TR 95/D18 - Income tax: tax exemption available to non-profit bodies established for the encouragement or promotion of a game or sport

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Draft Taxation Ruling

Income tax: tax exemption available to non-profit bodies established for the encouragement or promotion of a game or sport

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IT 2153

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What this Ruling is about

Class of person/arrangement

1. This ruling applies to sporting clubs seeking to clarify their income tax status.

2. This Ruling describes the circumstances when a society, association or club (a club) will be regarded as being established for the encouragement or promotion of a game or sport. Where this is the case, the club is exempt from income tax under subparagraph 23(g)(iii) of the *Income Tax Assessment Act 1936* (the Act).

Ruling

Non-profit requirement

3. A club must not be carried on for the purposes of profit or gain to its individual members. The test is satisfied provided members do not benefit **as members**.

4. A club will not satisfy the non-profit test unless its Memorandum and/or Articles of Association or other constituent documents contain a prohibition against a distribution of profits and assets among members while the club is functional or on its winding-up. Examples of acceptable non-profit and dissolution clauses are as follows:

Non-profit clause

'The property and income of the ... however derived shall be applied solely towards the promotion of the objects of the ... and no portion thereof shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit to the members.'

Dissolution clause

'If upon the winding up or dissolution of the ... there remains, after satisfaction of all its debts and liabilities, any property whatsoever, the same shall not be paid to or distributed among the members of the ... but shall be given or transferred to some other organisation having objects similar to the objects of the ...which is also not carried on for the profit or gain to its individual members, and which is similarly exempt from income tax.'

Encouragement or promotion

5. It is essential that the main or dominant purpose of a club is the encouragement or promotion of a game or sport. Encouragement or promotion can occur:

- directly, by providing the necessary facilities, co-ordinating activities or improving the abilities of participants;
- through the improvement of the standard of trainers and coaches or by encouraging increased and wider participation and improved performance; and
- indirectly, such as through the marketing of the game or sport to encourage funding, or by initiating or facilitating research and development in the game or sport.

Game or sport

6. A wide natural meaning can be given to the words 'game or sport' but they do not generally include activities that are merely a pastime or hobby.

Main or dominant purpose

7. To be eligible for exemption the main or dominant purpose of the club must be to promote or encourage the relevant game(s) or sport(s) with which it is associated.

8. Whether or not a club's main purpose is to promote or encourage a game or sport is a matter of fact and degree. In short, a good rule of thumb is whether a disinterested observer could readily characterise the club as one being carried on in the relevant year for that purpose.

9. Features which may support a conclusion that the main or dominant purpose of the club is to promote a game or sport include:

- the club's activities in the relevant year are significantly related to the game(s) or sport(s);
- the manner in which the club's surplus funds are used;
- the Board of the club is primarily concerned with the promotion of its game(s) or sport(s);
- the nature and conduct of its members and their level of participation in the game(s) or sport(s) promoted or encouraged by the club;
- voting rights in the club vest only in members participating in the game(s) or sport(s), or in 'full' members, and only participants in or promoters of the game(s) or sport(s) have a direct say in the running and direction of the club (as distinct from day to day management);
- the club promotes itself to patrons and the public as one encouraging or promoting the game(s) or sport(s), and advertisements and publicity emphasise the game or sporting facilities provided;
- the objects of the club when it was set up were the encouragement or promotion of the game(s) or sport(s), with other objects or purposes either minor or merely of an incidental nature, and those other objects or purposes have not become predominant;
- the club was set up by people with an interest in the game(s) or sport(s) and its constitution and founding documents are consistent with the aim of encouraging or promoting the game(s) or sport(s); and
- the club has from its inception been dedicated to a substantial degree to the game(s) or sport(s).

Date of effect

10. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does 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 the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Explanations

11. Subparagraph 23(g)(iii) of the Act now reads:

> '23. The following income shall be exempt from income tax:-
>
> (g) the income of a society, association or club which is not carried on for the purposes of profit or gain to its individual members and is -
>
> ...
>
> (iii) a society, association or club established for the encouragement or promotion of a game or sport;
>
> ...'

Non-profit requirement

12. Paragraph 23(g) requires that the income of a society, association or club not be carried on for the purposes of profit or gain to its individual members. The test will be satisfied if members do not benefit in their capacity as members**.** For example, a *bona fide* supplier of golf equipment to a golf club may profit from having such business with the club, and may also be a club member. However, he or she is not regarded as making the profit as a member.

13. '[An organisation] may be established for the statutory purpose even though incidental advantages can be gained by a subscriber or member' *Case K 42* 78 ATC 378 at 412.

