



CR 2019/27 - Income tax: Community Housing Canberra Limited - deductibility of donations under a Payment Direction Deed

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 This document has changed over time. This is a consolidated version of the ruling which was published on *24 April 2019*



Class Ruling

Income tax: Community Housing Canberra Limited – deductibility of donations under a Payment Direction Deed

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❶ Relying on this Ruling

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

If this ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in the ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this ruling.

Further, if we think that the ruling disadvantages you, we may apply the law in a way that is more favourable to you.

Summary – what this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions 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
 - section 30-15 of the ITAA 1997
 - subsection 30-15(2) of the ITAA 1997
 - section 30-17 of the ITAA 1997
 - Subdivision 30-B of the ITAA 1997
 - section 30-45 of the ITAA 1997
 - subsection 30-45(1) of the ITAA 1997
 - Subdivision 30-BA of the ITAA 1997
 - Subdivision 30-DB of the ITAA 1997

- section 30-248 of the ITAA 1997
- 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 to Community Housing Canberra 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 27 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

7. This Ruling applies from 01 April 2019 to 31 March 2024. The Ruling continues to apply after 31 March 2024 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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 *Public Rulings*).

Scheme

8. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- Residential Open Leasing Agency Agreement (the Agency Agreement).
- Standard Tenancy Agreement (residential) (the Tenancy Agreement).

9. Community Housing Canberra Limited (CHC) is a Public Benevolent Institution (PBI), registered under the *Australian Charities and Not-for-profits Act 2012* effective from 1 January 2014.

10. CHC is endorsed as a deductible gift recipient (DGR) effective from 1 July 2000.

11. CHC is a community housing organisation providing affordable rental properties to people on low to moderate income. CHC currently owns and manages properties in order to provide long-term accommodation for people on low to moderate incomes struggling to afford housing.

12. CHC will act as a not-for-profit real estate agency, trading under the name of 'HomeGround Real Estate Canberra'. CHC will continue to maintain its other operations, including its status as a PBI and DGR.

13. CHC will implement an Affordable Housing Initiative (AHI) where CHC will act as a not-for-profit real estate agency providing a professional property management service to landlords and tenants and reinvest any profits back into the community.

14. The AHI involves CHC 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.

15. The AHI is a series of arrangements between landlords, tenants and CHC (in its capacity as the landlords' agent and as a DGR).

16. Under the AHI, the landlords will enter into a Payment Direction Deed with CHC, whereby CHC, in its capacity as the landlords agent, will deduct donation amounts from the landlord's rental income to be paid to CHC.

17. A description of the AHI is:

- The landlord enters into the Agency Agreement with CHC (trading as HomeGround Real Estate Canberra).
- CHC identifies tenants that meet certain eligibility criteria for participation in the AHI.
- CHC and the prospective tenant determine how much the tenant can afford to pay as monthly rent (as per CHC's eligibility criteria) and the rental subsidy, being the difference between what the prospective tenant can afford to pay and market rent (the Rental Subsidy).

- CHC agrees to enter into a subsidy agreement with the tenant where CHC will be responsible for providing the Rental Subsidy (for example the difference between the market rent and what the tenant has agreed to pay).
- CHC identifies a suitable landlord for the proposed tenancy and enters into the Payment Direction Deed with the landlord, where it is agreed that CHC, acting as the landlord's agent, will deduct donation amounts from the landlord's rental income to be paid to CHC. The donation amount can be equal to, less than or greater than the Rental Subsidy amount.
- The landlord and tenant enter into a Tenancy Agreement.
- The rent stipulated under the Tenancy Agreement is market rent.
- Prior to a tenant entering into the Tenancy Agreement, CHC will furnish a signed letter to the tenant confirming the details of the subsidy agreement. The letter stipulates the amount of the Rental Subsidy and the amount of rent the tenant is required to pay to CHC.
- During the lease period, the tenant pays his or her share of the rent amount to CHC.
- CHC trading as HomeGround Real Estate Canberra collects the rent from the tenant, deducts various outgoings (for example, council rates, insurance, and management fees calculated on the gross rent) and remits the net rent amount (rent under the Tenancy Agreement less outgoings and the donation amount) to the landlord in accordance with the Agency Agreement.

18. Landlords are required to enter a Payment Direction Deed to participate in the AHL.

19. Management fees charged by CHC under the Agency Agreement will be set and levied on a case by case basis, depending on the landlords circumstances or if they are another not for profit organisation. Management fees are calculated on the gross rent amount.

20. The fees and commissions set out under the Agency Agreement cannot be varied except with the agreement in writing of the landlord (clause 11 of the Agency Agreement).

