


CR 2006/38 - Income tax: deductibility of donations to the Australian Prospectors and Miners Hall of Fame

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Class Ruling

Income tax: deductibility of donations to the Australian Prospectors and Miners Hall of Fame

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1 This Ruling provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant taxation provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

Relevant taxation provision(s)

2. The taxation provisions dealt with in this Ruling are Division 30 of the *Income Tax Assessment Act 1997* (ITAA 1997) and section 78A of the *Income Tax Assessment Act 1936* (ITAA 1936).

Class of entities

3. The class of entities to which this Ruling applies is public companies (the donating companies) who make donations to the Australian Prospectors & Miners Hall Of Fame Foundation (the Foundation). Public companies which use or intend to use public recognition for a gift to the Foundation for the purposes of commercial advertising are excluded from the Class of entities to which this Ruling applies.

Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in this Ruling.
5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 12 to 19 of this Ruling.
6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:
 - this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
 - this Ruling may be withdrawn or modified.
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Date of effect

8. This Ruling applies from 1 July 2005. However, the Ruling 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 Ruling. Furthermore, the Ruling only applies to the extent that:
 - it is not later withdrawn by notice in the *Gazette*; or
 - the relevant provisions are not amended.
9. If this Class Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).
10. If this Class Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Class Ruling is made, the following two conditions are met:
 - the income year or other period to which the rulings relate has not begun; and
 - the scheme to which the rulings relate has not begun to be carried out.

11. If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Scheme

12. The scheme that is the subject of the Ruling is described in paragraphs 13 to 19 of this Ruling. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of the documents incorporated into this description of the scheme are:

- Application which is being treated as a Class Ruling dated 4 July 2005; and
- Letter dated 4 October 2005 in response to a request for information from the Australian Taxation Office dated 30 September 2005.

13. The Foundation is a deductible gift recipient (DGR) for Australian taxation purposes.

14. The Foundation invests in public companies as part of its investment activities.

15. The Foundation approaches the public companies, in which it holds an investment, for a gift of money.

16. Numerous donating companies have indicated that they are prepared to provide gifts to the Foundation equal to the amount the Foundation has invested in the public company. Other donating companies have indicated they will donate amounts greater than or less than the investments made.

17. There will be no obligation, either via contract or understanding, on the donating companies to provide a gift or donation to the foundation.

18. The Foundation's investment in the donating companies is not dependant on, or conditional upon, any gift or donation being made by the donating companies.

19. The donating companies will receive public recognition for any gift made through acknowledgement in the Foundation's newsletter and/or annual report and will have their name placed on the donor's board in the Foundation's office reception. This form of public recognition applies to all donors including those within which the Foundation does not hold an investment.

Ruling

20. Donations made by the donating companies to the Australian Prospectors & Miners Hall Of Fame Foundation are allowable deductions under Division 30 of the ITAA 1997.

Commissioner of Taxation

3 May 2006

Appendix 1 – Explanation

❶ *This Appendix 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.*

21. Division 30 of the ITAA 1997 provides that the types of non-testamentary gifts (to the value of \$2 or more) to a DGR that can be deductible include:

- money;
- property (including trading stock) purchased during the 12 months before the gift was made;
- property valued by the Commissioner at more than \$5,000;
- an item of trading stock disposed of outside the ordinary course of business;
- property under the Cultural Gifts Program; or
- gifts of places listed in the register of the National Estate.

22. The term 'gift' is not defined in the ITAA1997 but the courts have described a gift as having the following characteristics and features:

- there is a transfer of the beneficial interest in property;
- the transfer is made voluntarily;
- the transfer arises by way of benefaction; and
- no material benefit or advantage is received by the donor by way of return.

23. The issue of what is a gift for the purposes of Division 30 of the ITAA 1997 is dealt with in Taxation Ruling TR 2005/13 Income tax: tax deductible gifts – what is a gift. In determining whether a transfer of property is a gift it is necessary to consider each of the factors outlined in paragraph 22 of this Ruling in the context of the circumstances surrounding that transfer (paragraph 15 of TR 2005/13).

