CR 2018/19 - Income tax: deductibility of donations to MDA Limited under a Donation Deed

Class Ruling

Income tax: deductibility of donations to MDA Limited under a Donation Deed

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Summary – what this ruling is about

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

Relevant provisions

2. The relevant provisions dealt with in this Ruling are:

- subsection 26-55(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)
- subsection 26-55(2) of the ITAA 1997
- Division 30 of the ITAA 1997
- Subdivision 30-B of the ITAA 1997
- section 30-15 of the ITAA 1997
- section 30-17 of the ITAA 1997
- section 30-45 of the ITAA 1997
- subsection 30-45(1) of the ITAA 1997
- section 30-120 of the ITAA 1997

- subsection 30-228(1) of the ITAA 1997
- Subdivision 30-DB of the ITAA 1997
- section 30-247 of the ITAA 1997
- section 30-248 of the ITAA 1997
- subsection 995-1(1) of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is Landlords who:

- participate in the Affordable Housing Initiative, and
- make a donation to MDA Limited (MDA) pursuant to a Donation Deed.

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 8 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- this Ruling may be withdrawn or modified.

Date of effect

7. This Ruling applies from 9 May 2018. However, this Ruling will 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 this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Scheme

8. The following description of the scheme is based on information provided by the applicant.

9. MDA Limited (MDA) was registered on 24 February 2014 as an Australian public company limited by guarantee. It had previously been an incorporated association.

10. MDA is a Public Benevolent Institution, registered under the *Australian Charities and Not-for-profits Commission Act 2012* effective from 1 January 2014.

11. MDA is endorsed as a Deductible Gift Recipient (DGR) effective from 1 July 2006.

12. Welcome Residential Pty Ltd (Welcome Residential) is an Australian Private Company registered on 27 February 2017 whose sole shareholder is MDA. This entity does not have deductible gift recipient status; it is a not-for-profit real estate agency whose profits will be applied for the wellbeing of newly arrived Queenslanders through education, social inclusion, and housing and employment initiatives. Welcome Residential must remain 100% owned by MDA for this Class Ruling to apply.

13. Welcome Residential will conduct the Affordable Housing Initiative which is a series of arrangements between landlords, tenants and MDA.

14. This Initiative involves Welcome Residential coupling landlords who would like to 'make a difference' with tenants who are on low incomes, are priced out of the market and are at risk of becoming homeless, or are currently experiencing homelessness.

15. Welcome Residential will act as real estate agent for the landlords (Landlords) under the Affordable Housing Initiative; the Landlord and Welcome Residential will complete the Property Occupations Form 6 (Queensland Government), to appoint Welcome Residential as the property agent.

16. A description of the Affordable Housing Initiative is:

- Welcome Residential identifies tenants that meet certain eligibility criteria for participation in the Affordable Housing Initiative and identifies a suitable Landlord for the proposed tenancy.
- A General Tenancy Agreement is entered into between the tenant and Landlord.
- Welcome Residential and the prospective tenant agree on how much the tenant can afford to pay as monthly rent.
- Welcome Residential submits a request to MDA for a rental subsidy, being the difference between what the prospective tenant can afford to pay and typical market rent.
- MDA agrees to enter into a Rental Subsidy Agreement with the tenant to provide financial assistance to the

tenant, (that is the difference between the market rent and what the tenant has agreed to pay).

