

CR 2020/69 - Havelock Housing Association Incorporated - deductibility of donations under a payment direction deed



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Class Ruling

Havelock Housing Association Incorporated – deductibility of donations under a payment direction deed

❶ Relying on this Ruling

This publication (excluding appendix) 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 this 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 this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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What this Ruling is about

1. This Ruling sets out tax consequences of a landlord paying donation amounts to Havelock Housing Association Incorporated (HHAI) by way of an executed Payment Direction Deed (PDD).
2. Full details of this scheme are set out in paragraphs 8 to 22 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.

Who this Ruling applies to

4. This Ruling applies to landlords (Lessors) who:
 - participate in the HHAi Affordable Housing Initiative (AHI), and
 - make a donation to HHAi pursuant to a PDD.

When this Ruling applies

5. This Ruling applies from 1 July 2020 to 30 June 2025.

Ruling

6. Donation amounts deducted from the Lessor's gross rental receipts and paid to HHAI, in accordance with a valid and executed PDD, are tax-deductible gifts under section 30-15.
7. A Lessor can claim a deduction for their donation amounts, however the donation amounts cannot add to or create a tax loss under subsection 26-55(2).

Scheme

8. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.
9. HHAI is a registered public benevolent institution (registered PBI), registered under the *Australian Charities and Not-for-profits Commission Act 2012* effective from 1 January 2014.
10. HHAI is endorsed as a deductible gift recipient (DGR) effective from 1 July 2000.
11. The objectives of HHAI, per clause 2.1 of the Constitution include (but are not limited to) the following:
- to increase the range of housing and accommodation options in the Australian Capital Territory (ACT) by providing a high standard of community housing in the ACT through Havelock House and other properties owned and/or managed by the Association
 - to manage Havelock House as affordable housing for people on low incomes, and to manage its facilities in the interests of the community
 - to increase the range and availability of secure, affordable housing to low-income earners by expanding community housing in the ACT
 - to expand the range of housing options available to people in housing need or stress
 - to enter into any arrangements of a commercial or similar nature that will enable the Association to further its community housing objectives.
12. In furtherance of HHAI's objectives, HHAI will operate an AHI. HHAI will continue to maintain its other operations.
13. The AHI involves HHAI finding Lessors who would like to 'make a difference' for tenants who are on low incomes, are priced out of the market, and are at risk of becoming homeless or are currently experiencing homelessness (Tenants).
14. Under the AHI, the Lessor will rent properties at market rate to HHAI under a lease agreement (Lease Agreement). HHAI will then rent out the Lessor's property to Tenants at a reduced rate of rent (74.99% or less of the market rate of rent). Under the Lease Agreement, the Lessor agrees that Tenants may occupy the Lessor's property.
15. A description of the AHI is:
- The Lessor enters into a Lease Agreement with HHAI to rent the property at market rent.
 - HHAI organises for a market valuation of market rate of rent for the specific property with market valuations occurring on a regular basis on existing properties.

- HHAI identifies Tenants that meet certain eligibility criteria for participation in the AHI and rents out the Lessor's property at below the market rent.
- HHAI provides property management services to the Lessor for a fee, being 7% of the market rent.
- The Lessor may enter into a PDD where it agrees that HHAI will deduct and retain a donation amount from the Lessor's rent, which will be the difference between market rate of rent and the rent received by HHAI from the Tenant.
- HHAI collects the rent, deducts various outgoings (such as council rates, insurance, and the service fee) and remits the net rent amount (rent under the lease agreement less outgoings) to the Lessor in accordance with the Lease Agreement.
- The Lessor receives net rental returns and a receipt acknowledging the deductible gift donation to HHAI.
- The Lessor's right to receive market rent is created by the Lease Agreement with rent payable, however the Lessor provides a direction to offset payments by way of a donation to HHAI.

