


# ***CR 2023/34 - The Illawarra Community Housing Trust Ltd - deductibility of donations under a payment direction deed***

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Status: **legally binding**

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## Class Ruling

# The Illawarra Community Housing Trust Ltd – deductibility of donations under a payment direction deed

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### **📌 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 penalties or interest in respect of the matters covered by this Ruling.

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### **What this Ruling is about**

1. This Ruling sets out the income tax consequences of a landlord paying donation amounts to the Illawarra Community Housing Trust Ltd (ICHT) by way of an executed Payment Direction Deed (PDD).
2. Details of this scheme are set out in paragraphs 8 to 20 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997), unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to Landlords who:
  - participate in ICHT's Leasing Programs (LP), and
  - make a donation amount to the ICHT pursuant to a PDD.

### **When this Ruling applies**

5. This Ruling applies from 1 July 2022.

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## Ruling

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6. Donation amounts deducted from the third-party landlords (Lessors) gross rental receipts and paid to ICHT, in accordance with a valid and executed PDD, are tax-deductible gifts under section 30-15.

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

## Scheme

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8. 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.

9. ICHT is a public benevolent institution, registered under the *Australian Charities and Not-for-profits Commission Act 2012* effective from 1 January 2014.

10. ICHT is endorsed as a deductible gift recipient (DGR) effective from 1 July 2000.

11. The objects of ICHT under its Constitution (Clause 6) include but are not limited to the following:

6.1 make a significant and substantial contribution to the provision of affordable, appropriate and well-managed housing to meet the needs of households in receipt of low to moderate incomes or who are otherwise in need of assistance;

...

6.3 develop, acquire, own, dispose of, operate and manage housing to reduce the risk of, and find solutions to, homelessness and housing stress;

6.4 offer homeless persons and families, or those in housing stress, information about the range of resources which may enhance housing stability and provide assistance to reduce or minimise housing stress;

...

6.8 apply for and enter into and administer grants, leases, contracts, collaborations, financial arrangements and partnerships to further the objectives of the company; ...

12. ICHT was approved as a Tier 1 registered community housing provider with the National Regulatory System for Community Housing from 4 June 2015.

13. As a community housing provider, ICHT provides the following housing services:

- Social housing – this program provides secure and affordable rental accommodation to people with a housing need on low incomes in accordance with NSW Government Guidelines in relation to eligibility.
- Affordable housing – this program provides housing at a specified price of below market rent to community members who are on a very low to moderate income. This program is designed to address the gap between social housing and the private housing market.

14. ICHT delivers its LP through leasing residential properties from Lessors at market rent and sub-leasing those properties to tenants whose circumstances satisfy the applicable criteria (Tenants).

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15. An overview of the LP is:
- the Lessor enters into a Lease Agreement with ICHT to rent the property at market rent
  - the Lease Agreement provides that the Lessor agrees to the ICHT sub-leasing the property to a Tenant
  - ICHT identifies Tenants that meet certain eligibility criteria for social or affordable housing and sub-lets the Lessor's property at below the market rent
  - ICHT organises for a market valuation of the market rent for each specific property, and
  - the amount of rent payable by Tenants to ICHT is based on government guidelines for social and affordable housing, generally based on the Tenant's household income. A portion of the market rent is covered by government funding. The balance of the market rent is payable by ICHT.
16. ICHT provides Lessors with the option to enter into a PDD during the term of a Lease Agreement.
17. Under the PDD:
- the Lessor directs ICHT to deduct a specified amount (a Donation) from each monthly rental payment as a donation (Clause 3.1(a) of the PDD)
  - ICHT agrees to accept the Donation for the purposes of furthering its charitable purposes (Clause 3.2(a) of the PDD)
  - ICHT must issue the Lessor with a receipt for the aggregate amount of all Donations received from the Lessor annually no later than 31 July of each financial year during the Term (Clause 3.2(c) of the PDD)
  - the PDD may be terminated by the Lessor giving ICHT no less than 30 days written notice (Clause 6.1 of the PDD)
  - ICHT acknowledges that the PDD does not constitute an ongoing promise by the Lessor to donate an amount to the ICHT (Clause 3.2(b) of the PDD)
  - the Lessor acknowledges and agrees under Clause 3.1(b) of the PDD that
    - the Donation is made to the ICHT at the Lessor's own volition
    - the Donation may be used by ICHT for the purposes and in a manner which is consistent with its obligations under the ITAA 1997
    - ICHT has not made any representations in respect of the allocation of any particular Donation to a particular purpose or Tenant
    - by retaining the Donation in accordance with the PDD, ICHT has discharged all of its obligations under the PDD with respect to the Donation, and
  - the Lessor warrants that neither the Lessor nor any of its associates receive any advantage or benefit from the ICHT as a consequence of entering the PDD and making any Donation to the ICHT (Clause 5.3(b) of the PDD).
18. ICHT provides Lessors with the option to engage ICHT for property management services in respect of properties leased by the Lessors to ICHT.