21. Under the Payment Direction Deed:

- The landlord directs CHC trading as HomeGround Real Estate Canberra (the Agent) to deduct the donation amount from each monthly rent payment and

pay the donation amount to CHC, into a nominated account, within 5 business days of the Agent receiving the monthly rental payment (paragraph 2.1(a)).

- CHC agrees to accept the donation amount as a donation to further its charitable purposes and issue a receipt to the landlord for the donation amount received (paragraph 2.1(b)).
- The landlord can revoke the payment direction at any time by giving CHC fourteen business days' written notice (subclause 2.2).
- CHC acknowledges that the Deed does not constitute an ongoing agreement by the landlord to donate the donation amount and that the payment direction may be revoked at any time (subclause 3.1).
- The landlord acknowledges that (subclause 3.2):
 - each donation amount is a donation to CHC
 - a donation amount may be used for any purpose at the absolute discretion of CHC which is consistent with its obligations under the ITAA 1997
 - CHC 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 written direction of CHC, the Agent will have discharged all of its obligations under the Deed and the Authority (the Agency Agreement) in respect of the donation amount.

22. A payment made by a landlord to CHC in accordance with the Payment Direction Deed is not directly connected to any one tenant or any other person. The donation amount received by CHC becomes part of the general pool of funds used to finance its operations, including the payment of rental subsidies to tenants.

23. Where a landlord revokes the Payment Direction Deed, CHC will continue to pay the Rental Subsidy of the tenant until the end of the Tenancy Agreement (as required by the subsidy agreement).

24. There are no consequences for landlords who revoke the Payment Direction Deed.

25. Following the end of the Tenancy Agreement, if a landlord has revoked the Payment Direction Deed, the tenant may negotiate the lease of the property at full market rent, or they can vacate.

26. Landlords can utilise the property management services of CHC for properties they lease at full market rent. Such an arrangement is not part of the AHL.

27. The landlord does not receive any benefit or advantage from CHC, the tenant or any other party as a consequence of making donations to CHC under the Deed.

Ruling

28. Donation amounts paid by a landlord to CHC in accordance with an executed Payment Direction Deed are tax deductible gifts for the purposes of section 30-15 of the ITAA 1997.

29. A landlord can claim a deduction for the donation amounts, but the donation amounts cannot create or add to a tax loss of the landlord (section 26-55 of the ITAA 1997).

Commissioner of Taxation

24 April 2019

Appendix 1 – Explanation

① *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

30. 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 – what is a gift*.

31. 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.

32. The courts have described a gift as having 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.

33. 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 surrounding the transfer that provide the context and explanation for the transfer.

Transfer of money or property

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

35. 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.

36. 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.

37. 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 him or herself, they may do by an agent. If an agent discloses the principal's name (or at least the existence of a principal) to the third party with whom they are dealing, the agent him or herself is not normally entitled

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

38. Under the Payment Direction Deed, the landlord directs the Agent to deduct the donation amount from the rent the landlord receives under the Tenancy Agreement, and pay it to CHC.

39. Prior to the Agent making the payment to CHC, the landlord has beneficial interest in the money collected under the Tenancy Agreement; the landlord owns the money held for them by their agent. Following the payment, ownership of the money transfers to CHC who can use it as they decide.

40. The gift is made by the landlord when the Agent transfers the donation amount to CHC.

Transfer made voluntarily

41. 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.

42. 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.

43. To participate in the AHI a landlord must enter into a Payment Direction Deed. However, a landlord is under no obligation to make ongoing donations under the Payment Direction Deed and can revoke it at any time. It is the will of the landlord to participate in the AHI and make ongoing payments under the Payment Direction Deed, and there is nothing that interferes with the landlord's exercise of their will.

44. Although a payment under the Payment Direction Deed has a contractual nature, the payment is voluntary.

Arises by way of benefaction

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

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

47. 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.

48. In cases where the giver gives a gift for self-interested commercial or fiscal reasons rather than conferring benefaction on the recipient, the transfer does not proceed from detached and disinterested generosity. However, a motive of seeking a tax deduction does not, by itself, disqualify a transfer from being a gift.

49. Payments made in accordance with the Payment Direction Deed will cause money owned by a landlord to be transferred to CHC for its benefit. There is no evidence that a detriment will arise to CHC from accepting the payments.

50. There is no commercial benefit for a landlord to make the payments. The landlord will receive the rent amount under the Tenancy Agreement irrespective of whether payments are made under the Payment Direction Deed, and fees payable by landlords to the Agent are set under the Agency Agreement (calculated on gross rent) and are levied regardless of whether a landlord makes payments under the Payment Direction Deed.

51. Transfers under the Payment Direction Deed confer benefaction on CHC.

No material benefit or advantage

52. 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.

53. 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.