16. Under the Lease Agreement (references are to relevant sections of the Lease Agreement):

- the Lessor leases the relevant property to HHAI for market rent (clauses 1 and 3, and the Schedule)
- the market rent is reviewed annually (clause 13.4)
- HHAI will manage the review of the market rent and following the review, the market rent will be adjusted (clause 13.4)
- the Lessor appoints HHAI to perform property management services for the duration of the Lease Agreement, HHAI accepts its appointment, and neither party can revoke the appointment (clause 1.1), and
- HHAI provides the property management services to the Lessor in exchange for a management fee (clause 5 and the Schedule).

17. The property management services include (clause 5.2):

- carrying out inspections of the property at periodic intervals
- itemising monthly rent receipts, outgoings and other expenses (other than those covered by the management fee) paid on the Lessor's behalf, and, if required by the Lessor, providing information on an annual basis, and
- paying outgoings on the Lessor's behalf in respect of the property (for example, rates, charges, property insurance premiums) unless the Lessor elects to assume responsibility, provided HHAI received relevant notices and accounts in sufficient time to enable payment by the due date.

18. Under the AHI, the Lessor may enter into a PDD (clause 4.1 of the Lease Agreement) for a period of 12 months (clause 2 of the PDD).

19. Lessors are not required to enter into a PDD.

20. Under the PDD (references are to relevant sections of the PDD):

- the Lessor directs HHAI to deduct the donation amount from each monthly rental payment and pay the donation amounts to HHAI (clause 3.1)

- HHAI agrees to accept the donation amount as a donation to further its charitable purposes and issues a receipt in the name of the Lessor for the donation amount annually in arrears (clause 3.2 and 3.3)
- the Lessor acknowledges and agrees, under clause 3.3, that the donation amount
 - is a donation to HHAI each month (unless the direction is terminated)
 - may be used by HHAI in a manner that is consistent with its obligations under the ITAA 1997
 - is an arrangement that the Lessor enters into at its own discretion, and the Lessor or its associates do not receive any advantage or benefit from HHAI, and
- the Lessor may terminate the PDD at any time by providing HHAI with 30 days' notice (clause 3.4).

21. The Lessor or an associate of the Lessor will not receive any advantage or benefit from HHAI for entering into the AHI.

22. HHAI may terminate the Lease Agreement by giving 30 days' notice to the Lessor (clause 9.2 of the Lease Agreement).

Commissioner of Taxation

25 November 2020

Appendix – Explanation

❶ *This Explanation 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.*

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Meaning of gifts

23. The meaning of gift for the purposes of Division 30 is dealt with in Taxation Ruling TR 2005/13 *Income tax: tax deductible gifts – what is a gift*.

24. The word 'gift' is not defined in the ITAA 1997. For the purposes of Division 30, the word 'gift' has its ordinary meaning.

25. 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.

26. 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

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

28. 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.

29. 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.

30. The transfer may still be a gift when it is made by way of an agent. In an agency relationship, an agent has the 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 who 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.

31. Under the PDD, the Lessor directs HHAI to deduct the donation amount from the rent the Lessor receives under the Lease Agreement and pay it to HHAI.

32. Prior to the donation amount being paid to HHAI, the Lessor has beneficial interest in the rent paid under the Lease Agreement. Following the payment of the donation amount, ownership of the money transfers to HHAI who can use it as they decide.

33. The donation is made when the donation amount is transferred to HHAI's own account and HHAI no longer holds it as agent for the Lessor.

Transfer made voluntarily

34. 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.

35. 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 to give effect to the benefaction have contractual or similar features.

36. A Lessor is under no obligation to enter into a PDD and can revoke the PDD at any time. It is the will of the Lessor to make donations under the PDD and there is nothing in the arrangement that interferes with the exercise of the Lessor's will.

37. A payment under the PDD is voluntary and may be revoked with 30 days' notice by the Lessor.

Arises by way of benefaction

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

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

40. 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.

41. In cases where the giver gives a gift for self-interested commercial or fiscal reasons rather than conferring a 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.

42. Payments made in accordance with the PDD will cause money owned by the Lessor to be transferred to HHAI for its benefit. There is no evidence that a detriment will arise to HHAI from accepting the payments.

