


# ***CR 2024/28 - Link Wentworth Housing Limited - deductibility of donations under a payment direction deed***

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Status: **legally binding**

## Class Ruling

# Link Wentworth Housing Limited – deductibility of donations under a payment direction deed

### **❶ 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 Link Wentworth Housing Limited (Link Wentworth) by way of an executed Payment Direction Deed (PDD).
2. Details of this scheme are set out in paragraphs 9 to 23 of this Ruling.
3. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.

**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 Link Wentworth Affordable Housing Scheme (AHS), and
  - make a donation to Link Wentworth 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 in relation to the scheme outlined in paragraphs 9 to 23 of this Ruling.

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

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### When this Ruling applies

6. This Ruling applies from 1 July 2022. However, if the scheme carried out is no longer implemented by Link Wentworth, 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- this Ruling may be withdrawn or modified.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 landlord's gross rental receipts and paid to Link Wentworth, in accordance with a valid and executed PDD, can be deducted against the landlord's assessable income pursuant to 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. Link Wentworth is a public benevolent institution registered under the *Australian Charities and Not-for-profits Commission Act 2012* (registered PBI) effective from 3 December 2012.

11. Link Wentworth is endorsed as a deductible gift recipient (DGR) effective from 1 July 2011.

12. Clause 2.1 of the Link Wentworth's Constitution states that the objects of the company are:

... to provide benevolent relief to persons in Australia suffering from poverty, distress, sickness, suffering, misfortune, destitution, disability or helplessness, regardless of their race, creed, colour or gender, by any means, including:

- (a) providing emergency, low rental, subsidised or otherwise affordable and well-managed charitable housing;
- (b) facilitating access to other assistance and social services, such as programs relating to financial literacy, housing independence and sustainable employment to relieve poverty, distress or disadvantage;
- (c) working collaboratively with government and non-government organisations to create and build socially inclusive communities that provide for improved economic, educational and social opportunities and outcomes to relieve poverty, distress or disadvantage;
- (d) increasing and optimising the quantity and quality of emergency, low rental, subsidised or otherwise affordable charitable housing;
- (e) raising income through the provision of, property investment and management services, including the provision of properties for sale or rental in the general housing market, as a means of achieving, or in pursuit of, the charitable object of the Company;

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- (f) finding and implementing solutions to homelessness, including working with homeless people to transition them to suitable, affordable and sustainable housing; and
- (g) doing such other things as are incidental or conducive to the attainment of the charitable object of the Company.

13. In addition to Link Wentworth's objective of providing affordable housing to disadvantaged members of the community, Link Wentworth acts as a real estate agency and operates the AHS.

14. The AHS is a series of arrangements between landlords, Link Wentworth (in its capacity as the landlord's agent and as a DGR) and tenants.

15. The AHS involves Link Wentworth connecting landlords who would like to 'make a difference' with tenants who are on low incomes, are priced out of the market or are at risk of becoming homeless or currently experiencing homelessness.

16. Under the AHS, landlords will specify amounts they wish to donate to Link Wentworth by way of a PDD.

17. Under the PDD, Link Wentworth, acting as the landlord's agent, would deduct amounts from the landlord's income, which represent donation amounts.

18. The donation amounts may be paid into a nominated bank account of Link Wentworth or Link Wentworth may set off the donation amounts against amounts payable by Link Wentworth to the landlord in relation to the rental of the property.

19. A donation amount made by a landlord is not directly connected to any one tenant or any other person. The donation amount received by Link Wentworth becomes part of its general pool of funds used to finance the operations of the organisation, including the provision of rental subsidies. The landlord has no control over how the funds will be deployed by Link Wentworth.

20. A description of the AHS is:

- The landlord enters into the Exclusive Residential Affordable Housing Property Management Agreement (Management Agreement) with Link Wentworth to act as agent for the landlord.
- The rent stipulated under the Management Agreement is market rent. The landlord and the Link Wentworth agree on the market rent by way of independent valuation or consultation with the landlord via market comparisons.
- The management fee stipulated under the Management Agreement is at market rate.
- If a landlord's property is registered under the National Rental Affordability Scheme, a flat fee of 9% plus goods and services tax of the annual market rent is charged due to additional compliance related work that is necessary.
- Link Wentworth identifies tenants who meet the State Environmental Planning Policy for Affordable Housing income eligibility thresholds for participation in the AHS.
- The landlord advises Link Wentworth on the amount it proposes to donate to Link Wentworth.
- Link Wentworth and the landlord may enter into a PDD where Link Wentworth, acting in its capacity as the landlord's agent, will deduct

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amounts (representing the donation amounts) from the landlord's rental income.

- Link Wentworth advertises the property at market rent along with an accompanying rent subsidy offered by Link Wentworth. Generally, the rental subsidy amount is equal to the amount proposed to be donated by the landlord. Link Wentworth will be responsible for providing the rental subsidy amount on behalf of the tenant under the subsidy agreement regardless of whether the landlord makes a donation to Link Wentworth.
- A residential lease agreement, at market rent, is entered into between the landlord and the tenant.
- Link Wentworth enters into a subsidy agreement with the tenant where:
  - Link Wentworth will be responsible for providing a portion of the market rent (the rental subsidy amount) to the landlord on behalf of the tenant during the lease period
  - the tenant will be responsible for paying the difference between the market rent and the rental subsidy amount to Link Wentworth, as agent for the landlord during the lease period.
- Where a landlord does not, or ceases to, make donations to Link Wentworth under a PDD, Link Wentworth will fund the rental subsidy amount from its general pool of funds during the lease period.
- In accordance with the Management Agreement, Link Wentworth will remit an amount to the landlord equal to the market rent (being the amount paid to Link Wentworth by the tenant, together with the rental subsidy amount), minus any outgoings (for example, council rates, insurance, management fees) and any donation amount referable to a PDD.