- MDA will pay the rental subsidy to Welcome Residential at a specified frequency directly into Welcome Residential's trust account.
- The rent stipulated under the General Tenancy Agreement is market rent.
- Just prior to the tenant entering into a General Tenancy Agreement MDA furnishes a signed letter to the tenant confirming the details of the Rental Subsidy Agreement. The letter stipulates the amount MDA will fund by way of a subsidy to the tenant and the amount the tenant is required to pay. Both amounts are payable to Welcome Residential.
- During the rental period, the tenant pays their share of the rent obligation to Welcome Residential's trust account.
- Welcome Residential collects the rent, and deducts outgoings such as council rates, insurance, and various fees and commissions.
- Welcome Residential charges Landlords the following fees and commissions (which are recorded in the Property Occupations Form 6):
  - a Management Fee of a percentage of the weekly rent
  - an Administration Fee of an amount per month per property
  - a Letting Fee of one week's rent
  - a Re-let Fee of a percentage of the weekly rent
  - a Tribunal Lodgement Fee: at cost
  - Tribunal Appearance Fees: an amount per appearance
  - a Professional Photography Fee: an amount per session
  - Property Signboard Install and Removal Fee: an amount per property
  - Website and domain advertising Fee: At Cost.
- The Management Fee levied on the Landlord by Welcome Residential is calculated on the gross rental income (that is the market rent).
- Welcome Residential then remits the net rent amount to the Landlord.

- At the time of entering the General Tenancy Agreement and during the term of that Agreement, the Landlord may enter into a Donation Deed with MDA under which Welcome Residential deducts donations from the Landlord's gross rental receipts and pays them to MDA on a specified frequency.
- MDA issues the Landlord a receipt for the donation amount.
- The Landlord's right to receive market rent is created by the General Tenancy Agreement with rent being payable irrespective of whether the Landlord decides to make a donation or not.

17. Landlords are not required to enter into a Donation Deed and the Donation Deed is revocable at the option of the Landlord by giving MDA 7 days written notice.

18. Under the Donation Deed:

- The Donor (Landlord) authorises Welcome Residential to pay the donations to MDA on a specified frequency in accordance with a Payment Authority which forms part of the Donation Deed. (Under the Payment Authority the Landlord directs Welcome Residential to deduct from the rental payment, collected under the General Tenancy Agreement, the donation amount as agreed and pay it to MDA (DGR)).
- MDA agrees to accept the donation amount as a donation to further its charitable purposes and must, at the end of each financial year, issue a statement which sets out the donations paid by the Landlord.
- The Donation Deed is revocable at the option of the Landlord by giving MDA 7 days written notice.
- MDA acknowledges that the Donation Deed does not constitute an ongoing promise to give donation amounts and that the Donation Deed is revocable.
- The Landlord acknowledges that:
  - each donation amount is a donation to MDA
  - a donation amount may be used for any purpose at the absolute discretion of MDA which is consistent with its obligations under the ITAA 1997
  - MDA has not made any representations with respect to the allocation of any particular donation amount to a particular purpose or property, and

- by paying each donation amount in accordance with the Donation Deed, Welcome Residential will have discharged all of its obligations under the Donation Deed in respect of deducting the donation amounts from the Landlord's rent and paying the donation amounts to MDA.

19. The Landlord, or an associate of the Landlord, does not receive any advantage or benefit from MDA, Welcome Residential, the tenant or any other party on making donations under the Affordable Housing Initiative.

Ruling

20. Donations deducted from a Landlord's gross rental receipts and paid to MDA, in accordance with a valid and executed Donation Deed under the Affordable Housing Initiative, are tax deductible gifts under section 30-15 of the ITAA 1997.

21. A Landlord can claim a tax deduction for their donation amounts, however the donation amounts cannot add to or create a tax loss under subsection 26-55(2) of the ITAA 1997.

Commissioner of Taxation
9 May 2018

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.***

Donation amounts are gifts

22. 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.*

23. The word 'gift' is not defined in the ITAA 1997. For the purposes of Division 30 of the ITAA 1997 the word 'gift' has its ordinary meaning as established by case law.

24. The courts have determined that a payment is a gift if it has 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.

25. 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 that provide context and explanation for the transfer.

Transfer of money or property

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

27. 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.

28. The giver must have proprietary rights in the property just prior to its transfer. When property, including money, 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.

29. 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 themselves, the person may do by an agent. If an agent discloses his principal's name (or at least the existence of a principal) to the third party with whom he is dealing, the agent himself is not normally entitled to the benefit of, or be liable on, the contract. Therefore, an agent does not have beneficial interest in the property being transferred.

