TR 2004/D19 - Income tax: tax deductible gifts - what is a gift

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This document has been finalised by TR 2005/13.

Draft Taxation Ruling

Income tax: tax deductible gifts – what is a gift

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Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the ***Taxation Administration Act 1953****. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office.*

What this Ruling is about

Class of person/arrangement

1. This Ruling explains what is a gift for the purposes of the gift deduction provisions (Division 30 of the *Income Tax Assessment Act 1997* (ITAA 1997).

2. The Ruling does not seek to substitute a quasi-definition for the meaning of the word 'gift'. It provides principles relevant to the factual determination of whether a particular transfer of money or property constitutes a gift. In the explanations the judicial background to these principles is outlined, and includes examples illustrating how the principles may be applied.

3. The Ruling also explains the operation of section 78A of the *Income Tax Assessment Act 1936* (ITAA 1936). Section 78A identifies the circumstances under which a gift to a deductible gift recipient (DGR) is not an allowable deduction under Division 30 of the ITAA 1997.

4. The Ruling does not apply to contributions made to registered political parties, as provided for by item 3 of the table in section 30-15 of the ITAA 1997. It also does not apply to claims for income tax deductions made under section 8-1 of the ITAA 1997 (the general deduction provision).

5. The Ruling does not deal with the recently enacted measures concerning deductions for contributions relating to fund-raising events which apply from 1 July 2004.

Background

6. Division 30 of the ITAA 1997 provides that the types of non-testamentary gifts (to the value of $2 or more) to a DGR that can be deductible are:

- money;
- property (including trading stock) purchased during the 12 months before the gift was made;
- property valued by the Commissioner at more than $5,000;
- an item of trading stock disposed of outside the ordinary course of business;
- property under the Cultural Gifts Program; or
- gifts of places listed in the Register of the National Estate.

Deductions are also allowed for testamentary gifts, but only if they are made under the Cultural Bequests Program under Subdivision 30-D of the ITAA 1997.

7. For the purpose of calculating the amount that is deductible in respect of a gift, the Division provides rules for valuing gifts and for spreading deductions over 5 years or less.

8. Division 30 of the ITAA 1997 is subject to the operation of section 78A of the ITAA 1936 which strengthens the conditions under which deductions are available and denies deductions for ostensible gifts made as part of tax avoidance arrangements or schemes.

9. Division 30 of the ITAA 1997 applies to gifts made in the 1997-1998 and subsequent years of income. For gifts made in the 1996-1997 or earlier years of income, deductibility is provided for by section 78 of the ITAA 1936.

Date of effect

10. It is proposed that when the final Ruling is issued, it will apply both before and after its date of issue. However, the final Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the final Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Previous Rulings

11. Taxation Rulings IT 2071, IT 2265, IT 2443, and Taxation Determinations TD 92/110, TD 93/57, TD 93/139, and TD 93/185 are incorporated in this Ruling and so are withdrawn from the date of issue of the final Ruling.

Ruling

12. The term '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.

13. Rather than attempting a definition of gift, the courts have described a gift as having the following characteristics and features:

- there is a transfer of the beneficial interest in property;
- the transfer is made voluntarily;
- the transfer arises by way of benefaction; and
- no material benefit or advantage is received by the giver by way of return.

14. In doing so, the courts have recognised that the criteria may not be absolute and may involve a matter of degree.

15. In determining whether a transfer is a gift it is necessary to consider the whole set of circumstances surrounding the transfer and this may include consideration of parties other than the giver and the DGR. It is the substance and reality of the transfer that has to be ascertained. It is therefore necessary to take account of those acts, transactions, arrangements and circumstances that provide the context and the explanation for the transfer.

Transfer of beneficial interest in property

16. The making of a gift to a DGR involves the transfer of a beneficial interest in property to that DGR.

17. It is a requirement that identifiable property has in fact been transferred to the DGR.

18. For there to be a transfer, the property which belonged to the giver must become the property of the DGR. A gift is effectual only where the giver has done everything that is necessary, in accordance with the relevant laws governing the transfer of that kind of property, to transfer the property to the DGR.

19. Where only some of the giver's beneficial interest in a thing (whether a physical item or some other form of property) is transferred, it is only the transferred interest that can be a gift.

20. By reason of the operation of section 78A of the ITAA 1936 and/or the meaning of a gift, a deduction will not arise if less than full title to the transferred property is transferred or where the DGR fails to obtain immediate and unconditional right of custody and control of the property transferred.[1]

[1] See paragraphs 54, 78 and 222-225.

21. An exception is provided for in relation to cultural and heritage gifts under items 4, 5 and 6 of the table in section 30-15 of the ITAA 1997. Where the terms and conditions of the gift of the property are such that the DGR does not have immediate custody and control or unconditional rights to retain custody and control of, or full legal title to, the gifted property, a reduced deduction is allowable under section 30-220 of the ITAA 1997. Taxation Rulings TR 96/1 and IT 295 explain the procedures and valuation method for these gifts.

22. The provision of services to a DGR by a volunteer does not constitute a gift, as the ordinary meaning of property does not include services. Any expenditure incurred by the volunteer in the course of providing the unpaid services does not constitute a gift.

23. Of course, where a volunteer does make a gift of money or other property to a DGR, the fact that the giver is a volunteer does not prevent it being a tax deductible gift.

Transfer made voluntarily

24. In order for a transfer of property to be a gift, it must be made voluntarily, that is, 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.

25. A transfer is not made voluntarily if it is made for consideration or because of a prior obligation imposed on the transferor by statute or by contract. Nonetheless, a transfer, which 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.

26. A transfer is not made voluntarily in a case where the giver is offered a choice of making a purported gift to the DGR where:

- the choice is offered as an alternative to discharging or reducing the giver's contractual obligation to the DGR or an associate of the DGR; and
- the choice, once exercised, has the effect of discharging or reducing the giver's contractual obligation owed to the DGR or associate of the DGR.

27. A transfer is not made voluntarily in a case where the purported gift to a DGR made by the giver has the effect of discharging or reducing a prior contractual obligation of the giver's associate.

Arises by way of benefaction

28. An essential attribute of a gift is that benefaction is intended, and in fact conferred on the recipient. Conferring benefaction means that the DGR is advantaged in a material sense, to the extent of the property transferred to them, without any countervailing detriment arising from the terms of the transfer.

29. Where the giver is aware that the transfer of property will result in detriments, disadvantages, obligations, liabilities or limitations to the recipient, the attribute of benefaction may be missing. Whether benefaction is in fact conferred will depend to a large extent on the proportion which the detriment, disadvantage, obligation, liability or limitation bears to the value of the property transferred.

30. However, detriments, disadvantages, obligations, liabilities, or limitations borne by the recipient which are not within the knowledge and intention of the giver at the time of the transfer, and which do not arise from the terms of the transfer of property by the giver, do not necessarily preclude a finding that the conferral of benefaction was associated with the transfer.

31. Detriments that are insignificant in comparison with the value of the transfer will not preclude a finding that the transfer arises from benefaction.

32. Transfers of property which are made to a DGR on condition that the property in turn will be transferred to a second entity raise concerns as to whether benefaction has been conferred on the DGR. If the effect of the condition is that the DGR is merely an agent or trustee to pass the transferred property on to another organisation, it is evident that no benefaction will in fact be conferred on the DGR itself. It is also evident that where the second entity is a non-DGR no benefaction is conferred on any DGR.[2]

33. Where the first entity is a public fund DGR, and the second entity is a DGR, concerns may arise as to whether the condition attaching to the donation has created a separate fund which is not entitled to be endorsed as a public fund. This situation is discussed in TD 2004/23.

34. However, it is accepted that there is a conferral of benefaction on the DGR in the case where the transfer of property is made to a DGR with a stated preference for the property to be in turn transferred to a second entity. This is on the basis that the DGR receives the property in its own right and has an unfettered discretion in deciding whether or not to apply the property in accordance with the preference expressed by the giver.[3]

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[2] The effect of such transfers in relation to the recipient being an ancillary fund are outlined in Taxation Determination TD 2004/23. This involves the issue of whether the recipient of the transfer is a public fund, as required by the legislation covering ancillary funds.

[3] Refer paragraphs 129-137.

35. A gift ordinarily proceeds from a detached and disinterested generosity. There may be a variety of reasons and motivations behind the giver making a gift, however the fact that a giver's motive is a strong interest or emotional involvement in the work of the DGR will not disqualify the gift from being tax deductible.

36. A motive of seeking a tax deduction does not, by itself, disqualify a transfer from being a gift.

37. In cases where it is clear on the objective facts that the giver is giving effect to self-interested commercial or fiscal objectives rather than conferring benefaction on the DGR, it will be evident that the transfer does not proceed from detached and disinterested generosity.

No material benefit or advantage[4]

38. In order to constitute a gift, the giver must not receive a benefit or an advantage of a material nature by way of return. It does not matter whether the material benefit or advantage comes from the DGR or another party.

39. Any benefit that is received (or is reasonably expected to be received) by an associate of the giver has to be taken into account in determining whether a transfer falls within the provisions of paragraph 78A(2)(c) of the ITAA 1936.[5]

40. As well as any benefit or advantage received as a result of or in connection with a transfer of property, paragraph 78A(2)(c) of the ITAA 1936 also refers to any right or privilege (apart from the tax deduction that may be allowable) that the giver or giver's associate may receive as disqualifying the transfer from being a gift.[6]

41. The giver may still be regarded as having received a material benefit in a case where the value of the benefit to the giver is less than the value of the property transferred. In these circumstances it is not accepted that the value of the benefit received can be notionally deducted from the value of the property transferred and the net balance claimed as a gift. No part of the property transferred is considered a gift.[7]

42. Only advantages or benefits that are material will disqualify a transfer of property from being regarded as a gift. This excludes advantages or benefits of a *de minimis* nature.