54. There is no evidence that the landlord or an associate of the landlord will receive any benefit or advantage from making payments under the payment directions deed.

55. The landlord receives the rent amount under the Tenancy Agreement (as set between the parties to that agreement) irrespective of whether payments are made under the Payment Direction Deed, and fees payable by landlords to the Agent are set under the Agency Agreement and are calculated on gross rent as negotiated between the landlord and agent (landlords that make payments to CHC do not pay reduced fees). The fees under the Agency Agreement cannot be changed by CHC without the written approval of the landlord.

Donation amounts are gifts

56. The donation amounts paid by the landlord to CHC in accordance with the Payment Direction Deed are gifts for the purposes of Division 30 of the ITAA 1997.

Tax deduction on donation amounts

57. 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 subsection 30-15(2) sets out the categories of recipients of deductible gifts and contributions, the types of deductible gift or contribution that can be made to each category of recipients, and how much can be deducted.

Gift Recipient

58. Item 1 of the table in subsection 30-15(2) of the ITAA 1997 states that deductible gifts and contributions can be made to recipients who are covered by any of the tables in Subdivision 30-B of the ITAA 1997.

59. 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' (registered PBI).

60. Deductible gifts and contributions can therefore be made to a recipient that is a registered PBI.

61. A registered PBI 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.

62. However, gifts to a registered PBI will only be deductible if the registered PBI is also endorsed as a deductible gift recipient under Subdivision 30-BA of the ITAA 1997, or is named in Subdivision 30-B of the ITAA 1997 (item 1 of the table in subsection 30-15(2) of the ITAA 1997 and section 30-17 of the ITAA 1997).

63. CHC is a registered PBI that is endorsed as a deductible gift recipient; CHC can receive tax deductible gifts and contributions.

Type of gift

64. Item 1 of the table in subsection 30-15(2) of the ITAA 1997 provides that the deductible gifts and contributions that can be made

to an item 1 recipient include gifts of money. Money includes foreign currency and can be paid in various ways, including by cash, cheque, credit card or electronically.

65. Under the Payment Direction Deed a landlord directs the Agent to pay the donation amounts (money) to CHC (a deductible gift recipient).

66. The amounts paid to CHC are gifts of money to an endorsed deductible gift recipient and are tax deductible gifts under Division 30 of the ITAA 1997.

Amount of gift that can be deducted

67. Item 1 of the table in subsection 30-15(2) of the ITAA 1997 states that the amount that can be deducted for a gift of money is the amount that is given.

68. The value of the gift must however be \$2 or more (Item 1 of the table in subsection 30-15(2) 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.

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

70. 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 Division 30 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 income year in which the gift is made, but cannot contribute to a tax loss of the donor for the income year.

71. Whilst a deduction for a gift cannot contribute to a tax loss for the donor, Subdivision 30-DB 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.

72. If the 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 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.

73. A landlord who pays gifts to CHC in accordance with the Payment Direction Deed can claim a deduction for amounts of \$2 or

more provided the deduction does not contribute to a tax loss of the landlord (that is, the deduction must not create a tax loss or add to a tax loss). The landlord can elect to spread the tax deduction over up to 5 years.

Gift receipts

74. Tax law does not require a deductible gift recipient to issue a receipt for tax deductible gifts it receives. However, where a deductible gift recipient does issue a receipt, subsection 30-228(1) of the ITAA 1997 sets out the information that must be included in the receipt:

30-228(1) if a deductible gift recipient issues a receipt for a gift described in the relevant item of the table in section 30-15 to the fund, authority or institution, the deductible gift recipient must ensure that the receipt states:

- (a) the name of the fund, authority or institution; and
- (b) the ABN (if any) of the deductible gift recipient; and
- (c) the fact that the receipt is for a gift.

75. Paragraph 2.1(b) of the Payment Direction Deed requires CHC to issue a receipt to the landlord for the donation amounts paid under the Payment Direction Deed.

76. The contents of each receipt must include the name and ABN of CHC and the fact that the receipt is for a gift.

Appendix 2 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2005/13; TR 2006/10

Legislative references:

- ITAA 1997 30-15
 - ITAA 1997 30-15(2)
 - ITAA 1997 30-17
 - ITAA 1997 Subdiv 30-B
 - ITAA 1997 30-45
 - ITAA 1997 30-45(1)
 - ITAA 1997 Subdiv 30-BA
 - ITAA 1997 Subdiv 30-DB
 - ITAA 1997 30-228(1)
 - ITAA 1997 30-248
 - ITAA 1997 995-1(1)
 - TAA 1953
 - ITAA 1997 26-55
 - ITAA 1997 26-55(1)
 - ITAA 1997 26-55(2)
 - ITAA 1997 Div 30
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ATO references

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