


CR 2023/39 - Habitat for Humanity Australia - deductibility of donations under a payment direction deed

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Class Ruling

Habitat for Humanity Australia – 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 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 income tax consequences of a landlord paying donation amounts to Habitat for Humanity Australia (HFHA) by way of an executed Payment Direction Deed (PDD).
2. Details of this scheme are set out in paragraphs 9 to 26 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997).

Note: By issuing this Ruling, the ATO is not endorsing this arrangement. Potential participants must form their own view about the arrangement.

Who this Ruling applies to

4. This Ruling applies to landlords who:
 - participate in the Subsidised Housing and Affordable Rental Program, and
 - make a donation to HFHA pursuant to a PDD.
5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to the scheme outlined in paragraphs 9 to 26 of this Ruling.

Note: Division 230 will not apply to individuals unless they have made an election for it to apply.

Status: **legally binding**

When this Ruling applies

6. This Ruling applies from 1 July 2023. However, if the scheme carried out is no longer implemented by HFHA, or the scheme implemented 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 - this Ruling may be withdrawn or modified.

Ruling

7. Donation amounts deducted from the amount of rent that the landlord would otherwise receive from HFHA, in accordance with a valid and executed PDD, are tax-deductible gifts under section 30-15.
8. A landlord 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

9. 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.
10. HFHA is a public benevolent institution (PBI), registered under the *Australian Charities and Not-for-profits Commission Act 2012* effective from 29 November 2020.
11. HFHA is endorsed as a deductible gift recipient (DGR) effective from 30 November 2020.
12. HFHA was established in New South Wales as a company limited by guarantee, registered under the *Corporations Act 2001*. HFHA's operational and strategic decisions are made wholly in Australia.
13. Clause 4.1(a) of HFHA's Constitution, which it adopted on 28 November 2022, states that its charitable purpose is providing relief to persons in need, due to such poverty, sickness, suffering, distress, misfortune, disability, destitution or helplessness as arouses compassion in the community, by improving their economic and social conditions.
14. The benevolent activities of HFHA, under Subclause 4.3(a) of HFHA's Constitution, include (but are not limited to) the following:
- providing simple, decent, secure and affordable housing for families and individuals in need;
 - building, improving or repairing housing and local or neighbourhood facilities for communities, families and individuals in need and to work with others to do so;
 - ...
 - advocating and raising community awareness on behalf of those in need of decent and secure housing;
 - ...
15. As part of its benevolent activities, HFHA will operate a Subsidised Housing and Affordable Rental Program. HFHA will continue to maintain its other operations.

Status: **legally binding**

16. The purpose of the Subsidised Housing and Affordable Rental Program is for HFHA to provide affordable housing at below market rent to people in need in New South Wales. To achieve this, HFHA proposes to engage landlords who would like to assist these people in need by participating in the Subsidised Housing and Affordable Rental Program.

17. HFHA may subsequently extend the Subsidised Housing and Affordable Rental Program to operate in other Australian jurisdictions.

18. Under the Subsidised Housing and Affordable Rental Program:

- The landlord will lease their residential property to HFHA for market rent under a Lease Agreement.
- HFHA will sublease the residential property to people who are in need that meet the HFHA's eligibility criteria under a Sublease Agreement.
- The rent charged by HFHA to subtenants will be no more than 50% of the market rate of rent.
- The market rent of the residential property will be determined on commencement of the Lease Agreement by an independent valuer's opinion on market value.
- HFHA will provide property and asset management services to the landlord for a fee of between 7 to 10% of the rent payable under the Lease Agreement (the Management Fee).
- The Management Fee payable by landlords to HFHA is at no less than market value.
- The landlord may donate a percentage of the market rent they receive from HFHA (net of the applicable Management Fee) back to HFHA.
- The donation would be implemented by having the donation amount deducted from the amount of rent that the landlord would otherwise receive from HFHA, under a PDD.
- HFHA would provide the landlord with a receipt in respect of the donation amounts.

19. HFHA's eligibility criteria for subtenants include:

- individuals, couples and families who are suffering from housing stress, are homeless or are at risk of experiencing homelessness
- lower-income households spending more than 30% of their gross income on housing costs, who struggle to afford other basic expenses such as food, utilities, medical and education expenses
- prospective tenants identified and assessed by social housing providers and PBIs with whom HFHA will partner in order to alleviate housing stress and homelessness in Australia.

20. HFHA will utilise donations received from landlords in order to provide the Subsidised Housing and Affordable Rental Program.

