

CR 2019/41 - YWCA Canberra Ltd - deductibility of donations under a Payment Direction Deed



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Class Ruling

YWCA Canberra Ltd – deductibility of donations under a Payment Direction Deed

Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or pay any penalties or interest in respect of the matters covered by this Ruling.

Further, if we think that this Ruling disadvantages you, we may apply the law in a way that is more favourable to you.

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What this Ruling is about

1. This Ruling sets out tax consequences of a landlord paying donation amounts to YWCA Canberra Limited by way of an executed Payment Direction Deed.
2. Full details of this scheme are set out in paragraphs 7 to 24 of this Ruling.

Who this Ruling applies to

3. This Ruling applies to landlords who:
 - participate in the Affordable Housing Initiative (AHI), and
 - make a donation to YWCA Canberra Limited (YCL) pursuant to a Payment Direction Deed.

When this Ruling applies

4. This Ruling applies from 1 July 2018 to 30 June 2023.

Ruling

5. Donation amounts paid by a landlord to YCL in accordance with an executed Payment Direction Deed are tax deductible gifts for the purposes of section 30-15 of the *Income Tax Assessment Act 1997* (ITAA 1997).
6. A landlord can claim a deduction for the donation amounts, but the donation amounts cannot create or add to a tax loss of the landlord (section 26-55 of the ITAA 1997).

Scheme

7. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.
8. YCL is a Public Benevolent Institution (PBI), registered under the *Australian Charities and Not-for-profits Commission Act 2012* (ACNCA 2012) effective from 1 January 2014.
9. YCL is endorsed as a deductible gift recipient (DGR) effective from 1 July 2000.
10. The benevolent activities of YCL include providing services to the homeless and those at risk of homelessness.
11. YCL will operate an AHI. YCL will continue to maintain its other operations.
12. The AHI involves YCL finding landlords who would like to make a difference with tenants who are on low incomes, are priced out of the rent market or are at risk of becoming homeless or are currently experiencing homelessness.
13. Under the AHI, landlords will rent properties at market rate to YCL (under a lease agreement (Lease Agreement)) who will rent out the landlords properties to tenants at a reduced rate of rent (74.99% or less of the market rate). The Lease Agreement requires a Landlord to consent to allow tenants approved by YCL to occupy the property (clause 9.1).
14. Under the Lease Agreement:
 - the landlord (Lessor) leases the relevant property to YCL for market rent (clause 1 and the schedule). The market rent is reviewed annually or at least once every three years (clauses 5 and 7.5, and the Schedule). YCL will manage the review of the market rent (clause 7.5.1). Following the review of market rent, the market rent will be adjusted (clause 5)
 - the Lessor appoints YCL to perform property management services for the duration of the Lease Agreement. YCL accepts the appointment and neither party can revoke the appointment (clause 1.1), and
 - YCL provides the property management services to the Lessor in exchange for a management fee (clause 7.1). The management fee is a flat fee. The management fee is deducted by YCL from the monthly rent payments (clause 7.1).
15. The property management services include (clause 7.2 of the Lease Agreement):
 - carrying out inspections of the property at periodic intervals
 - itemising monthly rent receipts, outgoings and other expenses (other than those covered by the Management Fee) paid on the Lessor's behalf, and, if required by the Lessor, provide information on an annual basis

- provided YCL receives relevant notices and accounts in sufficient time to enable payment by the due date, paying on the Lessor's behalf outgoings in respect of the Property (for example, rates, charges, property insurance premiums), unless the lessor elects to assume the responsibility. YCL may recoup amounts paid as a debt due by the Lessor, or by deduction from monthly rent payments, and
 - arranging compliance, at the Lessor's expense (by deduction from monthly rent payments) , with any of the Lessor's retained responsibilities under clause 8.2, if requested by the Lessor and YCL agrees to do so.
16. Other services to be provided by YCL under the Lease Agreement include:
- Emergency repair service (clause 7.3) – YCL will arrange any emergency works where such work is essential to preserve the property and/or protect human health, safety and security. If the emergency arises from a repair or maintenance item for which YCL is responsible under the Lease Agreement, YCL will bear the cost of the work. If the emergency is within or caused by matter falling within the Lessor's retained responsibilities the lessor must bear the cost.
 - Restoration service (clause 7.4) – At the end of the Lease Agreement YCL will ensure that the internal of the property is professionally cleaned, the appliances are clean and in good working order, and the external of the dwelling and the grounds and landscaping are in neat and tidy condition.
 - Repair and maintenance service (clause 8.1) – YCL must coordinate the repair and maintenance of the property (fair wear and tear excepted). The Lessor covers the cost of repairs and maintenance to the property, and agrees to a pre-approved portion of rent to be held in trust for scheduled maintenance work on the property.
 - Inspection service (clause 11.1) – YCL will undertake the majority of inspections on behalf of the Lessor and will, if requested, arrange one personal inspection of the property by the Lessor in each year of the term.
17. Under the AHI, the landlord may enter into a payment direction (clause 6 of the Lease Agreement) whereby YCL will deduct and retain a donation amount from the rent payable to the Lessor under the Lease Agreement.
18. Landlords are not required to enter into a Payment Direction Deed.
19. A description of the AHI is:
- The landlord enters into a Lease Agreement with YCL to rent the property at market rent.
 - YCL identifies tenants that meet certain eligibility criteria for participation in the AHI.
 - YCL rents out the landlord's property to tenants at a reduced rate of rent.
 - YCL provides property management services to the landlord for a fee.
 - The landlord may enter into a Payment Direction Deed with YCL where it is agreed that YCL will deduct and retain a donation amount from the landlord's rental income.
 - The landlord receives net rental returns (rent under the Lease Agreement less outgoings (including the management fee) and the donation amount (if any)) and where applicable a receipt acknowledging the donation to YCL.