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[4] As a result of amendments operative from 1 July 2004 (*Taxation Laws Amendment (2004 Measures No. 1) Act 2004*), deductions are available to individuals in respect of contributions to fundraising events conducted by DGRs where associated minor benefits are received by the contributor. Individuals are, in certain circumstances, able to receive a tax deduction for the net amount of a contribution made to a DGR, which has an associated minor benefit. The deduction is available for cash contributions above $250, where the value of the benefit received by the contributor is no more than 10 per cent of the contribution or $100, whichever is less.

[5] Refer paragraphs 51 & 212-219.

[6] Refer paragraphs 51 & 214-215.

[7] See footnote 4.

43. It is a question of fact in each case whether any benefit or advantage is sufficiently significant to be considered material.

44. A benefit or advantage is not material where it:

- has no link with the transfer;
- is insignificant in relation to the value of the transfer;
- only constitutes advertising for the DGR;
- cannot be put to use and is not marketable;
- does not create any rights, or confer any privileges or entitlements;
- merely accounts for the use of the funds;
- is mere public recognition of the giver's generosity; or
- confers membership of a DGR which was neither sought nor known by the giver at the time of making the transfer.

45. Some circumstances which may lead to a conclusion that a benefit or advantage is material are where:

- the benefit is sought by the giver in connection with the transfer;
- as a result of the transfer, a legal obligation is eliminated or reduced;
- the benefit is offered by the DGR as an inducement to potential givers;
- there is public recognition for purposes of commercial advertising for the giver;
- membership rights and privileges are obtained as a result of transfer; or
- there is a requirement to report to the giver on results of research undertaken by the DGR and the results are to be used by the giver.

Section 78A

46. Even if a particular transfer of property may arguably be a gift, the anti-avoidance provisions of section 78A of the ITAA 1936 may apply. Where that section applies, an income tax deduction for the gift will not be allowable under Division 30 of the ITAA 1997.

47. Section 78A does not apply to deny deductions for genuine gifts made under ordinary circumstances.

48. Section 78A applies where by reason of the making or receipt of the gift or any scheme or arrangement associated with the gift:

(a) the amount or value of the benefit derived by the DGR as a consequence of the gift is, or will be, or may reasonably be expected to be, diminished subsequent to the receipt of the gift (paragraph 78A(2)(a));

(b) another fund, authority or institution, other than the recipient DGR makes, or becomes liable to make, or may reasonably be expected to make a payment, or transfer property to any person or incur any other detriment, disadvantage, liability or obligation (paragraph 78A(2)(b));

(c) the giver or the giver's associate obtains, or will obtain, or may reasonably be expected to obtain any benefit, advantage, right or privilege apart from the benefit of a tax saving associated with the gift deduction (paragraph 78A(2)(c)); or

(d) the recipient DGR or another fund, authority or institution acquires property, directly or indirectly, from the giver or the giver's associate (paragraph 78A(2)(d)).

49. The provision applies to purported gifts if there is considerably reduced benefaction in fact conferred upon the recipient DGR arising from the transfer of the property, or alternatively, if the benefit of the transfer was obtained by the recipient DGR, another (associated) fund, authority or institution bears obligations as a result of the transfer. It also applies if the benefit associated with the transfer of the property is returned either wholly or in part to the giver or the giver's associate.

50. Paragraphs 78A(2)(a), (b) or (c) apply if the diminished benefit or the obligations arising on the part of the recipient DGR or another fund, authority or institution happen by reason of any act, transaction or circumstance that has occurred, or will occur, or may reasonably be expected to occur as part of, or in connection with, or as a result of:

- the making or receipt of the gift; or
- any scheme or agreement entered into in association with the making or receipt of the gift.

51. In characterising a transfer of property, paragraph 78A(2)(c) requires consideration to be taken not only of any advantage or benefit received by the giver but also by the associate of the giver. While the receipt of any material advantage or benefit by the giver disqualifies a transfer from being considered a gift, paragraph 78A(2)(c) extends the range of benefits which precludes tax deductibility to include any right or privilege obtained as a result of the transfer.

52. The net result is that the DGR obtains a benefit that is considerably less in comparison with the nominal value of the property transferred and for which the giver seeks a tax deduction. Section 78A operates in these circumstances to deny the whole of the deduction for the purported gift.

53. Where the reduction in the amount or value of the benefit received by the DGR is the result only of the DGR having to incur genuine expenses associated with the soliciting of the gift, section 78A does not apply to deny the deduction to the giver.

Giver or associate of the giver retains right to use donated property

54. Subsection 78A(3) deems a benefit to be received by the giver or the associate of the giver in relation to a gift of property other than money where the terms and conditions on which the gift is made are such that they:

- fail to give unencumbered legal and equitable title to the DGR;
- allow title to the property to be defeased upon fulfilment of the terms and conditions governing the transfer, so that the property reverts to the ownership of the giver or associate of the giver;
- fail to give immediate custody and control over the property to the DGR; or
- fail to give unconditional rights of custody and control over the property to the DGR.

55. Subsection 78A(3) does not apply to heritage and cultural gifts under item 4, 5 or 6 of the table in section 30-15 of the ITAA 1997.

56. The Commissioner may amend the assessment at any time to give effect to the application of section 78A.

Explanation

Ordinary meaning of a 'gift'

57. In considering the gift deduction provisions of the ITAA 1936, the courts have applied the ordinary meaning of 'gift'. In *Federal Commissioner of Taxation v. McPhail* (1968) 117 CLR 111 (*McPhail*), Owen J said, at 116, it is 'used in the sense in which it is understood in ordinary parlance'. In *Leary v. FC of T* 80 ATC 4438; (1980) 11 ATR 145 (*Leary*), Bowen CJ said: 'The context and the obvious intention of the section suggests that it is used in its ordinary non-technical sense'.[8] This meaning also applies in the gift deduction provisions as re-written in the ITAA 1997.

[8] At ATC 4439; ATR 147, and per Brennan J at ATC 4450; ATR 159 and per Deane J at ATC 4453; ATR 162-163.

58. As the courts have recognised that any clear, unqualified definition may not be possible, they have sought to characterise a transfer in question by reference to the presence or otherwise of the usual attributes of a 'gift'.

59. The courts have described a gift as having certain specified attributes. If a transfer fails to have one or more of these attributes, the transfer will not ordinarily be considered a gift.[9]

60. The characterisation of a transfer as a gift 'falls to be determined by reference to the overall arrangements and transactions which constituted its context'.[10] The enquiry is directed at ascertaining the substance and reality of the transfer.[11] It is therefore essential not only to focus on the transfer of the property between the giver and the DGR, but also to take account of any associated transactions, agreements and arrangements involving the giver's associate(s), the DGR's associate(s), the promoter and the promoter's associate(s).

61. The various attributes of a gift are discussed separately for convenience of presentation only. It is recognised that the examples that are provided to illustrate each attribute of a gift in turn are frequently illustrative of the other attributes as well.

Transfer of beneficial interest in property

Transfer must occur

62. The making of a gift to a DGR involves the transfer of money or property[12] to that DGR: section 30-15 of the ITAA 1997. In the simplest cases this involves the delivery of money (cash, cheque or electronic transfer of funds) or goods to the DGR.

63. 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 has been transferred to the DGR (c.f., *Re Rose (dec'd); Rose v. Inland Revenue Commissioners* [1952] 1 All ER 1217).

64. In *Milroy v. Lord*, Turner LJ said that for a gift to be valid and effectual, the giver:

> must have done everything which according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.[13]

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[9] Refer Deane J in *Leary:* 80 ATC 4438 at 4454; ATR 145 at 164.
[10] 80 ATC 4438 at 4456; 11 ATR 145 at 165 per Deane J.
[11] 80 ATC 4438 at 4456; 11 ATR 145 at 165 per Deane J.
[12] Gifts of property qualifying for tax deductions (excepting those made under the Cultural Gifts Program) include gifts of an estate or interest in land or in a building.
[13] (1862) 45 ER 1185 at 1189; 4 De G F & J 264, at p 274; [1861-73] All ER Rep 783.

Example 1

65. *Edwards owns shares in a company. In August 2003 he purports to assign by deed to a DGR a gift of all dividends arising during the next ten years from the shares. Edwards has not made a gift of a right to the dividends in August 2003, because the assignment was not effective. A dividend which may become payable in the future is a mere expectancy which cannot be equitably assigned without consideration: Norman v. Federal Commissioner of Taxation (1962-1963) 109 CLR 9.*

Example 2

66. *On a telethon Pearce calls a DGR to say she will give $500. She later forgets about it and never in fact gives anything to the DGR. Pearce has not transferred the $500 to the DGR.*

Example 3

67. *Brown wants to help a particular DGR. She opens a bank account for herself and deposits $50 in it each fortnight, intending to give the balance to the DGR each quarter. The making of deposits to her bank account does not transfer any property to the DGR. It is only when she transfers the money to the DGR that she can claim a tax deductible gift.*

Example 4

68. *Baker is approached by an employee of a DGR to make a gift to it as part of its annual fundraising campaign. She gives $20 to the employee and receives the DGR's receipt. However, the employee steals the money and never passes it on to the DGR. Despite this Baker has transferred the $20 to the DGR.*

Example 5

69. *Ronald participates in a workplace-giving program, as described in Practice Statement PS LA 2002/15, 'Evidence for making of a gift by a taxpayer who participates in a workplace giving program'. His employer has entered into arrangements with a number of DGRs. Under the program his employer withholds $20 from his weekly wage and passes it on to the DGR he has nominated. His PAYG payment summary for the financial year ended 30 June 2004 shows that his deductions in respect of gifts to the nominated DGR total $1,040. Ronald has made a gift of money to the DGR during that financial year. The amount of $1,040 shown on his PAYG payment summary is sufficient to support his claim for a deduction in his tax return.*

Property owned by the giver prior to transfer

70. For there to be a tax deductible gift, the giver must have proprietary rights in the property just prior to its transfer (for example, see *AAT Case 6919* (1991) 91 ATC 257; (1991) 22 ATR 3166). Upon the transfer, ownership in the property moves from the giver to the DGR.

