at 54-56; 6 ATR 248; *The Federal Coke Co Pty Ltd v FCT* (1977) 7 ATR 519; 77 ATC 4255; *Reckitt & Colman Pty Ltd v FCT* (1974) 4 ATR 501; 74 ATC 4185; *Seaham Harbour Dock Co v Crook (HM Inspector of Taxes)* (1931) 16 TC 333. But it cannot be accepted that an intention on the part of the payer and a payee or either of them that a receipt be applied to recoup capital expenditure by the payee determines the character of a receipt when the circumstances show that the payment is received in consideration of the performance of a contract, the performance of which is the business of the recipient or which is performed in the ordinary course of the business of the recipient.⁸

68. A payment by ClubBIZ to a supplier of capital works to a club replenishes the capital assets of the club. In view of the High Court's judgment in *International Pipecoaters* we consider that a payment from the corpus of ClubBIZ to a supplier to subsidise capital expenditure of a club is not ordinary income of the club and is a capital payment.

69. The following example in Hill J's judgement in *First Provincial* supports the conclusion that a payment to a club to fund capital works is capital in nature:

Not all subsidies need have the character of income. A subsidy to assist a taxpayer to start up a business may well have the character of capital.⁹

70. Examples of capital expenditure which may be incurred by a club include capital works, building and refurbishment projects and changes to the constituent documents of a club.

⁸ *G.P. International Pipecoaters Pty Ltd v. FC of T* 90 ATC 4413 at 4422; (1990) 21 ATR 1 at 10.

⁹ *First Provincial Building Society Limited v. FC of T* (1995) 56 FCR 320 at 328 ; 95 ATC 4145 at 4151; (1995) 30 ATR 207 at 214.

Income applied or dealt with on a club's behalf

71. As discussed at paragraph 29, the payments by ClubBIZ are not actually made to the club but are made to the supplier of the goods or services to the club.

72. Subsection 6-5(4) of the ITAA 1997 provides that you will have derived an amount of ordinary income as soon as 'it is applied or dealt with in any way on your behalf or as you direct'. A club has a liability to pay the supplier of the goods or services. Instead of providing the distribution directly to the club, ClubBIZ pays the distribution to the supplier of the goods or services. The payment to the supplier is made as a product or incident of the club's income-producing activities.

73. No payment can be made unless the club is a registered club and the purpose of the payment is to assist the club in carrying on its business more efficiently. In circumstances where a payment is made by ClubBIZ from corpus (Division 6 does not apply) an amount of income is derived by the club equal to the amount paid to the supplier in accordance with subsection 6-5(4).

Subsidy or bounty

74. The trustee's distribution of corpus to a beneficiary could potentially fall within the ambit of section 15-10 of the ITAA 1997. Section 15-10 of the ITAA 1997 includes in assessable income bounties and subsidies that are received in relation to carrying on a business and that are otherwise not assessable as ordinary income.

75. The basic tests contained in section 15-10 are that an amount is assessable income if it is:

- a bounty or subsidy;
- received in relation to carrying on a business; and
- not assessable as ordinary income under section 6-5 of the ITAA 1997.

76. The term 'subsidy' is not defined in income tax legislation.

77. The word 'subsidy', as noted by Windeyer J in *Placer Development Ltd v. Commonwealth of Australia* (1969) 121 CLR 353 derives from the Latin 'subsidium' meaning 'an aid or help'. The Macquarie Dictionary, 3rd ed, defines subsidy as including a grant or contribution of money.¹⁰

78. However in *First Provincial*, Hill J stated:

¹⁰ *Placer Development Ltd v. Commonwealth of Australia* (1969) 121 CLR 353 at 373.

... in modern usage, as *Jowitt's Dictionary of English law* (Sweet & Maxwell, 1977 2nd ed) observes, the word “generally means financial assistance granted by the Crown.” This is the meaning which the word truly has in the present context.¹¹

79. Following the decisions in *Squatting Investments Co Ltd v. FC of T* (1953) 86 CLR 570; (1953) 10 ATD 126; (1953) 5 AITR 496, *Reckitt and Colman Pty Ltd v. FC of T* (1974) 74 ATC 4185; (1974) 4 ATR 501 and *First Provincial*, it is now well accepted that a ‘subsidy’ includes a financial grant made by a government.

80. Furthermore, the decision in *First Provincial* confirmed that section 15-10 of the ITAA 1997 (which replaced its antecedent, paragraph 26(g) of ITAA 1936) may apply to payments of a capital nature.

