

TR 2005/22A2 - Addendum - Income tax: companies controlled by exempt entities.

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Addendum

Taxation Ruling

Income tax: companies controlled by exempt entities.

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Taxation Ruling TR 2005/22 primarily to:

- (a) reflect the impact of the decision of the High Court in *Federal Commissioner of Taxation v. Word Investments Limited* (2008) 236 CLR 204; 2008 ATC 20-072; (2008) 70 ATR 225; and
- (b) update references to other Rulings including references to Taxation Ruling TR 2005/21 Income tax and fringe benefits tax: charities which was withdrawn on 11 May 2011 and replaced by Taxation Ruling TR 2011/D2. Taxation Ruling TR 2011/D2 has been finalised as Taxation Ruling TR 2011/4.

TR 2005/22 is amended as follows:

1. Paragraph 6

- (a) Omit 'Taxation Ruling TR 2005/21 on charities, and'.
- (b) Insert 'and Taxation Ruling TR 2011/4 on charities.' after 'charities.'.

2. Paragraph 7

Omit the paragraph; substitute:

7. As well as the question of whether a particular company is covered by an item in Division 50, there is also the question of which amounts the exemption will apply to. Section 50-1 applies the exemption to 'total *ordinary income and *statutory income of the entities covered by the following tables'. This ensures that an exempt entity cannot claim an exemption in respect of amounts that are not in fact its ordinary or statutory income. However, it can also mean that where a company is acting only as the agent of an entity that is itself exempt (a situation which is expected to be unlikely or rare), the income generated may be the income of the exempt entity and not of the company.

3. Paragraph 16

At the end of the paragraph insert:

This position is consistent with the decision of the High Court in *Federal Commissioner of Taxation v. Word Investments Ltd* (2008) 236 CLR 204; 2008 ATC 20-072; (2008) 70 ATR 225 (*Word Investments*). In *Word Investments*, the High Court held that Word Investments Limited was charitable because it had a sole charitable purpose itself, not because it had been established by and had links with a charitable entity.

4. Paragraph 17

(a) Omit '- as shown by all relevant features including its constituent documents and activities -'.

(b) Insert after the paragraph:

The object or objectives in the constituent documents of the company and the activities by which those objects or objectives are achieved are the main factors to be considered.^{13A}

5. Paragraph 22

(a) Omit paragraph (g); substitute

(g) a superannuation fund;

(h) an approved deposit fund.

(b) Omit 'MT 2000/1' from the final sentence; substitute 'Miscellaneous Taxation Ruling MT 2006/1'.

^{13A} Taxation Ruling TR 2011/4 *Income tax and fringe benefits tax: charities.*

6. Paragraph 24

After the paragraph insert:

24A. In *Word Investments*, the High Court held that Word Investments Limited, a company limited by guarantee established by a charitable entity (Wycliffe Bible Translators Australia – ‘Wycliffe’) primarily to raise funds for Wycliffe’s use, was itself charitable. Although Word Investments Limited was an independent organisation, there were substantial links between it and Wycliffe (for example, common directors and staff). Word Investments Limited chose to direct its funds to Wycliffe and other religious bodies in furtherance of its own charitable purpose. The status of the bodies to which the funds were directed was relevant in the assessment of the company’s status only in as much as it allowed for the conclusion that the funds would be applied to further Word Investments Limited’s charitable purpose. Gummow, Hayne, Heydon and Crennan JJ said [at paragraph 27]:

...Word’s position does not depend on the mere fact that its revenues are applied solely to charitable purposes, but on the related fact that those are its sole purposes...Word is a company having purposes which are solely charitable and which carried on commercial businesses only in order to effectuate those purposes.

7. Paragraph 29

At the end of the paragraph insert:

The Board did not have a constitution or charter giving it any religious purposes. It was the Church of England that had the religious purposes and the power to require the Board to remit funds from time to time to carry out those purposes.

8. Paragraph 30

At footnote 22, omit ‘See paragraphs 17 and 62’; substitute ‘See paragraph 17 of this Ruling.’

9. Paragraph 33

After the paragraph insert:

33A. *Theosophical Foundation* was referred to by Allsop J (Stone J agreeing) in the Full Federal Court decision in *Federal Commissioner of Taxation v. Word Investments Ltd* (2007) 164 FCR 194; [2007] FCAFC 171 as authority for the proposition that 'mere association with religious bodies is an inadequate basis upon which to characterise the entity as a religious or charitable institution'.^{27A} He stated that this proposition could be accepted. The subsequent decision of the High Court in *Word Investments* did not disturb this conclusion.