Example 6

71. *Mauger is the sole shareholder and managing director of her private company. The company owns a boat. Mauger delivers it to a DGR as a gift such that it becomes the property of the DGR. While there has been a transfer of property to the DGR, and while Mauger was involved in the transfer, it is not Mauger herself who has made the gift. The boat was never her property, so she is unable personally to gift it to the DGR. However the company may have made a gift if Mauger transferred the boat in her capacity as managing director and if there are no other disqualifying factors.*[14]

Example 7

72. *Tudor owns land. Whilst continuing to own the land, she grants, by deed, a 20 year lease over the land to a DGR with no premium or rent payable. Tudor has not made a gift of the lease to the DGR. While the granting of the lease results in the DGR obtaining a proprietary interest in the land, which is personal property, Tudor has not transferred this personal property to the DGR. She herself was never the owner of that personal property (see Commr of Taxes (Qld) v. Camphin (1937) 4 ATD 315; 57 CLR 127; 1 AITR 147; 91 ATC 257).*

Example 8

73. *Reid Pty Ltd is a company. It allots and issues 20,000 $1 ordinary shares to a DGR for no consideration. Reid Pty Ltd has not made a gift of the shares. Before allotment a share does not exist as a piece of property; it is only when it is allotted and issued that the rights which it confers are created. When a share is allotted, nothing is transferred or conveyed from the company to the shareholder (see Ord Forrest Pty Ltd v. Federal Commissioner of Taxation (1974) 130 CLR 124 at 148; (1974) 4 ATR 230 at 237; 74 ATC 4034 at 4041 per Gibbs J).*

[14] *Federal Commissioner of Taxation v. Clendon Investments P/L* (1977) 7 ATR 493; (1977) 77 ATC 4246.

Example 9

74. *In 2000 Gould acquired a 20-year leasehold interest in a pastoral property. In 2003 Gould prepaid the lease fees for the remainder of the lease term and by deed assigned his rights in the lease to an indigenous DGR for no consideration. His transferred rights in the lease were valued by the Commissioner at $100,000. Gould is entitled to a deduction of $100,000 in respect of this gift to the DGR.*

Transfer of beneficial interest

75. As a result of the transfer, the giver loses and the DGR receives the benefits associated with ownership (that is custody and control) and/or equitable interest in the property transferred. Where the giver only transfers a nominal or legal title to the property, there is no gift.

Only transferred interest tax deductible

76. Where the giver transfers only part of their interest in the property to the DGR, the giver is entitled to a tax deduction only in respect of their transferred interest.

Example 10

77. *Dawson owns a two third interest in a rental warehouse. She transfers half of her interest to a DGR. Only the one third interest transferred can be a tax deductible gift.*

Full title to be received by the DGR upon transfer

78. Upon the transfer, the DGR must receive full title, custody and control of the property transferred, so that the DGR is entitled to deal with the property in its own right to the entire exclusion of the giver.[15] Subsection 78A(3) extends the exclusion to include the giver's associate.[16]

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[15] If the gift is complete, the giver cannot retract the gift. As Latham CJ states in *Brunker v. Perpetual Trustee Co Ltd* (1937) 57 CLR 555 at 582:

> A person who makes a gift cannot recall the gift simply because it is a gift. If he repents of the gift, that fact is immaterial, if the gift of what he has given is complete.

[16] See paragraphs 54 and 222-225.

Example 11

79. *In December 2003 McLean executes a deed of gift in favour of a DGR, under which he binds himself to give it $10,000 on 1 January 2007. Because there is only a promise, albeit under deed, the $10,000 has not been transferred to the DGR in December 2003.*

Example 12

80. *Smith owns a warehouse which he lets. After discussions with an educational DGR, he executes a deed of trust under which he settles ownership of the warehouse property on the DGR to hold it solely for the benefit of an associated non-DGR school. Despite Smith having transferred the legal interest in the warehouse to a DGR, the DGR has no beneficial interest in it. Smith cannot claim the transfer as a tax deductible gift.*

Example 13

81. *Solomon hands over $5,000 to a DGR, on the basis that it will simply act as her agent in passing the money on to a particular school which is not a DGR. The DGR agrees to the condition and passes it on to the school. While Solomon has physically handed over the $5,000 to a DGR, there is no transfer of beneficial interest in the money to the DGR.*

Exception applying to cultural and heritage gifts

82. The requirement that the DGR receives full title, custody and control of the property upon transfer does not apply to cultural and heritage gifts (items 4, 5, & 6 of the table in section 30-15 of the ITAA 1997). Even though the DGR may not, under the terms and conditions of the gift, have full title, custody or control of the property, section 30-220 of the ITAA 1997, in conjunction with subsection 78A(5) of the ITAA 1936 allows the giver a tax deduction.

83. The provisions are designed to encourage gifts of significant works of art and other items of cultural property for public display and for preservation of property of heritage significance. However, the deduction is reduced to reflect the benefit that flows from retaining some rights of custody and enjoyment of the gifted property on the part of the giver. Taxation Rulings TR 96/1 and IT 295 explain the procedures and valuation method for such gifts.

Money or property must be transferred to DGR

84. Services that are provided to a DGR by volunteers are not tax deductible as there is no transfer of property involved. Likewise any expenses that may be borne by the volunteer in the course of providing the services to the DGR are not deductible as gifts as there is no transfer of property to the DGR.

85. In *Case S43* 85 ATC 343; (1985) 28 CTBR (NS) *Case 49*, the Board of Review affirmed the decision of the Commissioner to deny deductions for motor vehicle, postage and telephone expenses totalling $675 incurred by the taxpayer in the course of undertaking voluntary work for a DGR. The Board held that the taxpayer did not make a gift of money or property to the DGR. What the taxpayer gave was simply his services.

Example 14

86. *Symon works as an accountant for a registered tax agent, where her work is charged at $70 per hour. She also maintains a DGR's books on a volunteer basis, spending four hours each fortnight. She wants to claim a tax deduction for $280 per fortnight, being the four hours at her accountancy charge rate of $70. The notional 'expenditure' is not a tax deductible gift; she has not transferred any property to the DGR.*

Example 15

87. *Kennedy buys himself protective clothing to wear when working as a volunteer for a rescue DGR. Even though he only uses the clothing when working for the DGR, he has not transferred it to the DGR such that it becomes the property of the DGR. Accordingly, Kennedy has not made a tax deductible gift to the DGR.*

Example 16

88. *Groom travels to a remote area to work for a DGR without remuneration. He pays for his own airfares. The expenditure is not a tax deductible gift to the DGR.*

89. Where there is in fact a transfer of property to a DGR, the giver, though a volunteer, is entitled to a tax deduction in respect of the transfer.

Example 17

90. *Glynn is a telephone counsellor for a DGR. She provides a dedicated telephone at her home for this purpose. She pays all the costs associated with the provision of this telephone line ($300), and then seeks reimbursement from the DGR. After it reimburses her for these costs, she voluntarily gives the $300 to the DGR. The payment to the DGR is a tax deductible gift.*

Example 18

91. *Pulsford buys toys at her local toyshop and gives them away to children she helps while working as a volunteer at a clinic for a DGR. There is no transfer of property to the DGR, and so there is no tax deductible gift. However, if she gives the toys to the DGR (and it uses them in its clinic), she will have made a gift to the DGR. If the DGR chooses to give the toys away to the children who attend its clinic, this will not affect the fact that Pulsford has previously made the gift to the DGR.*

Transfer made voluntarily

92. The case authorities make it clear that for a transfer of property to be a gift it must be made voluntarily. A transfer will be voluntary if it is 'the act and will of the disponor and there was nothing to interfere with or control the exercise of that will' (*Cyprus Mines Corporation v. Federal Commissioner of Taxation* 78 ATC 4468 at 4481; (1978) 9 ATR 33 at 48).

93. A transfer made under a sense of moral obligation is still regarded as made voluntarily.[17]

Example 19

94. *Cruikshank promises his neighbour's daughter that he will give $2 to a DGR for each lap she completes in a walkathon to raise money for it. She completes 30 laps. Cruikshank's gift of $60 to the DGR is voluntary even though the amount given depended upon the number of laps completed.*

Example 20

95. *Braddon buys a ticket in a raffle run by a DGR to win a boat. The payment for the ticket is not a gift. The payment is not voluntary as the ticket has been purchased as part of a contractual arrangement under which he has acquired rights in the raffle.*

Example 21

96. *Macfarlane, who suffers a depressive condition, goes to a health promotion charity (a DGR) which offers counselling for no charge. A prominent sign says that if you are satisfied with the service, a donation of $30 would be appreciated. Macfarlane finds the counselling very helpful, and decides to give the suggested $30 to the DGR. The $30 is a gift. The use of moral persuasion does not prevent the payment from being considered as voluntarily made.*

[17] *Leary* 80 ATC 4438 at 4439; 11 ATR 145 at 147 per Bowen CJ.