Transfer of beneficial interest in property

24. The making of a gift to a DGR involves the transfer of a beneficial interest in money or property to the DGR. It is a requirement that identifiable property has in fact been transferred to the DGR.

25. TR 2005/13 provides at paragraph 61:

In the simplest cases this involves the delivery of money (cash, cheque or electronic transfer of funds) or goods to the DGR.

26. The donating companies are transferring an amount of money to the Foundation. Therefore there has been a transfer of the beneficial interest in the property.

Transfer made voluntarily

27. TR 2005/13 provides at paragraph 23;

In order for a transfer of property to be a gift, it must be made voluntarily, that is, 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

28. There is no obligation on the donating companies to make a gift or donation to the foundation. While there may be a sense of moral obligation on the part of the donating companies the donation is still a voluntary gift.

Arises by way of benefaction

29. Paragraph 27 of TR 2005/13 provides:

An essential attribute of a gift is that benefaction is intended, and in fact conferred on the recipient. Conferring benefaction means that the DGR is advantaged in a material sense, to the extent of the property transferred to them, without any countervailing detriment arising from the terms of the transfer.

30. The intention to confer benefaction need not be the sole reason for making the gift. For example, the fact that the donor is also motivated by the desire to obtain a tax deduction will not, by itself, deprive a payment of its character as a gift, *FC of T v. Coppleson* 81 ATC 4550; (1981) 12 ATR 358.

31. It is accepted that the Foundation will be advantaged in a material sense by the gift of money and there is, in the circumstances covered by this arrangement, no countervailing detriment.

No material benefit or advantage

32. In order to constitute a gift, the donor must not receive a benefit or an advantage of a material nature by way of return. It does not matter whether the material benefit or advantage comes from the DGR or another party (paragraph 37 of TR 2005/13).

33. Paragraph 186 of TR 2005/13 provides;

The public recognition accorded to givers will commonly not be a material benefit. This includes mere acknowledgement in newsletters, annual reports, on a donor's board and so on. As Bowen CJ said in *Leary* [*Leary v. F. C. of T.* 80 ATC 4438; (1980) 11 ATR 145], 'a man may, by his gifts, gain fame or formal honours without losing his tax deductions'.

Further at paragraph 192 of TR 2005/13:

On the other hand, recognition accorded to the giver for purposes of commercial advertising is a material benefit. Sponsorships of DGR's by commercial entities generally fall into this category. Such outgoings, however, may be income tax deductible as business expenses.

34. It is considered that donations made in line with the arrangement as detailed in paragraphs 9 to 16 of this Ruling do not give rise to a material benefit for the donating companies. The public recognition they receive is in the nature of 'mere acknowledgement' as contemplated in paragraph 186 in TR 2005/13.

35. Therefore the donations made would qualify for deduction under Division 30 of the ITAA 1997.

Section 78A

36. In some circumstances section 78A of the ITAA 1936 will apply to deny a deduction under Division 30 of the ITAA 1997. Section 78A of the ITAA 1936 is not intended to apply to genuine gifts made in ordinary circumstances; rather it is intended to render ineffective arrangements designed to exploit the availability of deductions in respect of gifts.

37. It is considered that the provisions of Section 78A of the ITAA 1936 will not apply to the scheme as detailed in paragraphs 9-16 of this Ruling.

Appendix 2 – Detailed contents list

38. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2005/13

Subject references:

- deductions

Legislative references:

- ITAA 1936 78A

- ITAA 1997 Div 30

- TAA 1953

- TAA 1953 Sch 1 357-75(1)

- Copyright Act 1968

Case references:

- Leary v. FC of T 80 ATC 4438;
(1980) 11 ATR 145

- FC of T v. Coppleson 81 ATC
4550; (1981) 12 ATR 358

ATO references

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