Encouragement or promotion

14. The terms 'encouragement or promotion' used in subparagraph 23(g)(iii) are not specifically defined in the Act and are to be treated as having their ordinary meaning. The words cover both directly carrying on activities and supporting them less directly, for example by providing financial support or by providing accreditation for referees, umpires, coaches and other non-playing participants in the activities.

Game or sport

15. There is no special definition of what constitutes a 'game' or 'sport' and therefore the words are intended to be given their wide natural meanings. The words 'game or sport' are often used interchangeably and a 'game' can be a description of a sporting contest, e.g., a game of tennis or cricket, the Olympic Games.

16. For the purposes of subparagraph 23(g)(iii) we consider a 'sport' to be:

> 'a contest, organised in accordance with rules between individuals or teams by a society, association or club established to encourage or promote the sport, which involves a physical activity requiring the application of skill, strength, dexterity, physical prowess and/or tactics producing a measurable outcome and where the predominant purpose of participation is either the activity or the outcome or both';

and we define a 'game' as:

> 'an activity, other than a sport, involving a contest organised in accordance with rules between individuals or teams by a society, association or club established to encourage or promote the game, requiring the application of skill, dexterity and/or tactics producing a measurable outcome where the predominant purpose of participation is the outcome, not the activity.'

17. Generally speaking, a 'game' or 'sport' does not include a pastime or hobby. For purposes of comparison, we can define a 'pastime' or 'hobby' as:

> 'an activity, physical or otherwise, with or without a measurable outcome, which does not involve a contest in accordance with rules between individuals or teams organised by a society, association or club established to encourage or promote a game or sport and where the predominant purpose is participation.'

Thus, philately is a pastime or hobby and not a game or sport. The operation of a gambling machine may also be seen in this light.

18. However a club may conduct a game or sport if it conducts activities that, when carried on by individuals, are regarded as a pastime or hobby. For example, if an individual jogs on a regular basis, this will be no more than a pastime or hobby; if a club regularly arranges races between joggers this could be a 'sport'. Similarly, chess or bridge played socially between individuals is a pastime or hobby; played in a competition run by a club established for that purpose, it is seen as a 'game'. On the other hand, some activities which are a pastime or hobby when carried on by individuals will not gain the

character of a game or sport when run by a club. An example would be the modelling of railways.

19. The element of competition will be a factor in determining that a particular activity is a game or sport if it is present above a mere social level. Thus chess or bridge is competitive when carried on in a tournament or under the auspices, respectively, of a chess or a bridge club but is not sufficiently so if undertaken as a social activity.

20. An activity is not a game or sport if it is, or is seen to be, conducted primarily as a form of social activity by its participants, even if it might in different circumstances be accepted as a game or sport. An example would be one of the many forms of dancing where the activity is the particular means for the participants to engage in social fellowship and not as a competitive activity.

21. Some decisions as to what constitutes a game or sport include: *Case Y 14* 91 ATC 198, *AAT Case 6793* (1991) 22 ATR 3073 (competitive motor cycling); *Case U 128* 87 ATC 753; *Tribunal Case 93* (1987) 18 ATR 3651 (skiing); and as to what does not, include: *Case 10/93* 93 ATC 152; *AAT Case 8635* (1993) 26 ATR 1009 (modelling of railways).

22. Examples of a 'sport' are:

athletic activity: aerobics, if competitive; amateur wrestling; athletics including hurdling, jumping, running and walking; boxing; dancing, such as ballroom dancing, if competitive; 'field games', including discus, javelin, shot putt and hammer throwing; martial arts such as judo, kung fu, ju jitsu and karate; mountaineering; orienteering; rogaining; water-based sports including diving, swimming, surfing, surf life-saving, synchronised swimming and water polo;

played with ball or projectile: badminton; baseball; basketball; bocce; bowling (ten-pin); bowls; cricket; croquet; football (all codes); golf; handball; hockey; ice-hockey; lacrosse; marbles; netball; softball; squash; table tennis; tennis; underwater hockey; volleyball;

involving animals: camel racing; equestrian activities; polo; pony club activities; rodeo activities;

using equipment to achieve mobility: canoeing; cycling; dragon boat racing; drag racing; go-kart racing; kayaking; motor-car racing (circuit, rally); motor cross; motorcycle racing; mountain bicycle riding; rowing; yachting;

using other equipment: abseiling; archery; billiards; darts; fencing; gymnastics; pool; power lifting (competitive); snooker; skateboarding; snow sports including bobsled, luge, skiing, ski-

jumping and snow boarding; target shooting; water skiing; weight-lifting; windsurfing; wood chopping;

contests involving combinations of activities: swimming/running/cycling; swimming/surf ski/running; Highland Games; Olympic Games;

any outdoor sport when played indoors; and

any indoor sport when played outdoors.