30. Under a Payment Authority, the Landlord directs Welcome Residential to deduct a specified donation amount from each rental payment and pay it directly to MDA. Nothing prevents a transfer from being a gift where it is made through an agent, as long as the beneficial interest remains with the donor just prior to the transfer and beneficial interest transfers to the recipient. This is the case with this arrangement. The Landlord retains beneficial interest in the money just before it is paid to MDA.

31. When the money is transferred, MDA has full beneficial ownership and control of the money. MDA has absolute discretion on how the amount may be used, consistent with its purposes. The amount does not have to be used to pay subsidies on that Landlord's particular property. It forms part of the general funds used to finance the operations of MDA, including payment of rental subsidies to tenants generally.

32. The gift is made by the Landlord when Welcome Residential transfers the donation amount to MDA.

Transfer made voluntarily

33. 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.

34. 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 have contractual or similar features.

35. Even though the arrangement for the donation to MDA under the Donation Deed has a contractual nature, the donation is voluntary.

36. A Landlord is under no obligation to enter into the Donation Deed and the Donation Deed is revocable by the Landlord. The Donation Deed does not constitute an ongoing promise to make donations to MDA.

Arises by way of benefaction

37. A gift should confer benefaction on the recipient. Benefaction means that the recipient is advantaged materially by the gift without any detriment arising from the terms of the transfer.

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

39. 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 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.

40. 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 a detached and disinterested generosity. A motive of seeking a tax deduction does not, by itself, disqualify a transfer from being a gift.

41. The donation by the Landlord is a transfer of money which materially benefits MDA with no detriment.

42. A donation paid by a Landlord comes from detached and disinterested generosity. The rights, entitlements, and obligations of Landlords under the Affordable Housing Initiative are the same regardless of whether donations are made. There is no commercial or fiscal reason to make a donation. The gift confers benefaction to MDA.

No material benefit or advantage

43. 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.

44. 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.

45. The Landlord or an associate of the Landlord does not receive a benefit or advantage from making the donation to MDA under the Donation Deed.

46. The rights and, entitlements of Landlords under the Affordable Housing Initiative are the same regardless of whether donations are made. Further, fees payable and other obligations of Landlords are the same regardless of whether donations are made.

47. Landlords, or their associates, do not receive a material benefit for making a donation.

48. Donation amounts paid by the Landlord to MDA under the Affordable Housing Initiative are gifts.

Tax deduction on donation amounts

49. A donor can claim a tax deduction for a gift if the requirements in section 30-15 of the ITAA 1997 are satisfied. The table in section 30-15 of the ITAA 1997 specifies the types of gifts that are deductible, who a recipient of the gift can be, how much can be deducted for a gift, and any special conditions that apply.

Type of gift

50. The table in section 30-15 of the ITAA 1997 lists the types of gifts that can be made and includes gifts of money. Money includes foreign currency and can be paid in various ways, including by cash, cheque, credit card or electronically.

51. Under the Donation Deed the Landlord directs Welcome Residential, to deduct the donation amount from each rental payment and to pay the donation amount to MDA.

52. Donation amounts made by Landlords under the Donation Deed are a gift of money.

Gift Recipient

53. Item 1 of the table in section 30-15 of the ITAA 1997 states that gifts of money can be made to recipients who are included in the tables in Subdivision 30-B of the ITAA 1997.

54. Subdivision 30-B of the ITAA 1997 includes section 30-45 of the ITAA 1997. Item 4.1.1 of the table in subsection 30-45(1) of the ITAA 1997 includes recipients who are 'a registered public benevolent institution'.

55. Gifts of money can therefore be made to a recipient that is a registered public benevolent institution.

56. 'A registered public benevolent institution' is defined in subsection 995-1(1) of the ITAA 1997:

> ***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.

57. Gifts to a registered public benevolent institution will however only be deductible if the registered public benevolent institution is also endorsed as a deductible gift recipient, or is named in Subdivision 30-B of the ITAA 1997. This is required by the special conditions in Item 1 of the table in section 30-15 of the ITAA 1997 and by section 30-17 of the ITAA 1997.