Transfer pursuant to legal obligation not voluntary

97. To qualify as a gift, the transfer of property has to be voluntary. The transfer must not have arisen from any obligation imposed by law, whether by contract or otherwise. In *McPhail* Owen J said:

> it must appear that the property transferred was transferred voluntarily and not as a result of a contractual obligation to transfer it…[18]

In *Leary* Bowen CJ said:

> It seems that a payment … will not generally be regarded as voluntary if made under an obligation imposed by law, whether under contract or otherwise.[19]

Example 22

98. *Bamford pays $70 to an ambulance fund which is approved as a DGR. The $70 entitles him and his family to free ambulance services for the year. The $70 is not a gift. The contribution is paid as part of a contractual arrangement between the contributor and the fund (Case 58 (1974) 19 CTBR (NS)).*

Example 23

99. *On 1 May 2000 Fysh pays $500 to the XYZ School General Account to confirm enrolment of child C for the 2001 school year. Fysh has no entitlement to a refund of the enrolment fee, but can direct it to be transferred from the XYZ School General Account to the School Building Fund. On 1 March 2003 the $500 is transferred to the School Building Fund at Fysh's direction. As Fysh has no control over the non-refundable money other than to direct it to the School Building Fund, and in view of the fact that the initial payment was compulsory, no deduction is available as a gift.*[20]

100. *On 1 May 2002, Fysh pays a further $900 to the School General Account to confirm enrolment of his second child for the 2003 school year. While the child is at the school, Fysh does not direct the enrolment fee to the School Building Fund. After the child has left the school, the school writes to Fysh and gives him the option of having the $900 refunded or making a gift to the XYZ School Building Fund. The $900 is transferred at Fysh's direction from the XYZ School General Account to the XYZ School Building Fund (a DGR). As Fysh has control over the money and voluntarily decides to direct it to the XYZ School Building Fund, the $900 is a gift.*

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[18] (1968) 117 CLR 111 at 116.
[19] 80 ATC 4438 at 4439; 11 ATR 145 at 147.
[20] See also Taxation Determination TD 2004/7, *Income tax: can a prepayment of school fees be a deductible gift to a school building fund?* It concludes that payments made to DGRs under the prepaid school fee arrangements it deals with will not be gifts.

Example 24

101. *Watson and another party are bidding to buy an item of plant from a DGR. While her competitor's bid is $200,000, Watson offers to pay $160,000 for the item of plant as well as make a donation of $45,000. Watson's bid is successful. The $45,000 is not a voluntary payment by Watson; it is not a gift.*

Example 25

102. *A private school's half-yearly fee accounts include an amount described as a 'donation to the school building fund' (a DGR). It is included in the same way as all other amounts on the account, there is no other indication that its payment is not required, and it is included in the total amount shown as due and payable. The amount shown as a 'donation' is not a voluntary payment; it is not a gift. If on the other hand the account shows the amount as being optional, and it is not included in the total amount shown as due and payable, it is considered a voluntary payment and in the absence of contrary features, regarded as a gift.*

103. However where the means chosen to give effect to a voluntary transfer has contractual features, this will not prevent the transfer from being a gift.

Example 26

104. *Walker voluntarily enters into a deed of gift to transfer five yearly instalments of $2,000 to be paid on 30 June each year. Despite having a legal obligation to make the five $2,000 instalments, they are gifts. The decision to enter into the deed of gift was voluntary, and no consideration was received by Walker in respect of the transfer.*

105. A transfer to a DGR is not considered a voluntary payment where it has the effect of discharging or reducing a contractual obligation owed by the giver to the DGR or an associate of the DGR. This is so even where the giver has the choice whether or not to make the transfer to the DGR but is given to understand that the purported gift is offered as an alternative means of discharging or reducing the giver's contractual obligation.

Example 27

106. *Harney owes $13,000 to a DGR for outstanding fees for advertising provided by the DGR for Harney's business. To settle the debt the DGR agrees to accept a donation of $9,000 in full settlement of the outstanding fees. Harney's payment of $9,000 is not voluntary; it is not a gift.*

107. In *McPhail*, the payment to a school building fund (a DGR) was not accepted as a voluntary payment because '*it was a payment made pursuant to a contract between the taxpayer and the School Council*' in relation to school fees.[21] Under the arrangement, the parents qualified for lower school fees for their children should they take up the school's invitation to make payments to the building fund. The arrangement therefore involved a choice between full school fees and lower fees plus a 'gift' to the building fund. The High Court held there was no tax deductible gift.

108. This is further illustrated by the decision in *Cyprus Mines* where a mining company gave money to the State Library Board. Under the agreement with the WA Government, it had the alternative of either paying a royalty to the WA Government or an equivalent amount to a DGR resident in WA. In finding that the payment was not a gift, the Court held it was not sufficient that the company had the choice of whether to pay to a DGR, and, if so, the choice of which DGR. Importantly, it had no choice about whether it had to pay the specified sum. It was bound under the agreement to make payment of the specified sum within the prescribed time period. The payment to the DGR was not voluntary.

109. A transfer of property to a DGR in order to discharge a liability under an indemnity given to an associate of the DGR was likewise not considered a voluntary transfer and thus not a gift in *Klopper & Anor v. Deputy Commissioner of Taxation* 97 ATC 4179; (1997) 34 ATR 650 (*Klopper*). In that case, the taxpayer agreed to indemnify the Ocean Racing Club of Australia (ORCA) for the expenses involved with the taxpayer's participation in the Admiral's Cup. To discharge that liability, the taxpayer made purported gifts to the Australian Sports Aid Foundation (a DGR) on the understanding that the amounts given would be passed on to the ORCA. The court found that the payments were neither free from contractual obligation nor voluntary and thus not deductible as gifts.

Example 28

110. *A private school proposes to parents of students that if they all pay a designated 'voluntary' donation to the school building fund, an expected increase in the level of school fees will not be made. Such payments will not have the character of a gift for the purposes of the gift provisions. They are not, all things considered, voluntary in nature nor are they free from material benefit to the giver. They do not appear to proceed from a detached and disinterested generosity. As well, paragraph 78A(2)(c) would apply to deny a deduction as a gift.*

[21] (1968) 117 CLR 111 at 117 per Owen J.

Example 29

111. *A private school undertakes a fundraising campaign, contacting past students, local businesses, friends of the school and parents, requesting them to make whatever donations they can to the school building fund. It says that if the campaign target is not reached, it will have to raise fees to help fund repairs and extensions to school buildings. Payments made as part of this campaign do not raise concerns about their voluntary nature or the receipt of any material benefit by the givers.*

112. The decision in *Case 3/2000*, 2000 ATC 132; (2000) 43 ATR 1337 makes clear that even a purported gift to a DGR that has the effect of discharging or reducing a contractual obligation of the giver's associate is not considered a voluntary payment. In this Tribunal case, the purchaser had to make a payment of $8.1 million to the vendor as well as make a purported gift of $2.7 million to a DGR under a contract of purchase for land. Alternatively, the purchaser could procure an associate (who was not a party to the contract), to make a payment of $2.7 million to the DGR. The associate and the parties to the contract also entered into an option agreement which provided for a put and call option over the land as between the purchaser and the vendor at a price of $10.8 million. The Tribunal found, *inter alia*, that the payment by the giver's associate to the DGR was a contractual payment (that is, discharging the contractual obligations of the purchaser) and was thus not voluntary. Accordingly it was not a tax deductible gift.

Arises by way of benefaction

113. The 'essential idea' of a gift is that there is a conferral of benefaction on the recipient.[22] In *Leary* Deane J explained this feature:

> It involves, in my view, the concept that the relevant transfer is by way of well doing in that the recipient will be advantaged, in a material sense and without any countervailing material detriment arising from the circumstances of the transfer, to the extent of the property transferred to him.[23]

114. In order to determine whether the transfer is by way of benefaction, Brennan J was of the view in *Leary* that it is relevant to ascertain whether the giver has the knowledge or is at least aware that the recipient is free to enjoy the benefit of the property received:

> If the disponor is aware that the receipt of the property by the disponee will impose a liability upon the latter, the disposition may be seen not to be by way of benefaction … No doubt much depends upon a comparison between the property taken and the liability incurred.[24]

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[22] 80 ATC 4438 at 4441; 11 ATR 145 at 148 per Bowen CJ citing Dixon J in *Collector of Imposts (Vic.) v. Cuming Campbell Investments Pty Ltd* (1940) 63 CLR 619 at 642.
[23] 80 ATC 4438 at 4453-4454; 11 ATR 145 at 163.
[24] 80 ATC 4438 at 4451; 11 ATR 145 at 160 per Brennan J.

115. It may be necessary to consider the perspective of both the giver and the DGR. In *Leary*[25] Bowen CJ gives the example of a recipient DGR which has, to the knowledge of the giver, arranged its affairs such that it can never beneficially retain the benefit of the transfer which will simply pass through its hands. Or the giver may have put in place a structure that allows them to take back the benefit of the transfer such as in *Bray v. Federal Commissioner of Taxation* 77 ATC 4339; (1977) 7 ATR 780.

116. The extent of benefaction in fact conferred upon the recipient has to be determined by reference to the overall arrangement surrounding the transfer. The taxpayer in *Leary* made a payment of $10,000 described as a gift to a DGR. However, under an arrangement between the DGR and the promoter, the DGR, upon receipt of the payment of $10,000 was obliged to pay an amount equal to 98.8% of the $10,000 to the promoter. The substance and reality of the transfer was that the DGR was benefited to the extent of only $120. As such the arrangement that had been put in place largely precluded the payment from conferring benefaction on the DGR.

117. An obvious example of a transfer that is not by way of benefaction is where the giver merely makes a payment in order to receive services from the DGR. The DGR has the obligation of performing or providing the services. Generally, such payments also fail to be gifts because they are not voluntary and they provide material benefits to the giver.

Example 30

118. *Wilks needs to have an elective operation performed at a hospital (a DGR). There is a very long waiting list. He makes a payment of $1,000 to the hospital in order to be given priority ('jump the waiting list'), and the operation is moved forward by a month. The payment is made in return for a material advantage. It is not a gift.*

Detriments borne by the recipient

119. A transfer of property to a DGR that imposes detriments, disadvantages, obligations or liabilities on the DGR may mean that there is no conferral of benefaction. As well, paragraph 78A(2)(a) may apply to the transfer. Much will depend on a comparison of the benefit of the transfer to the DGR with the disadvantages, obligations or liabilities imposed on the DGR.

Example 31

120. *Skene transfers an artwork to a museum (a DGR) on the understanding that the museum will reduce the price of land it is selling to her nephew. The transfer is not a gift.*

[25] 80 ATC 4438 at 4441; 11 ATR 145 at 149.