10. Paragraph 34

Omit the paragraph.

11. Paragraph 35

(a) Omit '*Dominican Sisters, Glebe Administration Board, Theosophical Foundation and Cremation Society*'; substitute '*Dominican Sisters, Glebe Administration Board and Theosophical Foundation*'.

(b) Insert 'including *Word Investments*' after 'Division 50 of the ITAA 1997'.

12. Paragraph 40

At the end of the last sentence omit the reference to TR 2005/21 and substitute 'TR 2011/4'.

13. Paragraph 44

(a) After the first sentence insert:

The majority of the Federal Court held that the Leagues Club's main object or purpose was the provision of social amenities to its members, not the encouragement or promotion of rugby league football.

(b) Omit the quote after the final sentence.

^{27A} *Federal Commissioner of Taxation v. Word Investments Ltd* (2007) 164 FCR 194; [2007] FCAFC 171 at paragraph 38.

14. Paragraph 45

After the paragraph insert:

45A. In *Word Investments*, the High Court did not indicate that the decision in *Glebe Administration Board* should not be followed. It simply distinguished the circumstances, saying that it was:

...a decision about a particular statute different from the one under consideration in this appeal, and a decision about a different entity. In contrast to the view which the Court of Appeal took of the Board in that case, the correct view in this case is that Word was using its powers to employ commercial methods to raise money for its purposes: it was not doing commercial work within limitations fixed by reference to religious principles.^{37A}

45B. The charitable status of Word Investments Limited in *Word Investments* did not result just from the fact that its surplus funds were directed to other charitable institutions. Rather, the company was a charitable institution because, having regard to factors such as the proper construction of its objects as set out in its memorandum of association, the circumstances of its foundation and the 'effectuation' of its objects in its activities,^{37B} it was clear that its own purposes were charitable.

15. Paragraph 51

Omit the second sentence and attached quote; substitute:

The motives of the founders of an organisation could be relevant to determining its purpose, but will not be sufficient to convert what would otherwise be a non-exempt purpose into an exempt purpose. For example in *Cronulla Sutherland Leagues Club* Lockhart J said in the context of exempt sporting clubs:

Whether it is permissible to have regard to the subjective motives and intentions of the promoters of the appellant or those who have been its directors at any relevant time is not a question requiring decision in this case. Even taking into account evidence of that kind which was referred to by the primary judge the conclusion would still be that the appellant's main purpose is that of carrying on a social club for the benefit of its members.⁴²

16. Paragraph 53

Omit the paragraph.

^{37A} *Federal Commissioner of Taxation v. Word Investments Ltd* (2008) 236 CLR 204; 2008 ATC 20-072; (2008) 70 ATR 225 (*Word Investments*) at paragraph 31.

^{37B} *Word Investments* at paragraphs 17 and 27.

⁴² 90 ATC 4215 at 4227; (1990) 21 ATR 300 at 314.

17. Paragraph 56

Omit 'In *Cronulla Sutherland Leagues Club*, where the Leagues Club was not accepted as an exempt sporting club.'; substitute 'In *Cronulla Sutherland Leagues Club*, the Leagues Club was not accepted as an exempt sporting club even though.'

18. Paragraph 58

Omit 'MT 2000/1'; substitute 'MT 2006/1'.

19. Paragraph 64

(a) Omit '(except political or lobbying services)' in the sixth sentence; substitute: '(except political or lobbying purposes)'.

(b) At footnote 48 omit '(see TR 2005/21)'; substitute '(see TR 2011/4)'.

20. Paragraph 68

(a) Omit '*non-profit corporation*'; substitute '*non-profit company*'.

(b) Omit the last sentence; substitute '*The company's sole purpose as stated in its constituent documents is to provide insurance to the charities in respect of their assets in a cost-neutral way*'.

