TD 2004/23 - Income tax: where a trustee of a public fund under item 2 of the table in section 30-15 of the Income Tax Assessment Act 1997 has an obligation or otherwise gives an assurance to apply funds in accordance with requests from a donor, is a separate fund created? If so, is the separate fund a public fund entitled to be endorsed as a deductible gift recipient?

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Taxation Determination

Income tax: Where a trustee of a public fund under item 2 of the table in section 30-15 of the *Income Tax Assessment Act 1997* has an obligation or otherwise gives an assurance to apply funds in accordance with requests from a donor, is a separate fund created? If so, is the separate fund a public fund entitled to be endorsed as a deductible gift recipient?

Preamble

The number, subject heading, date of effect and paragraph 1 of this document are a 'public ruling' for the purposes of Part IVAAA of the ***Taxation Administration Act 1953*** *and are legally binding on the Commissioner.*

1. In these circumstances, a separate fund is created which does not satisfy the requirements for a public fund to which tax deductible gifts may be made. The separate fund is not entitled to be endorsed as a deductible gift recipient.

Separate fund

2. An obligation on the trustee to comply with requests from a donor may arise from the trust deed itself. This can occur where the trust deed contains clauses, the effect of which is that the trustee is required to hold and apply a gift and any resulting income:

- in accordance with requests from the donor;
- on the basis or conditions outlined by the donor; or
- subject to arrangements with the donor.

3. Alternatively, an obligation on the trustee may arise from a course of action taken by the trustee. An obligation may arise from undertakings or assurances given by the trustee. For example, assurances in promotional material or through other arrangements with the donor may state that the trustee will always comply with the donor's requests provided they come within the purpose of the fund. In some cases the donor's requests or recommendations are made through an advisory committee and the trustee gives a similar assurance or other undertaking that it will always follow the recommendations of the committee.

4. Some arrangements between the trustee and a donor are such that the trustee is not permitted to distribute the amount of the gift or resulting investment income without first obtaining and considering a recommendation from the donor or the donor's advisory committee, and the trustee is required to inform the donor if it intends to depart from the donor's recommendations. This can operate as an effective power of restraint or direction by the donor as the trustee needs the consent or acknowledgement of the donor before it can implement decisions on the application of the gift and resulting income. Such a feature is consistent with an obligation or assurance from the trustee to comply with the donor's ongoing requests.

5. Where the trustee of a public fund accepts a gift subject to such obligations or assurances, we consider that there is a relevant legal distinction between that gift and other gifts made to the fund without those features. There is a legally binding relationship, with ongoing rights and obligations, between the trustee and the donor that does not apply to persons who make contributions without those features. In these cases, a separate fund is created.

Separate fund is not a public fund

6. Public funds under item 2 of the table in section 30-15 of the *Income Tax Assessment Act 1997* (ITAA 1997) are required to be established and maintained under a will or instrument of trust solely for the establishment of, or the purpose of providing money, property or benefits to, other funds, authorities or institutions which are deductible gift recipients that are included by name, or under one of the categories of recipient, in the tables in Subdivision 30-B of the ITAA 1997. These other funds, authorities or institutions are referred to as 'eligible charities' in this Determination.

7. The term, 'public fund' is not defined in the Act but is accepted to be a fund in relation to which:

(a) the promoters or founders of the fund intend that the public will contribute to the fund;

(b) the public, or a significant part of it, does in fact contribute to the fund; and

(c) the public participates in the administration of the fund.[1]

8. A public fund under item 2 of the table in section 30-15 of the ITAA 1997 operates by pooling gifts from the public and then the fund's trustee decides how the gifts, and any income derived there from, are to be allocated to eligible charities. In many cases the amount of the gift is retained in the fund and invested, and periodic distributions are made only from the investment income.

9. Where the trustee's obligation or assurance is to comply with the donor's requests for particular eligible charities to benefit from the gift and any resulting income, a separate fund is created. The only contributors to that fund are the initial donor and in some cases, associates of the donor. The public is not invited to contribute to that fund and does not contribute.

[1] See Taxation Ruling TR 95/27 Income Tax: public funds.

10. Accordingly, the separate fund lacks the necessary elements for a public fund that are outlined in paragraph 7.[2] The separate fund is not a public fund entitled to be endorsed as a deductible gift recipient.