Example 32

121. *Charleston owns an extremely valuable painting by a famous artist. It requires costly restoration work which she cannot afford. She offers to give it to a public art gallery (a DGR). The gallery is anxious to receive the painting, irrespective of the cost of restoration, to add to its collection of the artist's work. This will be a gift; benefaction is being conferred on the DGR. Valuation issues may however arise in determining the amount Charleston will be able to deduct for the gift.*

Detriments to recipient not intended by giver

122. It is not expected that in ordinary circumstances, the giver has to make enquiries as to whether the transfer imposes obligations, liabilities, limitations or detriments to the DGR. If in fact the DGR is disadvantaged in this manner but is not within the knowledge and intention of the giver at the time of making the gift, and does not arise from the terms of the transfer of property by the giver, the transfer is still regarded a gift.

123. Where property that is transferred is represented to be of a certain kind or value or in a particular condition but is in fact less valuable or is defective, the transfer is still a gift. However, there are valuation issues in calculating the amount of the tax deduction.

Example 33

124. *Harper has a painting which she purchased as a classic. She gives it to a public art gallery (a DGR). Some time after receiving the painting, the gallery finds that it is a clever fake. The transfer is nonetheless a gift to the gallery.* (The amount of the gift deduction will depend on the relevant valuation method for the particular factual situation. If the painting was purchased during the past 12 months, the deduction would equal the lesser of the market value on the day Harper made the gift and the amount she paid for it. If the painting was purchased more than 12 months ago, the deduction would equal the value of the property as determined by the Commissioner.[26]

Example 34

125. *Thomson owns a house. On recent inspection his agent found it to be in good condition. He transfers the house to a public benevolent institution (a DGR). Subsequently an inspection finds it contains dangerous materials, and a demolition order is made by the local authority. The transfer is nonetheless a gift to the institution. (As outlined in the previous paragraph, the amount of the gift deduction will depend on the relevant valuation method for the particular factual situation).*

[26] 'How much you can deduct', item 1 of the table in section 30-15.

Immaterial detriments

126. If any liability or obligation falling on the DGR as a result of the transfer of property is immaterial, the transfer is still a gift.[27]

Example 35

127. *Cameron gives $50 to a DGR which, as part of its fundraising publicity, has promised to acknowledge such donations in the 'Benefactors Board' in its quarterly newsletter. The $50 is a gift. There is a complete disproportion between it and the DGR's obligation to list givers' names in its newsletter.*

128. Some common examples in fundraising drives where there is a complete disproportion between the obligation assumed by the DGR and the amount gifted are plaques on an honour board, named bricks in a wall, or named tiles in a path. Whether something is material is discussed further at 'Materiality'.[28]

Payments to DGR transferred to non-DGRs

129. Some DGRs operate on the basis of providing funding to non-DGRs. For example, the Australian Sports Foundation (item 10.2.1 in section 30-90 of the ITAA 1997) provides funding for sporting organisations that are non-DGRs.

130. Where a giver transfers money or other property to a DGR on condition that it be passed on to other organisations that are not DGRs, the question is raised as to whether benefaction has in fact been conferred upon the particular DGR.

131. If the effect of the condition is that the DGR is merely an agent or trustee or otherwise obliged to merely pass the transferred property on to an organisation that is not a DGR, it is clear that no benefaction has been conferred on the DGR itself. Accordingly, the transfer is not a tax deductible gift.

Example 36

132. *Willis gives $10,000 to a public benevolent institution (DGR) with the express stipulation that it be passed on to a community centre which is not a DGR. The DGR accepts the direction and passes the money on to the community centre. No benefaction has been conferred on the DGR. The payment is not a gift to the DGR.*

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[27] See Brennan J in *Leary v. FC of T* 80 ATC 4438 at 4451; (1980) 11 ATR 145 at 160 'No doubt much depends upon a comparison between the property taken and the liability incurred'.

[28] Paragraph 156 *et seq*.

133. To avoid the above result, the recipient DGR must:

- obtain in its own right the full value or benefit of the property; and
- be empowered and have the absolute discretion whether or not to distribute the property to those organisations nominated by the giver.

134. Payments made under a 'preferred donation arrangement' which satisfy the above conditions will be tax deductible. A preferred donation arrangement generally involves a person giving money to the DGR with a stated preference that the money will be passed on to an affiliate organisation preferred by the giver to fund projects or events nominated by the affiliate and approved by the DGR. The DGR must not be obligated to comply with the wishes of the giver. It must retain a discretion whether or not to distribute in accordance with the giver's wishes. The operation of such an arrangement is illustrated in *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681 at 683-685.

Example 37

135. *Solomon is an avid supporter of his local AFL team. He sends a cheque for $500 to the Australian Sports Foundation (ASF – a DGR) with a letter stating that the amount is to be given to his favourite team. The ASF does not have a discretion whether or not to apply the amount in accordance with the giver's wishes. The $500 is not a deductible gift, as no benefaction has been conferred on the DGR.*

Example 38

136. *Deakin is keen to encourage athletics. He sends a cheque for $300 to the ASF stating that he would prefer that the ASF direct the money to a nominated athletics organisation which encourages children to participate in athletics. The ASF has the discretion whether or not to apply the money in accordance with Deakins' wishes. The $300 is a deductible gift, as benefaction has been conferred on the DGR.*

137. There can also be issues about whether the recipient receives the transfer as a DGR. Where property is transferred to the trustee of a public fund under item 2 of the table in section 30-15 of the ITAA 1997 (a type of DGR often called an ancillary fund), and the trustee has an obligation or otherwise gives an assurance to a giver to apply funds for another DGR in accordance with requests from the giver, a separate fund is thereby created. This separate fund does not satisfy the requirements for a public fund to which tax deductible gifts may be made. The separate fund is not entitled to be endorsed as a DGR. This situation is explained in Taxation Determination TD 2004/23.

Motives of giver

138. For the purpose of determining whether a transfer of property is a gift, the giver's feelings and motives are ordinarily not relevant. To qualify as a gift, a transfer of property need not be made out of motives of benevolence.[29] As highlighted by Deane J in *Leary*[30] a gift ordinarily proceeds from a 'detached and disinterested generosity', 'out of affection, respect, admiration, charity or like impulses'.[31] Brennan J in *Leary*[32] cited a case decided in the United States Supreme Court (*Bogardus v. IRC* (1937) 302 US 34) in which Frankfurter J referred to the idea of a gift as the 'notion of a benefaction unentangled with any aspect of worldly requital.' The giver may have a variety of reasons and motivations for making the transfer such as a strong interest or emotional involvement in the work of the DGR.

Example 39

139. *Cameron has a severely autistic child. She makes a large donation to a foundation which undertakes research into autism. The fact that Cameron has a very strong emotional involvement in the subject matter of the research does not prevent her donation being a gift.*

140. The intention to confer benefaction need not be the sole reason for making a gift. For example, the fact that the giver is also motivated by the desire to obtain a tax deduction will not, by itself, deprive a payment of its character as a gift: (*Federal Commissioner of Taxation v. Coppleson*, 81 ATC 4550 at 4551-4552; (1981) 12 ATR 358 at 360).

141. In a case where the surrounding circumstances and/or associated arrangements show the giver is giving effect to self interested commercial or fiscal objectives rather than conferring benefaction on the DGR, the transfer does not proceed from a detached and disinterested generosity[33] (see, for example, *Case U38* 87 ATC 298).

No material benefit or advantage

142. The receipt of a material benefit by way of return to the giver will disqualify the transfer as a gift (Owen J in McPhail).[34] In that case the fee concession constituted a material benefit received by the giver upon making a payment to a school building fund (a DGR).[35]

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[29] *Leary* 80 ATC 4438 at 4453; 11 ATR 145 at 163 per Deane J and ATC 4441; ATR 148 per Bowen CJ.
[30] 80 ATC 4455; 11 ATR 164.
[31] Citing *Commissioner v. LoBue* (1956) 351 US 243,246 and *Robertson v. United States* 343 US 711,714; *IR Comr v. Duberstein* (1960) 363 US 278 at 285.
[32] 80 ATC 4438 at 4452; (1980) 11 ATR 145 at 161.
[33] 80 ATC 4438 at 4455; 11 ATR 145 at 164 per Deane J.
[34] (1968) 117 CLR 111 at 116 per Owen J.
[35] Refer paragraph 107.

143. An obvious example where a material benefit or advantage is received by way of return is where the transfer is made 'in return for valuable consideration received by the transferor from the transferee'.[36]

Example 40

144. *Turner makes a payment to an aged persons home, for which she was granted possession of a home unit for life. Her receipt was endorsed 'Donation' and 'all donations are tax deductible'. The payment is not a gift, as Turner received the right of possession of the unit for life (Case E44 73 ATC 371; (1973) 19 CTBR (NS) Case 4).*

145. Another obvious example of a material benefit received is where the transfer of property eliminates or reduces a legal obligation of the giver. This is illustrated in Leary where the taxpayer's purported gift of $10,000 to a DGR was funded by a loan of $8,500 provided by an associate of the scheme promoter. The taxpayer was entitled to collapse the loan the day after the purported gift by making a nominal payment of $17 to the lender.

Benefits not from recipient

146. Where a giver is found to have received a material benefit in return for a purported gift, it is not necessary that the material benefit comes directly from the recipient of the property transferred. In *Leary* Brennan J said:

> The ordinary notions of a gift do not pay much regard to the difference between a return to a disponor which he receives as consideration under a contract and a return which is furnished under some other arrangement or understanding; nor is it of great importance that the return does not come directly from the disponee, but indirectly. It will always be of significance that a disponor has received from a disponee, either directly or indirectly, the return sought for making the disposition.[37]

147. This is illustrated in *Cyprus Mines*[38] and *Klopper*[39] where the material benefit in the form of a relief from contractual liability did not emanate from the DGR which received the transfer.