23. A 'game' includes card games such as bridge and board games such as backgammon, chess and mahjong.

24. Activities which in most cases are no more than pastimes or hobbies or not in the nature of a 'game' or 'sport' include: bingo; bird-raising, bird-keeping and bird-watching; body building; car owners clubs/associations; casino games like roulette, blackjack, keno and gambling machines; climbing; competitions between animals such as greyhound racing (which might be eligible for exemption under subparagraph 23(g)(iv)); dancing as a social activity, including ballroom dancing, square-dancing and Highland dancing; fishing (any type); flying clubs, including gliding clubs and model flying; hang gliding; hot air ballooning; hunting; jogging; model-car racing; modelling of railways; numismatism; parachuting; philately; playing of gaming or gambling machines; reading; scuba diving and snorkelling; sheepdog trials; showing of animals; shooting; tai chi; and throwing activities of an *ad hoc* nature including boomerang throwing, frisbee throwing and gumboot tossing.

25. The activities listed in the previous paragraphs are intended to be illustrative and not prescriptive. Whether a pastime or hobby can be categorised as a game or sport for the purposes of the subparagraph will depend on the particular case submitted in favour of that conclusion. Such a case will address the relevant definition mentioned in paragraphs 15 and 16 and draw any necessary comparisons with examples outlined above. A listed game or sport may, because of the circumstances of a particular case, be categorised only as a pastime or hobby.

Main or dominant purpose

26. While the main or dominant purpose of an eligible club must be to promote or encourage the relevant game(s) or sport(s) conducted by that club, difficulties arise in administering this test where the club conducts social activities in conjunction with the administration of the game(s) or sport(s). It is readily accepted, though, that a certain amount of social activity is a normal part of the conduct of a game or

sport; social activity, of itself, is no bar to the gaining of exemption: *Case T 53* (1968) 18 TBRD 278 at 283.

27. The test to be applied is whether the club's main purpose or object for which it is established during the relevant years of income is the encouragement or promotion of a game or sport. This test was enunciated by the Full Federal Court in *Cronulla-Sutherland Leagues Club Limited v. FC of T* 90 ATC 4215; (1990) 21 ATR 300 and is based on the decision of the High Court of Australia in *Royal Australasian College of Surgeons v. FC of T* (1943) 68 CLR 436.

28. The Full Federal Court in *Cronulla-Sutherland* also makes it clear that the test necessarily looks to the circumstances existing in the relevant year of income (per Lockhart J at ATC 4226; ATR 313; per Beaumont J at ATC 4243; ATR 331; and per Foster J at ATC 4248; ATR 337).

29. Below is an analysis of the relevant cases.

30. In the *College of Surgeons*, the issue was whether the objects and activities of the College that promoted the professional interests of its members prevented it from being a scientific institution and therefore denied exemption to its income. The High Court concluded that the College was a scientific institution. The Justices expressed the matter variously; thus:

> 'Unless the promotion of surgical science is the main substantial or primary object...it cannot be described as a scientific institution' (per Latham CJ at 444);
>
> '...the main or real object...is the promotion and advancement of surgery...Its other objects are not collateral or independent but merely concomitant and incidental to the main object' (per Rich J at 447);
>
> '...those activities are merely or predominantly directed towards the promotion...of scientific knowledge' (per Starke J at 448);
>
> '...the activities of the appellant were mainly devoted to the promotion of the science of surgery. That was the primary and dominant object of the activities carried on by it' (per McTiernan J at 450); and
>
> '[the question] depends on whether the main and dominant object...is to promote the science of surgery' (per Williams J at 451).

31. Waddell J, in *'The Waratahs' Rugby Union Football Club Ltd v. FC of T* 79 ATC 4337; (1979) 10 ATR 33, having analysed those views and applying them to the facts of the case at hand, said at ATC 4341l; ATR 37:

> 'The conclusion which I draw from the *Royal Australasian College of Surgeons* is that, in order for the appellant to come within the statutory description in question in this case it must appear from the evidence that the main or real purpose for which it was established during the tax years in question was for the encouragement or promotion of an athletic game or athletic sport of the kind mentioned and that the purpose of a social club was not collateral to or independent of this purpose but merely concomitant and incidental to it.'