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19. Under a Management Agreement, if engaged, ICHT will provide the following services:

- identification and qualification of appropriate Tenants that meet the eligibility criteria participating in the LP
- collection of all rent payable by a Tenant under a sub-lease
- deduction of agreed upon outgoings (including but not limited to council rates, insurance and service fees) from rent collected and remittance of the balance to the Lessor in accordance with the Lease Agreement
- inspection of each property subject to the Lease Agreement at agreed periodic intervals
- preparation and provision of an itemised monthly rent receipt including details of all outgoings and other expenses paid on the Lessor's behalf as reasonably required
- unless the Lessor notifies ICHT in writing to the contrary, paying outgoings in respect of each property the subject of a Lease Agreement (including but not limited to council rates, charges and property insurance premiums) provided that ICHT receives the relevant notices and account statements from the Lessor within a sufficient time to enable payment by the due date, and
- any other services the Lessor and ICHT agree.

20. The management fee, charged for management services, will be calculated as a percentage of the market rent payable in respect of the properties as agreed between the Lessor and ICHT, provided that such management fee is not less than the market rate for such services as reasonably assessed by ICHT.

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**Commissioner of Taxation**

28 June 2023

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## Appendix – Explanation

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**ⓘ** *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**

21. The meaning of gift for the purposes of Division 30 is dealt with in Taxation Ruling TR 2005/13 *Income tax: tax deductible gifts – what is a gift*.

22. The word ‘gift’ is not defined in the ITAA 1997. For the purposes of Division 30 the word ‘gift’ has its ordinary meaning.

23. 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.

24. 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**

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

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26. 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.

27. 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.

28. The transfer may still be a gift when it is made by way of an agent. In an agency relationship, an agent has the 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 whom 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.

29. Under the PDD, the Lessor directs ICHT to deduct a specified amount (a Donation) from each monthly rental payment as a donation. ICHT agrees to accept the Donation for furthering its charitable purposes.

30. Prior to the Donation being directed to ICHT, the Lessor has beneficial interest in the rent paid under the Lease Agreement. Following the direction of the Donation to ICHT under the PDD, the ownership of the money is transferred to ICHT who can use it as they decide. That is, there has been a transfer in beneficial interest of the amount of the Donation.

31. The donation is made when ICHT pays the rent to the Lessor and ICHT allocates the amount of the Donation under the PDD for its charitable purposes.

### ***Transfer made voluntarily***

32. 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.

33. 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 to give effect to the benefaction has contractual or similar features.

34. A Lessor is under no obligation to enter into the PDD and if a PDD is entered into it may be revoked. It is the will of the Lessor to make donations under the PDD and there is nothing in the arrangement that interferes with the exercise of the Lessor's will.

35. A payment under the PDD is voluntary and may be revoked with 30 days notice by the Lessor.

### ***Arises by way of benefaction***

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

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

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38. 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.

39. In cases where the giver gives a gift for self-interested commercial or fiscal reasons rather than conferring a 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.

40. Payments made in accordance with the PDD will cause money owned by the Lessor to be transferred to ICHT for its benefit. There is no evidence that a detriment will arise to ICHT from accepting the payments.