58. MDA is:

- a registered public benevolent institution as defined in subsection 995-1(1) of the ITAA 1997
- a recipient described in Item 4.1.1 of the table in subsection 30-45(1) of the ITAA 1997
- a recipient to whom gifts may be made, as specified in section 30-15 of the ITAA 1997, and
- endorsed as a deductible gift recipient pursuant to section 30-120 of the ITAA 1997.

59. Donation amounts paid by Landlords to MDA under a Donation Deed are gifts to a registered public benevolent institution that is endorsed as a deductible gift recipient.

60. Gifts made to MDA by the Landlords whilst it is endorsed as a deductible gift recipient will be tax deductible.

Amount of gift that can be deducted

61. Item 1 of the table in section 30-15 of the ITAA 1997 states the amount you can deduct for a gift of money is the amount you are giving.

62. The value of the gift must however be $2 or more, as specified in the special conditions in Item 1 of the table in section 30-15 of the ITAA 1997.

63. However, a deduction for a gift cannot add to or create a tax loss for the donor.

64. Subsection 26-55(1) of the ITAA 1997 states there is a limit on the total amount you can deduct for an income year under section 30-15 of the ITAA 1997. The limit is calculated pursuant to subsection 26-55(2) of the ITAA 1997 and in effect means the deduction can reduce the donor's assessable income to nil in the tax year in which the gift is made, but any excess cannot be claimed in that year or carried forward to a later year as a tax loss.

65. Whilst a deduction for a gift cannot add to or create a tax loss for the donor, Subdivision 30-DB of the ITAA 1997, and in particular section 30-247 of the ITAA 1997, allows donors to elect to spread a tax deduction for a gift of money of $2 or more, over up to 5 years where the gift was made to a deductible gift recipient that is a registered public benevolent institution.

66. If a donor chooses to spread a deduction the election must be made as specified in section 30-248 of the ITAA 1997, 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 four of the 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.

67. Landlords who enter into a Donation Deed with MDA, can claim a tax deduction for their donation amount, where the donation amount is $2 or more. However, the amount claimed as a deduction by the Landlord cannot add to or create a loss. The Landlord may elect to spread the tax deduction over up to 5 years.

Record Keeping

68. Donors should keep records of all tax deductible gifts they make including the date the gift was made, the name of the deductible gift recipient to which the gift was made, the amount of the gift, a description if the gift was property and any election to spread the gift.

69. Deductible gift recipients are not required by the tax law to issue receipts for gifts, but when they do issue receipts they must include the information specified in subsection 30-228(1) of the ITAA 1997.

70. A receipt issued by a deductible gift recipient for a gift must include:

- the name of the deductible gift recipient
- the ABN of the deductible gift recipient, and
- that the receipt is for a gift.

71. Other useful information that deductible gift recipients can include in a receipt for a gift includes:

- the amount of money donated
- a description of any gifts of property, and
- the date of the gift.

72. If a donor does not have a receipt, they should keep any other statement or record with details of their gift.

73. MDA will issue a receipt for a tax deductible gift to the Landlord for the donation amount. The receipt must include the name and ABN of MDA, and state that the receipt is for a gift.

74. Landlords should keep records of all donation amounts paid to MDA. This includes receipts issued by MDA for the donation amounts, the Donation Deed and any other records or statements that provide details of the gift. If an election has been made to spread the deduction for the gift, the election, and any variations to the election, should also be kept by the Landlord.

Appendix 2 – Detailed contents list

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2005/13; TR 2006/10

Legislative references:

- ITAA 1997
- ITAA 1997 26-55(1)
- ITAA 1997 26-55(2)
- ITAA 1997 Div 30
- ITAA 1997 Subdiv 30-B
- ITAA 1997 30-15
- ITAA 1997 30-17
- ITAA 1997 30-45
- ITAA 1997 30-45(1)
- ITAA 1997 30-120
- ITAA 1997 30-228(1)
- ITAA 1997 Subdiv 30-DB
- ITAA 1997 30-247
- ITAA 1997 30-248
- ITAA 1997 995-1(1)

ATO references

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