Benefits less than value of transferred property

148. Even where the value of the benefit to the giver is less than the value of the property transferred, the transfer may still not be a gift. Issues of proportion between the transfer and the benefit are discussed at the topic 'Materiality'.[40]

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[36] 80 ATC 4438 at 4455; 11 ATR 145 at 164 per Deane J.
[37] 80 ATC 4438 at 4451; 11 ATR 145 at 159.
[38] See paragraph 108.
[39] See paragraph 109.
[40] Refer paragraph 156 *et seq*.

Splitting the gift from the amount paid in respect of the material benefit

149. Where DGRs conduct fundraising events such as celebrity dinners, gala events, $1,000-a-plate dinners, and so on, the price of a ticket cannot be notionally split between the value of the material benefit received, that is, the meal, and the amount which represents a gift. Where attendees are expected to pay a given sum of money in order to attend a function, no part of that sum can be considered a gift. This is so even where the cost of attendance is well in excess of the value of the meal received.[41]

Example 41

150. *Fisher attends a '$600 a plate dinner'. Regardless of whether the payment exceeds the cost of the meal, Fisher has received a material benefit in exchange for the purchase price of the ticket to the dinner. No part of the $600 is a gift.*

151. However, a fundraiser can offer tickets to a function for an amount which approximates its market value, and solicit additional optional donations from potential attendees. The ticket cost will not be deductible as a gift. However, the additional optional donations will be tax deductible.

Example 42

152. *Chapman attends a fundraising dinner and pays $50 which is for the cost of the meal. Later, the 'hat is passed around' by the organisers and he contributes $20 to the DGR. The $50 cost of the meal is not a gift. However, the $20 contribution is a gift.*

Example 43

153. *A DGR sells tickets for a Christmas concert for $5. It also requests attendees to give at least $20. Door attendants at the concert collect the $20, but no ticket holder who refused was excluded. The $20 is a gift and there is no material benefit to the giver.*

Example 44

154. *A performing arts organisation (a DGR) offers two levels of benefits to its patrons for different fees. For a fee of $1,000 the patron will be entitled to two free tickets, valet parking, access to preferential bookings, and two free tickets for a back-stage tour; and for a fee of $2,000 the patron will be entitled to the same benefits plus an additional three free tickets, two free tickets to rehearsals, and two tickets to complimentary intermission refreshments. A patron pays the $1,000 fee and also gives a further unsolicited $500 for which no benefits are provided. The $500 is a gift, but the $1,000 is not.*

[41] See footnote 4.

Example 45

155. *A body which is not a DGR organises an event to raise funds for a DGR. Admission tickets are sold to the public at a cost of $8 for adults, $3 for pensioners and $15 for a family (2 adults and up to 4 children). A box which includes seating for 6 people plus food and drink for all to view the event can be obtained at a cost of $300, by paying $40 to the organisers, purportedly to cover the cost of the benefit received, as well as a $260 'donation' to the DGR. The $40 is clearly not a gift to a DGR. Nor is the $260 because it was made to acquire a collateral advantage of a material nature. This would be the result even if the venue and facilities and so on had been provided free of charge to the organisers.*

Materiality

156. Only advantages or benefits that are material will affect whether a transfer is a gift (*McPhail*)[42]. The requirement of materiality will exclude matters of a *de minimis* nature (*Hodges*).[43]

157. The following discussion and examples are designed to illustrate those considerations relevant to deciding whether the benefit or advantage received is material.

Whether benefit has any link with the transfer

158. Where there is no link between a benefit received and an amount given, the benefit will not be material to that amount given. This will apply to a mere unintended benefit that was not anticipated on the part of the giver.

Example 46

159. *Phillips gives $50 to an environmental DGR as part of its fundraising campaign. Later in the week she calls in on a radio station's promotion of the DGR, and is given a book on its environmental issues for having correctly answered questions about the DGR's activities. The $50 is a gift; it is unrelated to the book the DGR gave her.*

Example 47

160. *Chanter gives $1,200 to her favourite DGR. She has also applied for a job with them. The DGR is unaware of her recent donation. Her successful appointment with the DGR is unrelated to her donation. The $1,200 is a gift.*

[42] (1968) 117 CLR 111 at 116.
[43] 97 ATC 2158 at 2162; 37 ATR 1095.

Example 48

161. *Mr Manifold gives an unsolicited $100 to a DGR. A few weeks later the board of the DGR meets and decides to recognise his generosity by sending him a book on the history of the DGR. The book is normally sold for $15. The $100 is a gift.*

Incentives offered

162. Where DGRs undertake fundraising campaigns, the features of the campaigns can assist in determining whether the amounts transferred to the DGR are gifts. It may be clear from some campaigns that they do not seek to elicit gifts.

Example 49

163. *A school building fund (a DGR) runs a raffle to raise money for an extension to a school building. The prizes in the raffle are a holiday for two to New Zealand, and ten $500 shopping vouchers. Tickets in the raffle cost $20. The $20 payments will not be gifts.*

Example 50

164. *A performing arts organisation (a DGR) offers, through a vigorous advertising campaign, different levels of benefits for different payments it describes as 'donations'. For example, for a 'donation' of $1,000 the patron will be entitled to two free tickets, valet parking, access to preferential bookings, and two free tickets for a back-stage tour; for a 'donation' of $2,000 the patron will be entitled to the same benefits plus an additional three free tickets, two free tickets to rehearsals, and two tickets to complimentary intermission refreshments. The payments will not be gifts.*

165. In such situations the 'incentives' offered are clearly part of a non-gift type of fundraising. The surrounding circumstances – including the advertising, the offering of incentives, the way the incentives are to be obtained, and the way the incentives vary with the amounts transferred can assist in characterising the payment. The value of the incentive does not, on its own, demonstrate whether the payment is a gift. Even an incentive valued at less than $10 can be part of an arrangement where the payments are not considered as gifts, given the surrounding circumstances.

Example 51

166. *A DGR has its volunteers sell chocolates in their workplaces. The different sorts of chocolates cost $1, $2 or $3. The amounts paid to buy the chocolates will not be gifts. It is irrelevant that the value of the chocolates is low.*

167. However, there may be situations where the characteristics of the fundraising campaign show clearly it is trying to elicit gifts. If this is the case, the presence of incentives – that are trifling or insignificant in the context of the campaign and the payments – may be immaterial.

Whether benefit insignificant in comparison with value of transfer

168. It is a question of fact in each case whether any benefit or advantage is sufficiently significant to be material. Where a benefit of utility or value is received, it will only be considered as not material if there is a considerable disproportion between the value of the transfer and the benefit received. For example, a benefit in the form of a key-ring might be immaterial when considering a transfer of $4,000 but significant for a $4 payment.

Whether benefit of promotional value to the DGR only

169. Where the only value or use of the item received promotes the DGR or advertises its activities, the benefit to the transferor will not be material. Such items which are commonly given in fundraising drives include lapel badges, bumper stickers, red noses, Legacy pins, daffodils on Daffodil Day and so on.

170. Information received about the DGR and its activities is unlikely to be a material benefit.

Example 52

171. *Zeal's donations to an overseas aid fund (a DGR) are used to sponsor a child in Africa. The DGR sends her updates on the child and how her donations are helping. This information, while important for Zeal and the DGR, is not a material benefit to her in the gift context.*

Whether benefit usable or marketable

172. Items that lack any utility and value to the giver and are only of promotional value to the DGR do not constitute a material benefit to the giver. This is contrasted with items of utility such as calendars, meals, concert tickets, chocolates, caps, t-shirts, mugs, and so on.

Example 53

173. *Bonython picks up an appealing acrylic key-ring figurine in the shape of a fairy which is in a display box at the counter in her local milk bar. The key-rings are being sold as a fund-raiser for a well-known DGR. She pays the amount shown on the box, $3. The payment is not a gift.*

Example 54

174. *Clemons participates in a DGR-run charity auction of a sports bat used in a recent international match. His bid of $2,000 is the highest, so he pays that amount to the DGR. The $2,000 is not a gift. Even though he has paid in excess of the market value of the bat, Clemons receives a material benefit for the payment.*

175. For fund-raising campaigns that operate by effectively selling usable items – like chocolates, caps, t-shirts, mugs, pens – the character of the payments will not be changed merely because the items bear promotional material for the DGR.

Example 55

176. *A DGR runs a fund-raising campaign in which its supporters sell coffee mugs for $5. The mugs bear logos with the DGR's name, and details of its charitable work, prominently displayed. The $5 is not a gift.*

Example 56

177. *A prominent health organisation (a DGR) has its fundraising staff in various shopping centres. Each collector stands at a display of the organisation's life-saving work, and asks passers-by to make donations. To every person who gives $5 or more, the collector gives a cheap pen with the organisation's logo. The amounts are gifts. The surrounding circumstances—including the promotion of the work of the DGR, the absence of bargaining, the disproportion between the amount of the gift and the value of the benefit received in return and the fact that the same sort of pen is given irrespective of the amount donated – indicate the amounts are not given in return for material benefits.*

Whether any rights etc., conferred on the giver

178. Where no rights, privileges, or entitlements are conferred, the giver will not have received a material benefit. Any benefits received might be merely opportunities to participate in a DGR's altruistic activities.

179. However any rights, privileges received will be a material benefit as in *Hodges*[44] where the taxpayer paid $1,100 (for defraying the cost of his airfares) to a DGR to be allowed to participate in an overseas aid project.

Example 57

180. *O'Keefe's son is a canoeist. His team wants to compete in an overseas competition. The team manager advises O'Keefe that he will need to pay $1,000 as his son's share of the cost of travelling to the competition, either directly to the club, or by making a 'preferred donation' to the Australian Sports Foundation (ASF). O'Keefe sends $1,000 to the ASF with advice that he would prefer his donation to be directed to his son's club. The $1,000 is not tax deductible, as the giver receives a material benefit as a result of the donation. The benefit is the removal of the obligation to pay $1,000 to the club to cover his son's share of the costs of travelling to the competition.*

181. Membership joining fees, whilst they will often flow from a desire to support the DGR and its work, constitute a material benefit. This is discussed further in paragraph 193 under the heading 'Membership Rights'.

