


# ***CR 2023/36 - YWCA Canberra - deductibility of donations under a payment direction deed***

 This cover sheet is provided for information only. It does not form part of *CR 2023/36 - YWCA Canberra - deductibility of donations under a payment direction deed*



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Status: **legally binding**

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## Class Ruling

# YWCA Canberra – deductibility of donations under a payment direction deed

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### **📌 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.

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### **What this Ruling is about**

1. This Ruling sets out the income tax consequences of a landlord paying donation amounts to YWCA Canberra (YC) by way of an executed Payment Direction Deed (PDD).
2. Details of this scheme are set out in paragraphs 9 to 26 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997), unless otherwise indicated.

**Note:** By issuing this Ruling, the ATO is not endorsing this arrangement. Potential participants must form their own view about the arrangement.

### **Who this Ruling applies to**

4. This Ruling applies to landlords who:
  - participate in the Affordable Housing Initiative (AHI), and
  - make a donation to YC pursuant to a PDD.
5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 9 to 26 of this Ruling.

**Note:** Division 230 will not apply to individuals unless they have made an election for it to apply.

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### When this Ruling applies

6. This Ruling applies from 1 July 2023 to 30 June 2028.

### Ruling

7. Donation amounts paid by a landlord to YC in accordance with an executed PDD are tax-deductible gifts for the purposes of section 30-15.

8. 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).

### Scheme

9. 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.

10. YC is a public benevolent institution (PBI), registered under the *Australian Charities and Not-for-profits Commission Act 2012* effective from 1 January 2014.

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

12. The benevolent activities of YC include providing services to the homeless and those at risk of homelessness.

13. YC will operate an AHI. YC will continue to maintain its other operations.

14. The AHI involves YC finding landlords who would like to make a difference with tenants who are on low incomes, are priced out of the rental market or are at risk of becoming homeless or are currently experiencing homelessness.

15. Under the AHI, landlords rent their properties at market rate to YC under a Lease Agreement, who then rents these properties to tenants at no more than 74.99% of the market rate. The Lease Agreement requires a landlord to consent to allow tenants approved by YC to occupy the property (clause 5).

16. Under Lease Agreement clauses:

- the landlord (referred to in the Lease Agreement as Lessor) leases the relevant property to YC for market rent (clause 2). The market rent is reviewed at least once every 3 years (clause 3.2)
- the landlord appoints YC to perform property management services for the duration of the Lease Agreement. YC accepts the appointment and neither party can revoke the appointment (clause 2.1), and
- YC provides the property management services to the landlord in exchange for a management fee (clause 7.1). The management fee is a flat fee which is deducted by YC from monthly rent payments (clause 7.1).

17. The property management services under clause 7.2 of the Lease Agreement include:

- carrying out inspections of the property at periodic intervals

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- itemising monthly rent receipts, outgoing and other expenses (other than those covered by the management fee) paid on the landlord's behalf, and, if required by the landlord, provide information on an annual basis
  - provided YC receives relevant notices and accounts in sufficient time to enable payment by the due date, paying on the landlord's behalf outgoings in respect of the Property (for example, rates, charges, property insurance premiums), unless the landlord elects to assume the responsibility. YC may recoup amounts paid as a debt due by the landlord, or by deduction from monthly rent payments, and
  - arranging compliance with any of the landlord's retained responsibilities under clause 8.2 at the landlord's expense (by deduction from monthly rent payments) if requested by the landlord and YC agrees to do so.
18. Other services to be provided by YC under the Lease Agreement include:
- Emergency repair service (clause 7.3) – YC will arrange any emergency works where such work is essential to preserve the property or protect human health, safety and security. If the emergency arises from a repair or maintenance item for which YC is responsible under the Lease Agreement, YC will bear the cost of the work. If the emergency is within or caused by a matter falling within the landlord's retained responsibilities the landlord must bear the cost.
  - Restoration service (clause 7.4) – at the end of the Lease Agreement YC will ensure that internally, the property is professionally cleaned, the appliances are clean and in good working order, and externally, the dwelling, grounds and landscaping are in neat and tidy condition.
  - Repair and maintenance service (clause 8.1) – YC must coordinate the repair and maintenance of the property (fair wear and tear excepted). The landlord covers the cost of repairs and maintenance to the property, and agrees to a pre-approved portion of rent to be held in trust for scheduled maintenance work on the property.
  - Inspection service (clause 11.1) – YC will undertake the majority of inspections on behalf of the landlord and will, if requested, arrange 1 personal inspection of the property by the landlord in each year of the term.
19. Under the AHI, the landlord may enter into a payment direction (clause 6) whereby YC will deduct and retain a donation amount from the rent payable to the landlord under the Lease Agreement.
20. Landlords are not required to enter into a PDD.
21. Under the AHI:
- the landlord enters into a Lease Agreement with YC to rent the property at market rent
  - YC identifies tenants that meet certain eligibility criteria for participation in the AHI
  - YC rents out the landlord's property to tenants at a reduced rate of rent
  - YC provides property management services to the landlord for a fee

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- the landlord may enter into a Payment Direction Deed with YC where it is agreed that YC will deduct and retain a donation amount from the landlord's rental income, and
- the landlord receives net rental returns (rent under the Lease Agreement less outgoings (including the management fee) and the donation amount (if any) and where applicable a receipt acknowledging the donation to YC.