21. Landlords are not required to enter into a PDD.

22. Under the PDD:

- The landlord unconditionally authorises, instructs and directs Link Wentworth to deduct the donation amount from each rental payment and pay the donation amount to Link Wentworth, into a nominated account, within 5 business days of Link Wentworth receiving the rental payment from the tenant (Clause 2(a) of the PDD).
- Link Wentworth agrees to accept the donation amount to further its charitable purposes and will issue a receipt in the name of the landlord for the donation amount received (Clause 2(c) of the PDD).
- The landlord can cancel the PDD at any time by providing Link Wentworth with 5 business days' written notice (Clause 2(d) of the PDD).
- Notwithstanding the above, Link Wentworth may set off the donation amount against amounts payable by Link Wentworth to the landlord in relation to the rental of the property rather than pay the donation amount into the nominated account (Clause 2(e) of the PDD).
- Link Wentworth acknowledges that the PDD does not constitute an ongoing agreement by the landlord to donate the donation amount and that the payment direction may be revoked by giving 5 business days' written notice (Clause 3(a) of the PDD).

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- The landlord acknowledges under Clause 3(b) of the PDD that:
  - each donation amount made under the PDD is a donation to Link Wentworth
  - a donation amount may be used for any purpose at the absolute discretion of Link Wentworth which is consistent with its obligations under the ITAA 1997
  - Link Wentworth 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 written directions of Link Wentworth, or Link Wentworth offsetting the donation amount in accordance with Clause 2(e) of the PDD, Link Wentworth will have discharged all its obligations under the PDD.

23. The landlord, or associate of the landlord, does not receive any advantage or benefit from Link Wentworth, Link Wentworth in its capacity as the landlord's agent, the tenant or any other party as a consequence of making the donation to Link Wentworth.

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**Commissioner of Taxation**

8 May 2024

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## 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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### **Meaning of 'gifts'**

24. 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*.

25. 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.

26. 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.

27. 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**

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

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29. 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.

30. 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.

31. 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 liable under, the contract. Therefore, an agent does not have beneficial interest in the property being transferred.

32. Under the PDD, the landlord unconditionally directs their agent Link Wentworth to deduct a donation amount from each rental payment paid by the tenant to the landlord under the lease agreement and pay it to Link Wentworth for their charitable purposes or have it set off in accordance with the PDD.

33. Prior to the donation amount being paid to Link Wentworth, 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 Link Wentworth who can use it for their charitable purposes at their absolute discretion.

34. The donation is made when the donation amount is transferred under the PDD to Link Wentworth's bank account or set off in accordance with the PDD. After the donation is made Link Wentworth no longer holds it as agent for the landlord.

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

35. A transfer must be made voluntarily 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.

36. 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.

37. Under the AHS arrangement, the landlord is 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.

38. A payment under the PDD is made voluntarily and may be revoked with 5 days' notice by the landlord.

#### ***Transfer arises by way of benefaction***

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

41. 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.

42. 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.

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

44. 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 Link Wentworth is specified under the Management Agreement and is levied at market rate irrespective of whether a landlord makes payments under the PDD.

45. Payments under the PDD confer benefaction on Link Wentworth.

#### ***No material benefit or advantage***

46. 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.

47. 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.

48. 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.

49. The landlord receives the rent amount under the lease agreement with the tenant regardless of whether donation amounts are paid to Link Wentworth under the PDD. The Management Agreement specifies the management fee paid by a landlord to Link Wentworth is not less than market value. A landlord does not receive a discount of any kind if they entered into a PDD. There is no material benefit for a landlord entering a PDD (for example, in the form of discounted or free property management services in exchange).

#### ***Donation amounts are gifts***

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

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### **Tax deduction on donation amounts**

51. 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, the types of deductible gift or contribution 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**

52. 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.

53. Subdivision 30-B includes section 30-45. Table item 4.1.1 of subsection 30-45(1) includes recipients who are registered PBI.

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

55. 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.

56. 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 of subsection 30-15(2) and section 30-17).

57. Link Wentworth is a registered PBI that is endorsed as a DGR. Therefore, Link Wentworth can receive tax-deductible gifts and contributions.

### **Type of gift**

58. 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.

59. Under the PDD a landlord instructs Link Wentworth to pay the donation amounts, in the form of money, to Link Wentworth, an endorsed deductible gift recipient.

60. Therefore, the donation amounts paid to Link Wentworth are gifts of money to an endorsed deductible gift recipient and are tax-deductible gifts under Division 30.

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

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

62. Under 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 means that the deduction

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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.

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

64. 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.

65. 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, and
- 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.

66. A landlord who pays donation amounts to Link Wentworth 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**

67. The 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) 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.

68. However, under clause 2(c) of the PDD Link Wentworth is required to issue a receipt in the name of the landlord for the donation amounts received.

69. The receipts issued by Link Wentworth to landlords must include the name and ABN of Link Wentworth and state 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 Div 230
  - ITAA 1997 995-1(1)
  - Australian Charities and Not-for-profits Commission Act 2012
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ATO references

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