182. A mere requirement for a DGR to report on how it has spent the money donated does not provide a material benefit to the giver. This is discussed further in paragraph 199 under the heading 'Reporting conditions'.

Public recognition

183. The public recognition accorded to givers will commonly not be a material benefit. This includes mere acknowledgement in newsletters, annual reports, on a donors board, and so on. As Bowen CJ said in Leary,[45] 'a man may, by his gifts, gain fame or formal honours without losing his tax deductions'.

Example 58

184. *Ewing phones in a pledge of $100 in a telethon to support a children's hospital (a DGR). Her name and amount pledged are read out on television. The fact that her generosity is publicly acknowledged on television will not constitute a material advantage to her.*

[44] 97 ATC 2158; 37 ATR 1095.
[45] 80 ATC 4438 at 4440; 11 ATR 145 at 147.

Example 59

185. *Dobson makes a $10,000 donation to the school building fund (a DGR) of the school his children attend. The trustees of the fund decide to acknowledge the gift by engraving his name, together with those of other givers who donated amounts in excess of $1,000, on a permanent plaque to be prominently placed on the wall in the entry foyer of the school. The fact that givers' generosity is publicly acknowledged in this manner will not constitute a material advantage to the givers.*

186. However, where an obligation is imposed that requires substantial expenditure on the part of the DGR to accord public recognition in relation to the amount transferred, the essential element of conferring benefaction would be absent. Paragraph 78A(2)(a) of the ITAA 1936 may also apply. Nonetheless, the usual modes of according public recognition for the donation such as plaques on an honour board, and named bricks in a wall or path that involve minimal expenditure by the DGR will not disentitle a deduction for the giver.

Example 60

187. *A museum (a DGR) issues a promotional pamphlet offering to engrave the names of donors who donate $1,000 or more (in a granite wall in a central courtyard in the museum). Glassey sends in her cheque for $1,000, together with the form attached to the pamphlet stipulating her name exactly as it is to be engraved in the wall. The advantage of having her name engraved is not material.*

Example 61

188. *Sargood, a wealthy businessman decides to make a gift of $5 million to the public hospital (a DGR) in his area for the purpose of building a new wing to treat people suffering from alcoholism. Sargood stipulates that the new wing should be named the 'Frederick Sargood Wing'. In order to recognise Sargood's generosity, the hospital will name the new wing in his honour. It will also acknowledge the gift by placing a plaque acknowledging his generosity in the foyer of the new building. The naming is not a material benefit, and paragraph 78A(2)(c) of the ITAA 1936 will not apply. Any benefit which may have been derived by Sargood, as well as the obligation he imposed are insignificant in relation to the value of the gift, so that it does not detract from a finding that the transfer was by way of benefaction on the hospital.*

189. On the other hand, recognition accorded to the giver for purposes of commercial advertising is a material benefit. Sponsorships of DGRs by commercial entities generally fall into this category. Such outgoings, however, may be income tax deductible as business expenses.

Example 62

190. *Mahon operates a shop under the trading name Mahon's Musical Supplies. He makes a payment of $20,000 to a cultural DGR, on the basis that it will place a prominent sign at the entrance to its complex thanking Mahon's Musical Supplies for its generous support. The $20,000 payment is not a gift, as he receives a material benefit, namely advertising for his shop, in return for it. As well, the payment would not be deductible because of paragraph 78A(2)(c). However, Mahon may be entitled to a tax deduction for the contribution as a business expense.*

Example 63

191. *Assume in the example above of Sargood's payment to the hospital (paragraph 188), he stipulated that the new wing be named after his business, the 'Sargood Pharmaceuticals Wing'. The benefit is likely to be material, (constituting advertising) and, in any event, a gift deduction may be precluded by paragraph 78A(2)(c) of the ITAA 1936. There may, however, be a deduction available as a business expense.*

Example 64

192. *As part of its 'corporate philanthropy' program, a large retailer sponsors three special exhibitions of a public art gallery (a DGR). Its business name is to be included in the name of the exhibition, all advertising and displays of the exhibition are to feature its logo and name in the dimensions it specifies, and they are to emphasise its philanthropic and artistic commitment. The retailer will give the gallery $400,000 for each of the exhibitions. The payments will not be gifts. They do not arise by way of benefaction. The retailer receives material benefits from the advertising. However, the retailer may be entitled to deductions for the payments as business expenses.*

Membership rights

193. As mentioned in paragraph 181, the rights conferred by membership subscriptions are a material benefit. The payment is also not voluntary and does not arise by way of benefaction.

Example 65

194. *Neild wants to support an environmental DGR. She decides the best way to help is to become a member, participate in its activities and work in its projects. Accordingly, she joins the DGR and pays the membership subscription. This payment is not a gift.*

195. While membership will commonly indicate a desire to further a DGR's work, taking up membership in order to receive special deals, members' privileges, voting rights, and so on, does not point to a gift.

Example 66

196. *McEacharn suffers from a debilitating disease. He hears that there is an association which undertakes research into the disease, educates sufferers on appropriate diets and the best ways to deal with the condition. He contacts the association, and is advised that if he pays a membership subscription of $60 per year, he will be entitled to receive the association's monthly newsletter that contains helpful information for sufferers, and he will be entitled to obtain advice from the association's professional officers. The $60 payment is not a gift. The payment discharges a contractual obligation, and McEacharn receives a material advantage in return for it.*

197. However, the conferral of membership which is neither sought nor known by the giver at the time of making the transfer is not a material benefit.

Example 67

198. *After hearing a DGR's promotions on the radio about how it helps sick children, Matheson sends it $3,000. The DGR replies saying that it appreciates her gift and has decided to confer membership on her for the next two years. Membership entitles Matheson to receive the monthly newsletter and to vote at the AGM. On this evidence there is no link between the gift and the membership; it is not material to the $3,000. Also, the payment was voluntary and there was a clear intention to confer benefaction.*

Reporting conditions

199. When a giver imposes a requirement on a DGR to account on how it has spent the gift, the report does not provide a material benefit to the giver.

Example 68

200. *Piesse makes a grant to a university (a DGR) to fund cancer research for publication in the usual scientific/medical journals. An agreement is entered into between Piesse and the university whereby the university will account for its expenditure on the research. This information does not provide a material benefit to Piesse. The payment is a gift.*

201. On the other hand, if a DGR is required to supply a report on the results of research undertaken in accordance with the conditions of a grant, and the results of the research are to be used in the grantor's business, the grant does not possess the usual attributes of a gift – the payment is not by way of benefaction to the recipient, an advantage of a material character may be expected to be received by

the grantor, and the payment does not proceed from a 'detached and disinterested generosity'.[46]

Example 69

202. *The Batchelor Pharmaceutical Company makes a grant to a public university (a DGR) with the stipulation that the grant is to be used to fund further research into a particular drug. The results of the research are to be made available exclusively to the company. The supply of information on the results of this research may be expected to provide a material benefit to the company. The payment to the university is consideration for the research undertaken by the university; the payment is not a gift.*

Section 78A

203. The integrity of the gift deduction provisions is supported by section 78A of the ITAA 1936. It contains anti-avoidance provisions such that, where it applies, an income tax deduction for a gift will not be allowable under Division 30 of the ITAA 1997. Broadly speaking, it aims to ensure that 'the benefit to the fund will equal the deduction allowed to the taxpayer' (per Sweeney J in Bray).[47]

204. Section 78A is not intended to apply to genuine gifts made in ordinary circumstances; rather it is intended to render ineffective schemes designed to exploit the availability of deductions in respect of gifts.[48]

205. Paragraph 78A(2)(a) applies where the amount or value of the benefit obtained by the DGR is reduced, or will be reduced or may reasonably be expected to be reduced subsequent to the making of the gift as a result of any circumstance, transaction or arrangement associated with the gift. The provisions apply to disqualify purported gifts where it is never intended to confer other than an immaterial benefit on the DGR. In other cases, whether the provisions will apply depends to a large extent on the disproportion between the benefit received by the DGR and the nominal value of the property transferred.

[46] A finding that a grant to a non-profit body is or is not a gift will have GST consequences: see paragraph 9-15(3)(b) of *A New Tax System (GST) Act 1999* which excludes a gift made to a non-profit body from being consideration for a supply. For detailed discussion on grants of financial assistance in the GST context, refer to Goods and Services Tax Ruling GSTR 2000/11, *Goods and services tax: grants of financial assistance*.

[47] 77 ATC 4339 at 4358; (1977) 7 ATR 780 at 803.

[48] Refer Second Reading Speech and Explanatory Memorandum on introduction of the Income Tax Assessment Amendment Bill 1978.

Example 70

206. *Thomas donates debentures in a company he controls, with a face value of $20,000, to a DGR. As part of a pre-arranged plan their terms and conditions are subsequently changed so that the debentures become valueless. Paragraph 78A(2)(a) will apply to the transfer to deny the gift deduction.*

207. Due to the operation of subsection 78A(4), where the amount or value of the benefit derived by the DGR as a result of a gift is less than the amount or benefit of the gift at the time the gift was made because the DGR incurs reasonable expenses for the purpose of obtaining or soliciting the gift, and for no other reason, paragraph 78A(2)(a) will not apply.

208. Expected costs for normal incidents of continuing ownership (such as local government rates on land, registration for motor vehicles, insurance, storage, maintenance), which a DGR will incur for its own holding of property once it is donated, will not trigger the application of paragraph 78A(2)(a). That is, such costs, despite being reasonably expected, will not be taken to lessen the amount or value of the donated property for the purposes of the paragraph.

209. Paragraph 78A(2)(b) provides that no deduction is available in respect of a gift made where, by reason of any transaction, circumstance or arrangement, another fund, authority or institution other than the recipient DGR makes, or becomes liable to make, or may reasonably be expected to make a payment or transfer property or incur any other detriment, disadvantage, liability or obligation.