43. There is no commercial benefit for a Lessor to make the payments. The Lessor will receive the rent under the Lease Agreement irrespective of whether payments are made under the PDD, and the management fee payable by a Lessor to HHAI is set under the Lease Agreement and is levied regardless of whether a Lessor makes payments under the PDD.

44. Payments under the PDD confer benefaction on HHAI.

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. There is no evidence that the Lessor or an associate of the Lessor will receive any benefit or advantage from making payments under the PDD.

48. The Lessor receives the rent amount under the Lease Agreement (as agreed with HHAI) irrespective of whether payments are made under the PDD. The management fee payable by Lessors to HHAI is set under the Lease Agreement and is a flat fee payable by all Lessors who participate in the AHI. Lessors who make payments under the PDD do not pay reduced fees.

Donation amounts are gifts

49. The donation amounts paid by the Lessor to HHAI in accordance with the PDD are gifts for the purposes of Division 30.

Tax deduction on donation amounts

50. A donor can claim a tax deduction for a gift if the requirements in section 30-15 are satisfied. The table in subsection 30-15(2) sets out the categories of recipients of deductible gifts and contributions, the types of deductible gifts or contributions that can be made to each category of recipients, and how much can be deducted.

Gift recipient

51. Table item 1 of subsection 30-15(2) states that deductible gifts and contributions can be made to recipients who are covered by any of the tables in Subdivision 30-B.

52. Subdivision 30-B includes section 30-45. Table item 4.1.1 of subsection 30-45(1) includes recipients that are a registered PBI.

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

54. A registered PBI is defined in subsection 995-1(1) as:

... 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.

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

56. As HHAI is a registered PBI that is endorsed as a DGR; HHAI can receive tax-deductible gifts and contributions.

Type of gift

57. Table item 1 of subsection 30-15(2) provides that the deductible gifts and contributions that can be made to a table 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.

58. Under the PDD, a Lessor directs HHAI to pay the donation amounts (money) to HHAI (an endorsed DGR).

59. The donation amounts paid to HHAI are gifts of money to an endorsed DGR and are tax-deductible gifts under Division 30.

Amount of gift that can be deducted

60. Table item 1 of subsection 30-15(2) states that the amount that can be deducted for a gift of money is the amount that is given.

61. The value of the gift must, however, be \$2 or more (as per table item 1 of subsection 30-15(2)). A donor can add together a series of gifts in an income year to work out whether the gift is \$2 or more.

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

63. Subsection 26-55(1) states there is a limit on the total amount you can deduct for the income year under Division 30. The limit is calculated pursuant to subsection 26-55(2) 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.

64. While a deduction for a gift cannot contribute to a tax loss for the donor, Subdivision 30-DB allows donors to elect to spread a tax deduction for a gift of money of \$2 or more over and up to five years.

65. If the donor chooses to spread a deduction, the election must be made as specified in section 30-248, including that 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
- start in the year the gift was made and can continue up to four years immediately following, and
- 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.

66. A Lessor who pays gifts to HHAI in accordance with the PDD can claim a deduction for amounts of \$2 or more provided the deduction does not contribute to a tax loss of the Lessor (that is, the deduction must not create a tax loss or add to a tax loss). The Lessor can elect to spread the tax deduction over and up to five years.

Gift receipts

67. Tax law does not require a DGR to issue a receipt for tax-deductible gifts it received. However, where a DGR does issue a receipt, subsection 30-228(1) sets out the information that must be included in the receipt:

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.

68. Clause 3.2 of the PDD requires HHAI to issue a receipt to the Lessor for the donation amounts paid under the PDD.

69. The contents of each receipt must include the name and Australian Business Number of HHAI and the fact that the receipt is for a gift.

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2005/13

Legislative references:

- ITAA 1997 26-55(1)
- ITAA 1997 26-55(2)
- ITAA 1997 Div 30
- 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
- Australian Charities and Not-for-profits Commission Act 2012
- Australian Charities and Not-for-profits Commission Act 2012 25-5(5)

ATO references

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