22. Under the PDD:

- the PDD is for a period of 12 months (clause 1)
- the landlord (referred to as the Lessor in the PDD) directs YC to deduct the donation amount from each monthly rental payment under the Lease Agreement and pay the donation amount to YC (clause 2.2)
- YC agrees to accept the donation amount as a donation and will issue a receipt in the name of the landlord for the donation amount annually in arrears (clause 2.3)
- the landlord acknowledges and agrees that (clause 2.4)
  - the donation amount is a donation that is payable to YC each month (unless the direction is terminated)
  - the donation amount may be used by YC in a manner that is consistent with its obligations under the ITAA 1997, and
  - the payment of the donation amount to YC is an arrangement that the landlord enters into at its own discretion, and the landlord or its associates do not receive any advantage or benefit from YC.
- the landlord may terminate the PDD at any time by providing YC with 30 days notice (clause 2.5).

23. The landlord, or an associate of the landlord, will not receive any advantage or benefit from YC for entering the AHL.

24. YC can vary (extend or reduce) the term of the Lease Agreement by giving written notice to the landlord. After giving written notice the expiry date of the Lease Agreement is varied (clause 3 of the Lease Agreement).

25. YC may terminate the Lease Agreement at any time during the term of the Lease Agreement by providing the landlord 30 days notice in writing (clause 14.5 of the Lease Agreement).

26. The landlord may consent to YC continuing to occupy the property after the end of the Lease Agreement. If the landlord consents to YC continuing to occupy the property after the end of the Lease Agreement, the provisions set out in the Lease Agreement continue to apply (clause 3.2).

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**Commissioner of Taxation**

5 July 2023

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## Appendix – Explanation

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

27. 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*.

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

29. 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.

30. 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**

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

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32. 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.

33. The giver must have proprietary rights in the property just prior to the 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.

34. 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.

35. Under the PDD, the landlord directs YC to deduct the donation amount from the rent the landlord receives under the Lease Agreement, and pay it to YC.

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

37. The donation is made when the donation amount is transferred to YC's account and YC no longer holds it as agent for the landlord.

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

38. 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.

39. 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 has contractual or similar features.

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

41. A payment under the PDD is voluntary and may be revoked with 30 days notice by the landlord.

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

42. 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.

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

44. 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

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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.

45. 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.

46. Payments made in accordance with the payment direction will cause money owned by a landlord to be transferred to YC for its benefit. There is no evidence that a detriment will arise to YC from accepting the payments.

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

48. Payments under the PDD confer benefaction on YC.

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

49. 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.

50. 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.

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

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

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

53. The donation amounts paid by the landlord to YC in accordance with the PDD are gifts for the purposes of Division 30.

#### **Tax deduction on donation amounts**

54. 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 gift or contribution that can be made to each category of recipients, and how much can be deducted.

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**Gift recipient**

55. 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.
56. Subdivision 30-B includes section 30-45. Table item 4.1.1 of subsection 30-45(1) includes recipients who are 'a registered PBI'.
57. Deductible gifts and contributions can therefore be made to a recipient that is a registered PBI.
58. A registered PBI is defined in subsection 995-1(1):  
**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.
59. 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, or is named in Subdivision 30-B (table item 1 of subsection 30-15(2) and section 30-17).
60. YC is a registered PBI that is endorsed as a deductible gift recipient; YC can receive tax-deductible gifts and contributions.

**Type of gift**

61. Table item 1 of subsection 30-15(2) 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.
62. Under the PDD a landlord directs YC to pay the donation amounts (money) to YC (an endorsed DGR).
63. The donation amounts paid to YC are gifts of money to an endorsed DGR and are tax-deductible gifts under Division 30.

**Amount of gift that can be deducted**

64. 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.
65. The value of the gift must however be \$2 or more (refer to 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.
66. 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.
67. 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 up to 5 years.

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68. If the donor chooses to spread a deduction the election must be made as specified in section 30-248, 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 4four 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.

69. A landlord who pays gifts to YC 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 landlord (that is, the deduction must not create a tax loss or add to a tax loss). The landlord can elect to spread the deduction over up to 5 years.

### **Gift receipts**

70. Tax law does not require a DGR to issue a receipt for tax-deductible gifts it receives. 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 items 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.

71. Clause 2.3 of the PDD requires YC to issue a receipt to the landlord for the donation amounts paid under the PDD.

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

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## References

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*Previous Rulings/Determinations:*

TR 2005/13

- 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 Div 230
- ITAA 1997 30-248
- ITAA 1997 995-1(1)
- Australian Charities and Not-for-profits Commission Act 2012 25-5(5)

*Legislative references:*

- ITAA 1997 26-55
- 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

ATO references

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