210. Paragraph 78A(2)(b) is a safeguarding provision designed to ensure that the provisions in paragraph 78A(2)(a) are not avoided through arrangements whereby a DGR receives the gift and another affiliated body incurs the detriment, disadvantage, liability or obligation and, as a result of the arrangement, the amount or value of the benefit derived as a consequence of the gift is less than the amount or value of the property comprising the gift at the time the gift is made.

Example 71

211. *Cook enters into an arrangement set up by a promoter with a DGR. She makes a purported gift of $100,000 to the DGR, using $95,000 borrowed from the promoter and $5,000 of her own money. Under the arrangement, a fund affiliated with the DGR must pay 99% of the purported gift to the promoter as a procuration fee. If the DGR had incurred the obligation to pay the procuration fee, the amount or value of the benefit derived by the DGR would have been only $1,000 from the purported gift of $100,000. Paragraph 78A(2)(b) will apply to the transfer, and no deduction will therefore be allowable.*

212. Where, by reason of the circumstances surrounding a transfer to a DGR, a giver or any associate of the giver receives any benefit, advantage, right or privilege other than the benefit of a taxation deduction, no deduction is allowable under Division 30 because of the operation of paragraph 78A(2)(c).

213. The case authorities do not make it clear that the characterisation as a gift is necessarily precluded where, arising from the transfer, a material benefit is received by an associate of the giver. However, paragraph 78A(2)(c) of the ITAA 1936 requires account be taken of any benefit obtained, or which is reasonably expected to be obtained, by any associate of the giver.

214. In *Case 3/2000*,[49] paragraph 78A(2)(c) of the ITAA 1936 was applied to deny a deduction where, upon the giver making the transfer, an associate of the giver had the advantage of being able to buy land for a substantially lesser amount.

215. The material benefit received by way of return is not restricted to pecuniary or proprietary benefits. Paragraph 78A(2)(c) of the ITAA 1936 refers to 'any benefit, advantage, right or privilege' (excluding the benefit in the form of a tax deduction that may be allowable) that either the giver or the associate of the giver has obtained or will obtain or may reasonably be expected to obtain as part of, in connection with or as a result of the transfer. Thus, in AAT *Case 12,314 Re Hodges v. FC of T* 97 ATC 2158; (1997) 37 ATR 1091, the taxpayer's payment to a DGR to defray the cost of his airfares for travelling overseas to work on an aid project was not considered a tax deductible gift. As a result of that payment, he was given the advantage of taking part in the project.

Example 72

216. *A performing arts body (DGR) organises a continuing fund-raising program so that patrons who pay $5,120 become members of its Patrons' Circle. Members receive complimentary tickets to special rehearsals, gala opening night, dinners with the leading actors, drinks in the company's private lounge during interval,and so on. The program's publicity material describes the payment as a $5,000 tax deductible gift and a $120 non-deductible membership fee.*

217. *No part of the $5,120 is a gift. The patron receives material benefits by way of return for the payment. The fact that the organisation's promotional material breaks the total payment required into two components and characterises them as a gift and a membership fee is not determinative of the character of the payments. The $120 is clearly not commensurate with the benefits received by the members. Additionally, even if some part of the $5,120 was found to be a gift, section 78A would apply to the arrangement to disallow any gift deduction.*

[49] 2000 ATC 132; (2000) 43 ATR 1337.

Example 73

218. *Thomson and her husband own all the shares in a company. The company's assets consist of cash of $2 million, and it has no liabilities. They make a gift of 49% of the shares in the company to a DGR. After the gift is made, the company uses its cash to purchase real estate which they personally own. The real estate is purchased for $2 million by the company. The market value of the real estate is in fact only $500,000. The gifted shares in the company are therefore only worth a fraction of their value at the time of the gift. Paragraphs 78A(2)(a) and (c) will apply to deny any gift deduction for the transfer of shares to the DGR.*

Example 74

219. *McColl transfers land which he owns to a not-for-profit hospital (DGR) in return for an undertaking that his mother will be granted a unit in an associated retirement village. Paragraphs 78A(2)(b) and 78A(2)(c) apply to the transfer.*

220. Paragraph 78A(2)(d) is directed at arrangements where a gift of cash is made to the DGR on the basis that the money will be used by the recipient DGR or another fund, authority or institution to acquire property from the giver or the giver's associate.

Example 75

221. *Page inherits an Australian federation sideboard. It is valued at $4,500. He gifts $4,500 cash to the local museum (a DGR) on the understanding that the museum will buy the sideboard from him. The gift of $4,500 cash is not an allowable deduction because of the operation of paragraph 78A(2)(d).*

Giver or associate retains rights to use of donated property

222. Subsection 78A(3) deems a benefit to be received by the giver or the giver's associate in respect of a gift made where the terms and conditions attaching to the gift result in the DGR not receiving:

- immediate custody and control of the property;
- unconditional right to retain custody and control of the property to the exclusion of the giver or an associate of the giver; or
- immediate, indefeasible and unencumbered legal and equitable title to the property.

223. Subsection 78A(3) therefore ensures that paragraph 78A(2)(c) will operate to deny a deduction where the terms and conditions under which the gift is made are such that the giver or the associate of the giver retains some control over the custody and/or use of the property.

Example 76

224. *Miller owns a rental property. By deed of gift, he transfers the entire title to the property to a DGR on the basis that the DGR will allow him to continue receiving the rental income from it for the rest of his life. Miller gives complete title in the property, and receives in return a material benefit, the right to receive rental income from the property which now belongs to the DGR. Furthermore, subsection 78A(3) operates to deny a deduction because Miller retains the rights of use of the gifted property.*

Example 77

225. *Barton owns a residential property and purports to grant to himself a lease of the property for life, and to simultaneously transfer the legal title to the property to a DGR. Although Barton intends to retain the life interest and transfer only the remainder interest to the DGR, he cannot legally grant himself a lease. At law the whole property initially transfers*[50] *with an immediate equitable obligation on the transferee DGR to grant back a lease. The transfer made by Barton to the DGR is not a gift because he receives a material benefit in return. Subsection 78A(3) operates to deny a deduction because the DGR does not receive unconditional rights of custody and control of the property.*

226. Under subsection 78A(5) of the ITAA 1936 cultural and heritage gifts under item 4, 5 or 6 in section 30-15 of the ITAA 1997 are excluded from the operation of subsection 78A(3). Rules are provided in section 30-220 of the ITAA 1997 allowing for reduced deductions in respect of these kinds of gifts under certain circumstances.[51]

227. Subsection 170(10) of the ITAA 1936 provides that nothing in section 170 prevents the amendment, at any time, of an assessment for the purpose of giving effect to the provisions of section 78A.

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[50] *Commissioner of Stamp Duties (N.S.W) v. Perpetual Trustee Co Ltd (Quigley's Case)* (1926) 38 CLR 272 and *D.K.L.R Holding Co. (No. 2) Pty Ltd v. Commissioner of Stamp Duties (N.S.W)* (1982) 149 CLR 431; 40 ALR 1.

[51] Refer paragraph 21 and 82.

Your comments

228. We invite you to comment on this draft Taxation Ruling. Please forward your comments to the contact officer by the due date.

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Detailed contents list

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Previous draft:

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Related Rulings/Determinations:

IT 295; TR 92/20; TR 96/1; TD 2004/7; TD 2004/23; GSTR 2000/11

Previous Rulings/Determinations:

IT 2071; IT 2265; IT 2443; TD 92/110; TD 93/57; TD 93/139; TD 93/185

Subject references:

- deductible gift recipients
- gifts and donations
- gifts to organisations
- material benefits derived from gifts

Legislative references:

- ANTS(GST)A 1999 9-15(3)(b)
- ITAA 1997 8-1
- ITAA 1997 Div 30
- ITAA 1997 Subdiv 30-D
- ITAA 1997 30-15
- ITAA 1997 30-90
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- ITAA 1936 78
- ITAA 1936 78A
- ITAA 1936 78A(2)(a)
- ITAA 1936 78A(2)(b)
- ITAA 1936 78A(2)(c)
- ITAA 1936 78A(2)(d)
- ITAA 1936 78A(3)
- ITAA 1936 78A(4)
- ITAA 1936 78A(5)
- ITAA 1936 170
- ITAA 1936 170(10)
- TAA 1953 Pt IVAAA
- Taxation Laws Amendment (2004 Measures No. 1) Act 2004

Case references:

- AAT Case 6919 (1991) 22 ATR 3166; (1991) 91 ATC 257
- AAT Case 12,314 Re Hodges v. FC of T 97 ATC 2158; (1997) 37 ATR 1091
- Bogardus v. IRC (1937) 302 US 34
- Bray v. FC of T 77 ATC 4339; (1977) 7 ATR 780
- Brunker v. Perpetual Trustee Co Ltd (1937) 57 CLR 555
- Case 3/2000 2000 ATC 132; (2000) 43 ATR 1337
- Case 58 (1974) 19 CTBR (NS)
- Case E44 73 ATC 371; (1973) 19 CTBR (NS) Case 4
- Case S43 85 ATC 343; (1985) 28 CTBR (NS) Case 49
- Case U38 87 ATC 298
- Collector of Imposts (Vic.) v. Cuming Campbell Investments Pty Ltd (1940) 63 CLR 619
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- Commr of Taxes (Qld) v. Camphin (1937) 4 ATD 315; 57 CLR 127; 1 AITR 147; 91 ATC 257
- Cyprus Mines Corporation v. FC of T 78 ATC 4468; (1978) 9 ATR 33
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- Milroy v. Lord (1862) 45 ER 1185; 4 De G F & J 264; [1861-73] All ER Rep 783
- Norman v. Federal Commissioner of Taxation (1962-63) 109 CLR 9
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- Re Australian Elizabethan Theatre Trust (1991) 102 ALR 681
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- Robertson v. United States 343 US 711,714

Other references:

- PS LA 2002/15

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