20. Under the Payment Direction Deed:

- The Payment Direction Deed is for a period of 12 months (clause 1).
- The landlord (Lessor) directs YCL to deduct the donation amount from each monthly rental payment under the Lease Agreement and pay the donation amount to YCL (clause 2.2).
- YCL agrees to accept the donation amount as a donation and will issue a receipt in the name of the Lessor for the donation amount annually in arrears (clause 2.3).
- The Lessor acknowledges and agrees that the donation amount (clause 2.4)
 - is a donation that is payable to YCL each month (unless the direction is terminated)
 - may be used by YCL in a manner that is consistent with its obligations under the Income Tax Assessment Act 1997, and
 - it pays to YCL is an arrangement that the Lessor enters into at its own discretion, and the Lessor or its associates do not receive any advantage or benefit from YCL.
- The Lessor may terminate the Payment Direction Deed at any time by providing YCL with 30 days' notice (clause 2.5).

21. The landlord, or an associate of the landlord, will not receive any advantage or benefit from YCL for entering the AHL.

22. YCL can vary (extend or reduce) the term of the Lease Agreement by giving written notice to the landlord. After giving written notice the expiry date of the Lease Agreement is varied (clause 3 of the Lease Agreement).

23. YCL may terminate the Lease Agreement at any time during the term of the Lease Agreement by providing the Lessor 30 days' notice in writing (clause 9.2).

24. The Landlord may consent to YCL continuing to occupy the property after the end of the Lease Agreement. If the landlord consents to YCL continuing to occupy the property after the end of the Lease Agreement, the provisions set out in the Lease Agreement continue to apply (clause 13.4).

Appendix – Explanation

ⓘ *This Explanation 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.*

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Donation amounts are gifts

25. The meaning of 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*.

26. 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.

27. The courts have described a gift as having 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.

28. 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 surrounding the transfer that provide the context and explanation for the transfer.

Transfer of money or property

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

30. 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.

31. The giver must have proprietary rights in the property just prior to its transfer. When money or property 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.

32. 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 him or herself, they may do by an agent. If an agent discloses the principal's name (or at least the existence of a principal) to the third party with who they are dealing, the agent him or herself is not normally entitled to the benefit of, or be liable under, the contract. Therefore, an agent does not have beneficial interest in the property being transferred.

33. Under the Payment Direction Deed, the landlord directs YCL to deduct the donation amount from the rent the landlord receives under the Lease Agreement, and pay it to YCL.

34. Prior to the donation amount being paid to YCL, the landlord has beneficial interest in the rent paid under the Lease Agreement. Following the payment of the donation amount, ownership of the money transfers to YCL who can use it as they decide.

35. The donation is made when the donation amount is transferred to YCL's own account and YCL no longer holds it as agent for the landlord.

Transfer made voluntarily

36. 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.

37. 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.

38. A landlord is under no obligation to enter into a Payment Direction Deed and can revoke the Payment Direction Deed at any time. It is the will of the landlord to make donations under the Payment Direction Deed and there is nothing in the arrangement that interferes with the exercise of the landlord's will.

39. A payment under the Payment Direction Deed is voluntary and may be revoked with 30 days notice by the landlord.

Arises by way of benefaction

40. A gift should intend and confer benefaction on the recipient. Conferring benefaction means that the recipient is advantaged materially without any detriment arising from the terms of the transfer.

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

42. 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.

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

44. Payments made in accordance with the Payment Direction will cause money owned by a landlord to be transferred to YCL for its benefit. There is no evidence that a detriment will arise to YCL from accepting the payments.

45. There is no commercial benefit for a landlord to make the payments. The landlord will receive the rent amount under the Lease Agreement irrespective of whether payments are made under the Payment Direction Deed, and the management fee payable by a landlord to YCL are set under the Lease Agreement and are levied regardless of whether a landlord makes payments under the Payment Direction Deed.