Not a separate fund

11. In contrast, a separate fund is not created if the donor merely expresses a preference to be considered when the trustee is making grants – *Re Australian Elizabethan Theatre Trust; Lord v. Commonwealth Bank of Australia and Others* (1991) 30 FCR 491; (1991)102 ALR 681. For example, a separate fund is not created where the trust deed or other material merely allows:

- a donor to, from time to time, express a preference for the gift and/or investment income to be applied to particular eligible charities or a particular type of eligible charity, for example, public benevolent institutions assisting the homeless;
- a donor to express a preference via a committee provided that the trustee does not have an obligation (or an effective obligation – see paragraph 4) to comply with the request or recommendation of the advisory committee or the donor;
- the trustee to maintain a named management account[3] to record the gift from the donor, the investment income and grants made;
- the trustee to provide regular reports to the donor advising how the amounts of the gift and investment income have been used; and/or
- the trustee to accept a donation as an agent for on-forwarding to a nominated eligible charity[4].

12. To ensure that a separate fund is not created, it must be clear from all the circumstances and having regard to the trust deed, receipts, marketing information and any other material that the trustee is not under an obligation to apply moneys in accordance with donors' wishes and does not make a promise or give an assurance to comply with donors' requests. This must be the genuine arrangement between the trustee and the donor and it is not acceptable for contrary 'understandings' to be entered into, even if orally.

[2] Where the requirement for public contributions cannot be met, a donor who wishes to establish their own fund to benefit eligible charities can consider applying for approval for a prescribed private fund. For more information about prescribed private funds, see *Guidelines for Prescribed Private Funds* (available on the ATO website at www.ato.gov.au)

[3] The use of the terms 'fund', 'sub fund' or 'foundation' in the name of the management account may be misleading if, on the facts, a separate fund is not created.

[4] Where a trustee of a public fund is merely acting as an agent for the donor and passes the transferred money or other property on to a nominated eligible charity, the donation is to the nominated eligible charity rather than to the public fund.

Examples

Example 1 – Separate fund

13. The trust deed of X Community Foundation includes a clause that a donor, in making a gift, may request that particular eligible charities are to benefit from the gift and that the trustee will advise the donor if it will accept and hold the gift in accordance with that request.

14. In this case, where the trustee has advised the donor that it will hold the gift in accordance with the request, the trustee is under an obligation to comply with the donor's request. As such, a separate fund is created, distinct from the X Community Foundation's public fund. The separate fund does not meet the public fund requirements and is not entitled to be endorsed as a deductible gift recipient. The donor is not entitled to a deduction for a gift to this separate fund.

Example 2 – Not a separate fund

15. The trust deed and promotional material of Z Community Foundation includes statements indicating that the trustee may accept a gift from a donor who expresses a preference for particular eligible charities, or a particular type of eligible charity, to benefit from their gift. The trust deed and promotional material also states that the trustee may take the donor's preference into account when making decisions, but the trustee is not under an obligation to comply with the donor's request.

16. The trustee maintains a named management account to record the gift from the donor and the resulting investment income and distributions. However, the trustee's bank account arrangements are not based upon a differentiation between the source of public gifts, including those where the donor expresses a preference. Ultimately, all gifts are pooled for investment purposes.

17. In this case, the management account is not considered to be a separate fund and its existence does not prevent Z Community Foundation from being a public fund entitled to be endorsed as a deductible gift recipient.

Example 3 – Separate fund

18. In Example 2, if a representative of the trustee of Z Community Foundation said to the donor words to the effect, 'don't worry about what it says on the forms, we will always follow your preference provided it is within the terms of the trust', then the trustee has given an assurance that the requests will be complied with. A separate fund is created and the separate fund is not eligible to be endorsed as a deductible gift recipient. The donor is not entitled to a deduction for a gift to this separate fund.

Date of Effect

19. This Determination applies to separate funds created both before and after its date of issue to the extent of denying the separate fund entitlement to be endorsed as a deductible gift recipient or to rely on the deductible gift recipient status of the public fund after the date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Commissioner of Taxation
30 June 2004

Previous draft:
Previously released as TD 2003/D16

Related Rulings/Determinations:
TR 95/27; TR 92/20

Subject references:
- ancillary funds
- charitable trusts
- deductible gift recipients
- gifts & donations
- public funds
- sub-funds
- trusts

Legislative references:
- ITAA 1997 30-15
- ITAA 1997 30-15 item 2
- ITAA 1997 Subdiv 30-B
- TAA 1953 Pt IVAAA

Case references
- Re Australian Elizabethan Theatre Trust; Lord v. Commonwealth Bank of Australia and Others (1991) 30 FCR 491; (1991) 102 ALR 681

ATO references
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