41. There is no commercial benefit for a Lessor to make the payments. The Lessor will receive the rent under the Lease Agreement irrespective of whether payments are made under the PDD, and any management fees payable by a Lessor to ICHT are set under a Management Agreement and are levied at a market rate regardless of whether a Lessor has entered into a PDD.

42. Payments under the PDD confer benefaction on ICHT.

***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 Lessor may also engage ICHT to provide a range of property management services. These management services are provided by ICHT for a management fee which is set as a percentage of the market rent and, is not less than the market rate for the services provided for comparable residential properties as reasonably assessed by ICHT.

46. There is no evidence that the Lessor or an associate of the Lessor will receive any benefit or advantage from entering into a PDD.

47. The Lessor receives the rent amount under the Lease Agreement (as agreed with ICHT) irrespective of whether a PDD is entered into. If Lessors, who make payments under a PDD, also enter into a Management Agreement with ICHT they do not pay reduced fees.

***Donation amounts are gifts***

48. The donation amounts paid by the Lessor to ICHT in accordance with the PDD are gifts for the purposes of Division 30.

***Tax deduction on donation amounts***

49. A donor can claim a tax deduction for a gift if the requirements in section 30-15 are satisfied. The table in subsection 30-15(2) sets out the categories of recipients of

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deductible gifts and contributions, the types of deductible gifts or contributions that can be made to each category of recipients, and how much can be deducted.

### **Gift recipient**

50. Table item 1 of subsection 30-15(2) states that deductible gifts and contributions can be made to recipients who are covered by any of the tables in Subdivision 30-B.

51. Subdivision 30-B includes section 30-45. Table item 4.1.1 of subsection 30-45(1) includes recipients who are 'a registered public benevolent institution' (registered PBI).

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

53. A registered PBI is defined in subsection 995-1(1):

**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.

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

55. ICHT is a registered PBI that is endorsed as a DGR; ICHT can receive tax-deductible gifts and contributions.

### **Type of gift**

56. Table item 1 of subsection 30-15(2) 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.

57. Under the PDD, a Lessor directs ICHT to allocate the Donation (money) to ICHT (an endorsed DGR) for its own charitable purposes.

58. The Donation amounts directed to be paid to ICHT under the PDD are gifts of money to an endorsed DGR and are tax-deductible gifts under Division 30.

### **Amount of gift that can be deducted**

59. Table item 1 of subsection 30-15(2) states that the amount that can be deducted for a gift of money is the amount that is given.

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

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

62. Subsection 26-55(1) states there is a limit on the total amount you can deduct for the income year under Division 30. The limit is calculated pursuant to subsection 26-55(2) and in effect means the deduction can reduce the donor's assessable income to nil in the

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income year in which the gift is made, but cannot contribute to a tax loss of the donor for the income year.

63. While a deduction for a gift cannot contribute to a tax loss for the donor, Subdivision 30-DB allows donors to elect to spread a tax deduction for a gift of money of \$2 or more, over and up to 5 years.

64. If the donor chooses to spread a deduction the election must be made as specified in section 30-248, 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 4 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.

65. A Lessor who directs amount to be paid to ICHT in accordance with the PDD can claim a deduction for amounts of \$2 or more provided the deduction does not contribute to a tax loss of the Lessor (that is, the deduction must not create a tax loss or add to a tax loss). The Lessor can elect to spread the tax deduction over and up to 5 years.

### **Gift receipts**

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

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 [Australian Business Number] (if any) of the deductible gift recipient; and
- (c) the fact that the receipt is for a gift.

67. Clause 3.2 of the PDD requires ICHT to issue a receipt to the Lessor for the Donation amounts paid under the PDD.

68. The contents of each receipt must include the name and Australian Business Number of ICHT and the fact that the receipt is for a gift.

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## References

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*Related Rulings/Determinations:*

TR 2005/13

*Legislative references:*

- 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)
- Australian Charities and Not-for-profits Commission Act 2012

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ATO references

NO: 1-WFQOQQG

ISSN: 2205-5517

BSL: PW

ATOlaw topic: Income tax ~~ Deductions ~~ Business and professional expenses ~~ Gifts / donations  
Income tax ~~ Deductions ~~ Gifts / donations ~~ Other

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