46. Payments under the Payment Direction Deed confer benefaction on YCL.

No material benefit or advantage

47. 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.

48. 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.

49. There is no evidence that the landlord or an associate of the landlord will receive any benefit or advantage from making payments under the Payment Direction Deed.

50. The landlord receives the rent amount under the Lease Agreement (as agreed with YCL) irrespective of whether payments are made under the Payment Direction Deed, and the management fee payable by landlords to YCL are set under the Lease Agreement and are a flat fee payable by all landlords who participate in the AHI (landlords who make payments under the Payment Direction Deed do not pay reduced fees).

Donation amounts are gifts

51. The donation amounts paid by the landlord to YCL in accordance with the Payment Direction Deed are gifts for the purposes of Division 30 of the ITAA 1997.

Tax deduction on donation amounts

52. 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 subsection 30-15(2) sets out the categories of recipients of deductible gifts and contributions, the types of deductible gift or contribution that can be made to each category of recipients, and how much can be deducted.

Gift recipient

53. Item 1 of the table in subsection 30-15(2) of the ITAA 1997 states that deductible gifts and contributions can be made to recipients who are covered by any of 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' (registered PBI).

55. Deductible gifts and contributions can therefore be made to a recipient that is a registered PBI.

56. A registered PBI 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. However, gifts to a registered PBI will only be deductible if the registered PBI is also endorsed as a deductible gift recipient under Subdivision 30-BA of the ITAA 1997, or is named in Subdivision 30-B of the ITAA 1997 (item 1 of the table in subsection 30-15(2) of the ITAA 1997 and section 30-17 of the ITAA 1997).

58. YCL is a registered PBI that is endorsed as a deductible gift recipient; YCL can receive tax deductible gifts and contributions.

Type of gift

59. Item 1 of the table in subsection 30-15(2) of the ITAA 1997 provides that the deductible gifts and contributions that can be made to an item 1 recipient include gifts of money. Money includes foreign currency and can be paid in various ways, including by cash, cheque, credit card or electronically.

60. Under the Payment Direction Deed a landlord directs YCL to pay the donation amounts (money) to YCL (an endorsed deductible gift recipient).

61. The donation amounts paid to YCL are gifts of money to an endorsed deductible gift recipient and are tax deductible gifts under Division 30 of the ITAA 1997.

Amount of gift that can be deducted

62. Item 1 of the table in subsection 30-15(2) of the ITAA 1997 states that the amount that can be deducted for a gift of money is the amount that is given.

63. The value of the gift must however be \$2 or more (Item 1 of the table in subsection 30-15(2) of the ITAA 1997). A donor can add together a series of gifts in an income year to work out whether the gift is \$2 or more.

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

65. Subsection 26-55(1) of the ITAA 1997 states there is a limit on the total amount you can deduct for the income year under Division 30 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 income year in which the gift is made, but cannot contribute to a tax loss of the donor for the income year.

66. Whilst a deduction for a gift cannot contribute to a tax loss for the donor, Subdivision 30-DB 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.

67. If the 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 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.

68. A landlord who pays gifts to YCL in accordance with the Payment Direction Deed can claim a deduction for amounts of \$2 or more provided the deduction does not contribute to a tax loss of the landlord (that is, the deduction must not create a tax loss or add to a tax loss). The landlord can elect to spread the tax deduction over up to 5 years.

Gift receipts

69. Tax law does not require a deductible gift recipient to issue a receipt for tax deductible gifts it receives. However, where a deductible gift recipient does issue a receipt, subsection 30-228(1) of the ITAA 1997 sets out the information that must be included in the receipt:

30-228(1)

If a * deductible gift recipient issues a receipt for a gift described in the relevant item of the table in section 30-15 to the fund, authority or institution, the deductible gift recipient must ensure that the receipt states:

- (a) the name of the fund, authority or institution; and
- (b) the * ABN (if any) of the deductible gift recipient; and
- (c) the fact that the receipt is for a gift.

70. Clause 2.3 of the Payment Direction Deed requires YCL to issue a receipt to the landlord for the donation amounts paid under Payment Direction Deed.

71. The contents of each receipt must include the name and ABN of YCL and the fact that the receipt is for a gift.

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2005/13

Legislative references:

- ITAA 1997
- ITAA 1997 26-55
- ITAA 1997 26-55(1)
- ITAA 1997 26-55(2)
- ITAA 1997 Div 30
- ITAA 1997 30-15
- ITAA 1997 30-15(2)
- ITAA 1997 30-17
- ITAA 1997 Subdiv 30-B
- ITAA 1997 30-45
- ITAA 1997 30-45(1)
- ITAA 1997 Subdiv 30-BA
- ITAA 1997 Subdiv 30-DB
- ITAA 1997 30-228(1)
- ITAA 1997 30-248
- ITAA 1997 995-1(1)
- TAA 1953
- Australian Charities and Not-for-profits Commission Act 2012

ATO references

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