21. Paragraph 69

Omit the paragraph; substitute:

69. *The company is a charitable institution in terms of item 1.1 in section 50-5. It does not merely possess characteristics as outlined at paragraph 18 of this Ruling. While it does not perform educational, religious and medical services, it has as its sole purpose the provision of insurance cover to the charities within the group. There is no private benefit provided. Taken as a whole, the circumstances of the company indicate it has a sole charitable purpose.*

22. Paragraphs 73 and 74

Omit the paragraphs; substitute:

73. *A college and its seven related entities, which are all charities, set up and control a non-profit corporation to provide business support services, such as labour hire, office services and publicity. Its constitution states that its object is to provide business services to the not for profit sector generally. The corporation provides at-cost services to the eight charities and provides its services to other organisations in the not for profit sector at commercial rates and on a commercial basis.*

74. *The non-profit corporation is not a charitable institution in terms of item 1.1 in section 50-5. While it provides at-cost services to the related charities and is controlled by them, this does not in itself mean that it has a sole charitable purpose. Its purpose is broader than providing services to related entities which are charities.*

23. Paragraph 81

After the paragraph, insert:

Example 5

81A. *A not for profit company is set up and controlled by four exempt sports clubs. Its constituent documents state that its objects are to promote and encourage the four sports, to provide a social and sporting club for members, and to provide funds to the four sports clubs.*

81B. *The company operates a club with bars, bistro and gaming machines to provide social amenities to club members and their guests. Club members may or may not be involved in the relevant sporting activities. It uses a significant proportion of its surplus funds in operating the club and to enhance the amenities for its members. It also distributes some of its surplus to support sporting purposes proposed by the sports clubs. It seeks exemption on the basis that it is a society association or club established for the encouragement of a game or sport (item 9.1(c) of section 50-45 of the ITAA 1997).*

81C. *The company has two purposes: one is the provision of a club for members and their guests and the other is the encouragement of sport. The fact that the company is controlled by the four sporting clubs is not determinative of whether the company's main purpose is the encouragement of a game or sport and therefore exempt under item 9.1(c) in section 50-45. It is necessary to examine all of the features of the company, including its objects and activities, in order to determine its purpose (see paragraphs 30-37 of Taxation Ruling TR 2011/4 in relation to 'Finding purpose'). The company's main purpose in this case is to provide members with club facilities, not to encourage a game or sport.*

24. Paragraph 82

After the paragraph insert:

82A. If the appropriate conclusion on the facts is that the company is carrying on a business or commercial enterprise as a means to a charitable end, it can still be charitable. For example, in *Word Investments*, the High Court construed Word Investments Limited's ability to conduct a business as a power to give effect to its object of advancing religious purposes. Making profits and directing any surplus to other charitable institutions were accepted as simply the means to further the company's own charitable purposes.

25. Paragraph 83

After 'the appropriate conclusion may be that' in the second sentence insert: 'the purpose of the company is an acceptable purpose and it carries on a business or commercial enterprise to give effect to that acceptable purpose,^{53A} or that'.

26. Footnote 56

Substitute footnote 56 with:

⁵⁶ See TR 2011/4 *Income tax and fringe benefits tax: charities*.

27. Paragraph 87

- (a) Omit the heading 'Example 5'; substitute 'Example 6'.
- (b) Omit the third sentence; substitute '*ABC Ltd's constitution does not specify any charitable objects, simply stating that its sole object is to carry on a trucking and haulage business*'.

28. Paragraphs 89 and 90

Omit the paragraphs, including the heading '*Example 6*'.

29. Paragraph 91

Omit 'examples in paragraphs 87-90'; substitute 'example at paragraphs 87-88'.

30. Paragraphs 94, 95 and 96

Omit the paragraphs, including the heading '*Alternative view*'.

^{53A} *Federal Commissioner of Taxation v. Word Investments Ltd* (2008) 236 CLR 204; 2008 ATC 20-072; (2008) 70 ATR 225.

31. Paragraph 97

Substitute the detailed contents list.

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32. Related Rulings/Determinations

- (a) Omit 'MT 2000/1'; substitute 'MT 2006/1'
- (b) Omit 'TR 2005/21'; substitute 'TR 2011/4'

33. Case References

Insert:

- *Federal Commissioner of Taxation v. Word Investments Ltd* (2007) 164 FCR 194; [2007] FCAFC 171.
- *Federal Commissioner of Taxation v. Word Investments Ltd* (2008) 236 CLR 204; 2008 ATC 20-072; (2008) 70 ATR 225.

Omit:

- Case B122 (1952) 2 TBRD 613; 2 CTBR (NS) Case 82
- Case C57(1952) 3 TBRD 297; 3 CTBR (NS) Case 68
- *Cremation Society of Australia Ltd v. Commissioner of Land Tax (NSW)* (1973) 2 NSWLR 704; 4 ATR 194

This Addendum applies both before and after its date of issue.

Commissioner of Taxation

16 November 2011

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