81. We consider that a distribution of corpus by the trustee is not a ‘subsidy’ within the ordinary and judicially recognised meaning of that term, i.e. financial assistance made by the Crown or State. The ClubBIZ trust does make the distribution as a form of financial assistance to the clubs to fund a ‘business health check’ or ‘certain business improvements’, however that assistance is granted by the trustee, not the NSW State Government.

82. In making a distribution to a beneficiary, the trust is not considered to have acted as an instrumentality within the shield of government. The ClubBIZ trust is not an instrument by which the NSW state government operates within the ‘club’ industry.

83. In *Inglis v. Commonwealth Trading Bank of Australia* (1969) 119 CLR 334, the High Court considered whether the Commonwealth Trading Bank was the instrument by which the Commonwealth participated in the business of banking.

84. In his judgement, Kitto J considered *Bank of NSW v. The Commonwealth* (1948) 76 CLR 1 and stated, *inter alia* of that case:

All four Justices considered that the Commonwealth Bank of Australia as constituted by the *Commonwealth Bank Act* 1945 (Cth) was a corporate agency or instrumentality of the Commonwealth to perform the functions assigned to it by that Act and any other Act . . . Their Honours went on to say that the absence of any corporators pointed to “an intention on behalf of the Commonwealth to transmute a part of itself into the outward form of a corporation as a convenient means of carrying on a Commonwealth activity.”¹²

85. Kitto J went on to add that the question in *Inglis* was whether on one hand did the Commonwealth have the intention to operate in a particular field through a corporation created for that purpose; or on

¹¹ *First Provincial Building Society Ltd v. FC of T* (1995) 56 FCR 320 at 327; 95 ATC 4145 at 4150; (1995) 30 ATR 207 at 213.

¹² *Inglis v. Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 337.

the other hand, was the intention of the Commonwealth to put into a field a corporation to perform its functions independently of the Commonwealth so that the concept of a Commonwealth activity cannot be realistically applied to that which the corporation does?¹³

86. The activities of the ClubBIZ trust fall into the latter category. The NSW State Government has consented to the creation of a trust to perform the function of providing funding to clubs independently of the State and therefore, the concept of a government function cannot be applied to those functions which the trust performs. As such, a distribution of trust corpus to the beneficiaries is not financial assistance **provided by the government** and therefore, not a subsidy for the purposes of section 15-10 of the ITAA 1997.

Assessable Recoupments

87. Assessable recoupments are included in assessable income under Subdivision 20-A of the ITAA 1997. If an entity pays an amount for you in respect of a loss or outgoing that you incur, you are taken to receive the amount as recoupment of the loss or outgoing (subsection 20-25(2) of the ITAA 1997). These conditions are satisfied when ClubBIZ pays an amount to a supplier of goods or services to a club. However, a recoupment of a loss or outgoing will only arise where the payment is not ordinary or statutory income¹⁴ (subsection 20-20(1) of the ITAA 1997) and the loss or outgoing is of a type listed in the table beneath subsection 20-30(1) of the ITAA 1997.

88. An assessable recoupment may arise for a club where:

- the payment to a supplier by ClubBIZ does not constitute ordinary income or statutory income of the club (other than under Subdivision 20-A); and
- the capital expenditure incurred by the club is of a type which qualifies for a deduction under Division 40 of the ITAA 1997 (item 1.9 of the table); and
- the club can or has deducted an amount for the loss or outgoing in a current or earlier income year.

¹³ *Inglis v. Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 337 – 338.

¹⁴ An amount is not an assessable recoupment to the extent that it is ordinary or statutory income because of a provision outside of Subdivision 20-A of the ITAA 1997.

Capital Gains

89. An entity may make a capital gain or loss if a CGT event happens. The distributions by ClubBIZ to undertake business health checks or business improvements do not bring about a CGT event or result in a capital gain.

Detailed contents list

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- ITAA 1997 6-5(4)

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IT 2512; TR 92/1; TR 92/20;

TR 97/16; CR 2001/1

- ITAA 1997 15-10

- ITAA 1997 SubDiv 20-A

- ITAA 1997 20-20(1)

- ITAA 1997 20-25(2)

- ITAA 1997 20-30(1)

Subject references:

- assessable income

- assessable recoupments

- beneficiaries

- bounties & subsidies

- capital allowances

- capital gains

- clubs & associations

- discretionary trusts

- exempt income

- government grants

- liability of trustees

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