32. In *Cronulla-Sutherland Leagues Club Limited v. FC of T* 89 ATC 4936; (1989) 20 ATR 1404 Hill J, at first instance, said at ATC 4954; ATR 1419:

> 'However, having regard to the later decision of the High Court in *Stratton v. Simpson* (1970) 125 CLR 138 it now seems clear that *Waddell J* had correctly construed the *Royal Australasian College of Surgeons'* case.'

33. The Full Federal Court in *Cronulla-Sutherland* disagreed with Hill J and concluded that it is not necessary that promotion or encouragement of the sport or game be the exclusive object or purpose (per Beaumont J at 90 ATC 4243; 21 ATR 332). Lockhart J said at ATC 4225; ATR 12 that for:

> 'a society, association or club to qualify for the exemption granted by sec. 23(g)(iii) it must be one that has as its main object or purpose the encouragement or promotion of an athletic game or athletic sport in which human beings are the sole participants. It may have other objects or purposes which are merely incidental or ancillary thereto or which are secondary or even unrelated to the main object or purpose without disqualifying the body from the exemption. But if it has two co-ordinate objects, one of which is outside the exemption, the exemption cannot apply because it would be impossible to say that one object is the main or predominant object.'

34. Foster J, who dissented on the facts, agreed with the analysis of Lockhart J and said at ATC 4248; ATR 337:

> 'I am satisfied that, on a proper analysis of the authorities, the subsection is satisfied if a club is shown to have a main purpose of relevant encouragement or promotion even if there exist a secondary and non-subservient purpose of conferring unrelated benefits upon members and visitors.'

35. Similarly, in *Commissioner for ACT Revenue Collections v. Council of the Dominican Sisters of Australia* 91 ATC 4602; (1991) 22 ATR 213, the Full Federal Court said at ATC 4607; ATR 218:

> 'In the light of what was said in the *Surgeons'* Case what had to be ascertained by the Tribunal in the present case was the primary and dominant object of the respondent. That object was to be ascertained by reference to the respondent's objects as stated in its memorandum of association and by a consideration of the activities in which it engaged.'

36. *Cronulla-Sutherland* concerned a leagues club of some 13,000 members with extensive social facilities. The club was incorporated in 1957 and had as one of its objects the promotion and development of rugby league; to that end it formed a committee to administer football activities. In time the club supported the entry of a team into the first grade competition organised and administered by the NSW Rugby League. Thereafter the football club was almost entirely dependant upon the leagues club for financial assistance in the form of grants, the provision of facilities and guarantees of expenditure.

37. In his decision at first instance, Hill J held that it was quite unreal to regard the social activities of the leagues club with all its facilities as being activities engaged in solely for the purpose of providing funds for the football club. The social activities became an end in themselves and were not merely concomitant and incidental to the promotion or encouragement of sport. At the very least they were a collateral or independent purpose. The social activities of the leagues club stamped it as a club established to provide for the social needs of its members rather than for the promotion or encouragement of football.

38. The majority of the Full Federal Court in *Cronulla-Sutherland* held that the leagues club's main object was the provision to its members of social amenities and licensed club facilities, not the encouragement or promotion of sport. Consequently it was not entitled to exemption. Foster J, in dissenting, noted that the taxpayer had:

> '...rendered financial assistance to the sporting body to such an extent as to prevent it making expenditures on maintenance of club facilities which would otherwise have been deemed desirable' (at 90 ATC 4250; 21 ATR 339).

39. Subparagraph 23(g)(iii) was also considered by the AAT in *Case W 114* 89 ATC 891; *AAT Case 5452* (1989) 20 ATR 4125 (*Grand United Port Macquarie West Bowling Club v. FC of T*) and in *Tweed Heads Bowls Club v. FC of T* 92 ATC 2087; *AAT Case 8267* (1993) 24 ATR 1068. In the former case Mr P M Roach, Senior Member, noting that the issue was ultimately a question of fact and degree, considered that a lawn bowls club had as its main object the promotion of the game of bowls, despite extensive club house facilities.

40. In *Tweed Heads*, the club had 920 members, of whom 830 were 'bowling' members, but the social facilities drew some 400,000 visitors annually. More than 70% of the total fixed asset value was said to have been applied to bowls/bowls promotion, even though a relatively small proportion of poker machine revenue was used for bowling in the relevant year. Dr Gerber concluded that:

> 'the "non-bowling" activities of the Club...have not overtaken the Club's main object - bowling - so as to attain an independent purpose to the point where the Club's object - the encouragement of the sport of bowls - has become a mere incident, subsumed in poker machines and other entertainment' (at ATC 2101; ATR 1084).