Status: **legally binding**

21. Under the Lease Agreement, the following applies:

- The landlord enters into a Lease Agreement with HFHA to rent the residential property at market rent for a term of 5 years (Clause 1.1 and Item 2 of the Lease Agreement).
- The rent must be paid to the landlord by monthly instalments in advance, on the first day of each month (Clause 2.1 and Item 4 of the Lease Agreement).
- Following the 5-year term of the Lease Agreement, the lease continues as a 6-monthly tenancy (Clause 1.2 of the Lease Agreement).
- Either party may terminate the Lease Agreement by giving the other party 180 days prior written notice (Clause 12.9 of the Lease Agreement).
- The rent payable under the Lease Agreement to the landlord is adjusted annually by a fixed interest percentage of 3%, that is, the rent is multiplied by 103% (Clause 2.3 and Item 5 of the Lease Agreement).
- The rent payable under the Lease Agreement will be subject to a market review mechanism, which may be initiated by the landlord not later than 60 days before the third anniversary of the commencement of the Lease Agreement (the Review Date), or which may otherwise be initiated by either party within 60 days of the Review Date (Clause 2.4 of the Lease Agreement). Following the review, the rent payable under the Lease Agreement will be adjusted.
- HFHA will only use the residential property for the permitted use of subletting the property under the Subsidised Housing and Affordable Rental Program (Clause 4.1 and Item 9 of the Lease Agreement).
- HFHA is required to provide property management services to the landlord and is entitled to receive the Management Fee as consideration, which is payable by the landlord to HFHA on the same date as HFHA is obliged to pay rent (Clause 11.4 of the Lease Agreement).
- HFHA is entitled to set the Management Fee off against amounts of rent that are due to the landlord (Clause 2.8(b) of the Lease Agreement).
- The Management Fee is calculated as a percentage of each monthly rent instalment payable by HFHA to the landlord under the Lease Agreement of between 7 to 10% (Schedule 1 of the Lease Agreement).

22. The property management services provided by HFHA for the Management Fee include (Schedule 3 of the Lease Agreement):

- carrying out inspections of the property at periodic intervals and reporting to the landlord in regard to the same
- itemising expenses paid on the landlord's behalf and, if required by the landlord, providing such information on an annual basis
- paying such outgoings (Operating Expenses) on the landlord's behalf in respect of the property as may be agreed in writing from time to time between the landlord and HFHA.

Status: **legally binding**

23. Under the PDD, the following applies:
- The landlord agrees to make regular monetary donations to HFHA to be deducted from each payment of rent due to the landlord under the Lease Agreement.
 - The donation amount is equal to a percentage of the rent payable from time to time (net of the Management Fee) under the Lease Agreement (Clause 1.1 of the PDD).
 - The landlord directs HFHA to deduct the donation amount from each payment of rent due and payable to the landlord and to apply that amount for HFHA's charitable purposes (Clause 3.1 of the PDD).
 - HFHA will, as soon as practicable (and no later than 30 days) following the end of each financial year, while the PDD remains on foot, issue a receipt to the landlord for the total of the donation amounts deducted by HFHA during that financial year (Clause 3.3 of the PDD).
 - The landlord acknowledges and agrees that
 - Each donation amount deducted by HFHA is a donation by the landlord to HFHA and may be used by HFHA in any manner that is consistent with its obligations under the ITAA 1997 (Clause 3.4(a) of the PDD).
 - Neither the landlord, nor any associate of the landlord, has received any benefit or advantage from HFHA in order to induce the landlord to enter into the PDD (Clause 2.1 of the PDD).
 - The landlord has entered into the PDD at its own discretion (Clause 3.4 of the PDD).
 - The PDD terminates automatically upon termination or expiry of the underlying Lease Agreement, and the landlord may separately terminate the PDD by giving 30 days written notice to HFHA (Clauses 4.1 and 4.2 of the PDD).
 - Each party must bear its own costs arising out of the negotiation, preparation and execution of the PDD (Clause 7 of the PDD).
24. HFHA's reimbursement or discharge of the landlord's Operating Expenses will have no impact upon the donation percentage applied in the PDD. However, it is expected that some portion of donations made will be used by HFHA to fund its obligation to pay Operating Expenses.
25. Landlords are not required to enter into or maintain a PDD.
26. The landlord, or an associate of the landlord, does not receive any advantage or benefit from HFHA, the subtenant, or any other party as a consequence of making the donations to HFHA.

Commissioner of Taxation

19 July 2023

 Status: **not legally binding**

Appendix – Explanation

❶ *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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Meaning of gifts

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

28. The word ‘gift’ is not defined in the tax law. For the purposes of Division 30, the word ‘gift’ has its ordinary meaning as established by case law.

29. 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.

30. 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

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

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32. 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.

33. 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.

34. 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.

35. Under the PDD, the landlord unconditionally directs HFHA to deduct the donation amount from each monthly rental payment payable to the landlord by HFHA under the Lease Agreement and pay it to HFHA.

36. Prior to the donation amount being paid to HFHA, 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 HFHA who can use it for any purpose at their absolute discretion which is consistent with its obligations under the tax law.

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

Transfer made voluntarily

38. 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.

39. 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.

40. Under the Subsidised Housing and Affordable Rental Program, landlords are not under any obligation to enter into a PDD and can revoke the PDD at any time. It is the will of the landlord to make donations under the PDD and there is nothing in the arrangement that interferes with the exercise of the landlord's will.