41. The final relevant case was that of *Terranora Lakes Country Club Limited v. FC of T* 93 ATC 4078; (1993) 25 ATR 294. There, the club had a membership of nearly 4,100 and provided and promoted various sporting activities. It also had extensive social facilities which were used by members and by the large number of visitors - approximately 1,000 per day - to the club. In the most recent year reported in the case, 90.3% of the club's income came from poker machines, bar trading and catering but only 16.9% was spent on sporting activities. The Commissioner argued (at ATC 4086; ATR 304) that the sporting activities were subordinate to the club's main object or purpose in the year of income, namely the provision of social amenities or facilities for members and non-members. Hill J concluded that:

> 'while the social activities...were very extensive and could clearly be seen as an end, or perhaps as ends in themselves, those activities were...pursued as a means of financing the extensive sporting activities conducted by the club' (at ATC 4086-4087; ATR 304).

Indicators of purpose

42. The authorities make it clear that the determination of a club's main purpose in the relevant year of income is one of fact and degree. In *Cronulla-Sutherland*, Lockhart J in the Full Federal Court said, at 90 ATC 4225; 21 ATR 312:

> 'The material facts and circumstances which should be examined to characterise the main purpose of the relevant body include its constitution, its activities, its history and its control. These may alter from time to time and the purpose of establishment may correspondingly change. It is not sufficient to look to the formation of the body and to ascertain what was at that time the purpose of its formation. The statute gives a periodic operation

to the words and directs the inquiry to a particular time, namely, the year of income so that consideration must be given not only to the purpose for which the society was established but also the purpose for which it is currently conducted.'

43. Subparagraph 23(g)(iii) looks to the year of income to determine whether each of its elements is satisfied. Evidence of the purpose for which it was originally or later set up is helpful but, equally importantly, the organisation must demonstrate by reference to its activities in that year that, in the year of income, it had as its main or predominant purpose the encouragement or promotion of a game or sport: *Case T 55* (1968) 18 TBRD 288 at 295; *Case K 42* 78 ATC 378 at 405.

44. The constitution and founding documents of an exempt organisation should be consistent with the aim of encouraging or promoting a game or sport. The organisation's history should also characterise it as one that was established, originally or after its foundation, by people with an interest in the game or sport and one that has in fact continued to encourage or promote a game or sport: *Case G 53* (1956) 7 TBRD 301 at 309; *Case T 52* (1968) 18 TBRD 271 at 276; cf *Case K 24* 78 ATC 216 at 238. See also *Brookton Co-operative Society Limited v. FC of T* 81 ATC 4347; (1981) 11 ATR 880 (FHC); *A & S Ruffy Pty Ltd v. FC of T* (1958) 98 CLR 637. However, as explained above, there may be situations where the original objects have changed.

45. A club is generally established for the enjoyment and benefit of its members. It is they who determine its nature and direction by exercising their voting rights. How a club is controlled on behalf of its members and the nature of the voting membership are, therefore, relevant in determining its purpose.

46. A situation in which only members participating in the game or sport or 'full' members have voting rights, and only participants in the game or sport have a direct say in the running and direction of the club, would be indicative of a club that is exempt from income tax; for example, a club for golfers or bowlers that is controlled by golfers or bowlers: see *Tweed Heads* at 92 ATC 2100; 24 ATR 1083.

47. An exempt organisation should promote itself to patrons and the public as one encouraging or promoting a game or sport, and advertisements and publicity, including the organisation's annual report, would emphasise the game(s) or sport(s) it promotes, rather than the social or other facilities.

48. Although the bulk of the income of an organisation may not be derived from its game or sporting facilities, a significant proportion of its income from other sources could be expected to be applied directly

or indirectly for the purpose of encouraging a game or sport. Income may be applied in maintaining, improving or expanding the social club facilities or the game or sporting facilities, but the predominant purpose of the application must be directed towards the promotion or encouragement of the relevant game or sport (see *Terranora*). The distribution of its surplus funds will also be a relevant factor: per Foster J in *Cronulla- Sutherland* at 90 ATC 4250; 21 ATR 339.

49. Other factors which may be supportive of a conclusion that a club's main purpose is to encourage or promote a game or sport include:

- proximity of the club's social facilities to its sporting facilities; and
- the decoration and fit out of an exempt club so as to reflect its game or sporting nature, e.g., the display of trophies, honour rolls or boards, pictures or statues of outstanding sporting achievers, displays of sporting equipment etc., along with the actual game or sporting facilities.

Your comments

50. If you wish to comment on this Draft Ruling, please send your comments by: 22 September 1995

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