41. A payment under the PDD is made voluntarily and may be revoked with 30 days notice by the landlord.

Arises by way of benefaction

42. 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.

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

44. 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.

45. 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.

46. Donation amounts made in accordance with the PDD will cause money owned by a landlord to be transferred to HFHA for its benefit. There is no evidence that a detriment will result from HFHA accepting the donation amount.

47. There is no commercial benefit for a landlord to make the donation amounts under the PDD. The landlord will receive the rent amount under the Lease Agreement regardless of whether donation amounts are made under the PDD. Furthermore, the Management Fee payable by a landlord to HFHA is specified under the Lease Agreement and is levied irrespective of whether a landlord makes payments under the PDD.

48. Payments under the PDD confer benefaction on HFHA.

No material benefit or advantage

49. 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.

50. 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.

51. There is no evidence that the landlord, or an associate of the landlord, will receive any benefit or advantage from making payments under the PDD.

52. The landlord receives the rent amount under the Lease Agreement regardless of whether donation payments are made under the PDD. The Lease Agreement specifies the Management Fee payable by landlords to HFHA, which is at no less than market value. A landlord does not receive a discount of any kind if they enter into a PDD. There is no material benefit for a landlord entering into a PDD (for example, in the form of discounted or free property management services in exchange).

Donation amounts are gifts

53. The donation amounts paid by landlords to HFHA in accordance with the PDD are gifts for the purposes of Division 30.

Tax deduction for donation amounts

54. If the requirements contained in section 30-15 are satisfied a donor can claim a tax deduction for a gift. The table in subsection 30-15(2) sets out:

- the categories of recipients of deductible gifts and contributions

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- the types of deductible gifts or contributions that can be made to each category of recipients
- how much can be deducted, and
- if any special conditions apply to the requirements.

Gift recipient

55. Table item 1 in 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.

56. Subdivision 30-B includes section 30-45. A registered PBI is a recipient covered by table item 4.1.1 in subsection 30-45(1).

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

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

registered public benevolent institution means an institution that is:

- a registered charity; and
- 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.

59. 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 (as stipulated in table item 1 in subsection 30-15(2) and section 30-17).

60. HFHA is a registered PBI that is endorsed as a DGR. Therefore, HFHA can receive tax deductible gifts and contributions.

Type of gift

61. Table item 1 in subsection 30-15(2) provides that the deductible gifts and contributions that can be made to a table 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.

62. Under the PDD a landlord instructs HFHA to pay the donation amounts, in the form of money, to HFHA, an endorsed DGR.

63. Therefore, the donation amounts paid to HFHA are gifts of money to an endorsed DGR and are tax deductible gifts under Division 30.

Amount of gift that can be deducted

64. In accordance with table item 1 in subsection 30-15(2), the amount that can be deducted for a gift of money is the amount that is given. However, subsection 30-15(2) further stipulates that the value of the gift of money must be equal to or greater than \$2.

65. Pursuant to subsection 26-55(1), there is a limit on the total amount that can be deducted for the income year under Division 30. The limit is calculated in accordance with subsection 26-55(2), which states that the limit is calculated by subtracting from your assessable income all your deductions except tax losses. This effectively means that the

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deduction can reduce the donor's assessable income to nil in the income year in which the gift is made, however it cannot contribute to a tax loss of the donor for the income year.

66. Therefore, a deduction for a gift cannot add to or create a tax loss for the donor.

67. Although 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 a period of up to 5 years.

68. If the donor elects to spread a deduction the election must be made as specified in section 30-248, including:

- The election must start in the year the gift was made and can continue up to 4 of the immediately following income years.
- The election must specify the percentage (if any) of the deduction that will be deducted in each of the income years.
- The election may be varied at any time. However, the variation can only alter the percentage that will be deducted in respect of income years which a tax return has not yet been lodged.
- The election must be in the approved form and must be made before the lodgment of the tax return for the income year in which the gift was made.

69. A landlord who pays donation amounts to HFHA in accordance with the PDD can claim a deduction for amounts of \$2 or more, provided the deduction does not create or add to a tax loss of the landlord. The landlord may elect to spread the tax deduction over a period of up to 5 years.

Gift receipts

70. The 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, as follows:

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.

71. Pursuant to Clause 3.3 of the PDD, HFHA is required to issue a receipt in the name of the landlord for the donation amounts received.

72. The receipts issued by HFHA to landlords must include the name and ABN of HFHA and state the fact that the receipt is for a gift.

Status: **not legally binding**

References

Related Rulings/Determinations:
TR 2005/13

- 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 Div 230
- ITAA 1997 30-248
- ITAA 1997 995-1(1)
- Australian Charities and Not-for-profits
Commission Act 2012
- Corporations Act 2001

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

ATO references

NO: 1-XK25U9Z

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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