TD 2003/D16 - Income tax: Where a trustee of a public fund under item 2 of the table in section 30-15 of the Income Tax Assessment Act 1997 (ITAA 1997) has an obligation or otherwise gives an assurance to apply funds in accordance with requests from a donor, is a separate fund created and, if so, is the separate fund a public fund entitled to be endorsed as a deductible gift recipient?

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Draft Taxation Determination

Income tax: Where a trustee of a public fund under item 2 of the table in section 30-15 of the *Income Tax Assessment Act 1997* (ITAA 1997) has an obligation or otherwise gives an assurance to apply funds in accordance with requests from a donor, is a separate fund created and, if so, is the separate fund a public fund entitled to be endorsed as a deductible gift recipient?

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 Determinations that represent authoritative statements by the Australian Taxation Office.*

1. In these circumstances, a separate fund is created which 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 deductible gift recipient.

Separate fund

2. An obligation on the trustee to comply with requests from a donor may arise from the trust deed itself. This can occur where the trust deed contains clauses, the effect of which is that the trustee is required to hold and apply a gift and any resulting income:

- in accordance with requests from the donor;
- on the basis or conditions outlined by the donor; or
- subject to arrangements with the donor.

3. Alternatively, an obligation on the trustee may arise from a course of action taken by the trustee. An obligation may arise from undertakings or assurances given by the trustee. For example, assurances in promotional material or through other arrangements with the donor may state that the trustee will always comply with the donor's requests provided they come within the purpose of the fund. In some cases the donor's requests or recommendations are made through an advisory committee and the trustee gives a similar

assurance or other undertaking that it will always follow the recommendations of the committee.

4. Some arrangements between the trustee and a donor are such that the trustee is not permitted to distribute the amount of the gift or resulting investment income without first obtaining and considering a recommendation from the donor or the donor's advisory committee, and the trustee is required to inform the donor if it intends to depart from the donor's recommendations. In effect, the trustee needs the consent or acknowledgement of the donor before it can implement decisions on the application of the gift and resulting income. This feature is consistent with an obligation or assurance from the trustee to comply with the donor's ongoing requests.

5. Where the trustee of a public fund accepts a gift subject to such obligations or assurances, we consider that there is a relevant legal distinction between that gift and other gifts made to the fund without those features. There is a legally binding relationship, with ongoing, variable rights and obligations, between the trustee and the donor that does not apply to persons who make contributions without those features. In these cases, a separate fund or sub-fund is created.

Separate fund is not a public fund

6. Public funds under item 2 of the table in section 30-15 of ITAA 1997 are required to be established and maintained under a will or instrument of trust solely for the establishment of, or the purpose of providing money, property or benefits to, other funds, authorities or institutions which are deductible gift recipients that are included by name, or under one of the categories of recipient, in the tables in Subdivision 30-B of ITAA 1997. These other funds, authorities or institutions are referred to as 'eligible charities' in this Determination.

7. The term, 'public fund' is not defined in the Act but is accepted to be a fund in relation to which:

(a) the promoters or founders of the fund intend that the public will contribute to the fund;

(b) the public, or a significant part of it, does in fact contribute to the fund; and

(c) the public participates in the administration of the fund.[1]

8. A public fund under item 2 of the table in section 30-15 of the ITAA 1997 operates by pooling gifts from the public and then the fund's trustee decides how the gifts, and any income derived therefrom, are to be allocated to eligible charities. In many cases the amount of the gift is retained in the fund and invested, and periodic distributions are made only from the investment income.

9. If the trustee has an obligation or gives an assurance to a donor to hold and apply the gift or resulting income for purposes other than for eligible charities, the trustee fails to maintain the fund solely for the benefit of eligible charities. Accordingly, the fund is not a public fund entitled to be endorsed as a deductible gift recipient.

[1] See Taxation Ruling TR 95/27 Income Tax: Public Funds.

10. Where the trustee's obligation or assurance is to comply with the donor's requests for particular eligible charities to benefit from the gift and any resulting income, the only contributors to the separate fund or sub-fund are the initial donor and in some cases, associates of the donor. The public is not invited to contribute to the sub-fund and does not contribute.

11. Accordingly, the sub-fund lacks the necessary elements for a public fund that are outlined in paragraph 7.[2] The sub-fund is not a public fund entitled to be endorsed as a deductible gift recipient.

Not a separate fund

12. In contrast, a separate fund or sub-fund is not created where the trust deed merely allows:

- a donor to express a preference for the gift and/or investment income to be applied to particular eligible charities;
- the trustee to maintain a named management account to record the gift from the donor, the investment income and grants made. The bank account and investments are not separate from those for the public fund; and/or
- the trustee to provide regular reports to the donor advising how the amounts of the gift and investment income have been used.

13. To ensure that a separate fund is not created, it must be clear in the trust deed (and in other material in relation to gifts, such as promotional material and donor forms and receipts) that the trustee is not under an obligation to apply moneys in accordance with donors' wishes, and that the trustee does not make a promise or give an assurance that it will comply with donors' requests. This must be the genuine arrangement between the trustee and the donor and it is not acceptable for contrary 'understandings' to be entered into, even if orally.

Examples

Example 1 - Separate fund

14. The trust deed of X Community Foundation includes a clause that a donor, in making a gift, may request that particular eligible charities are to benefit from the gift and that the Trustee will advise the donor if it will accept and hold the gift in accordance with that request.

15. In this case, where the trustee has advised the donor that it will hold the gift in accordance with the request, the Trustee is under an obligation to comply with the donor's request. As such, a separate fund is created, distinct from the X Community Foundation's

[2] Where the requirement for public contributions cannot be met, a donor who wishes to establish their own fund to benefit eligible charities can consider applying for approval for a prescribed private fund. For more information about prescribed private funds, see *Guidelines for Prescribed Private Funds* (available on the ATO website at www.ato.gov.au)

public fund. The separate fund does not meet the public fund requirements and is not entitled to be endorsed as a deductible gift recipient. The donor is not entitled to a deduction for a gift to this separate fund.

Example 2 - Not a separate fund

16. The trust deed of Z Community Foundation includes a clause indicating that the Trustee may accept a gift from a donor who expresses an initial preference for particular eligible charities to benefit from their gift. The trust deed states that the Trustee may take the donor's request into account when making decisions, but the Trustee is not to give any assurance that it will comply with the donor's request. When making a gift, donors use a donor form to express their initial preference and to acknowledge that they understand that the trustee is under no obligation and gives no assurance that their request will be complied with. Receipts contain similar information.

17. The trustee maintains a named management account to record the gift from the donor and the resulting investment income and distributions. However, the trustee maintains one bank account for all gifts from the public, including those where the donor expresses an initial preference. All gifts are pooled for investment purposes.

18. In this case, the management account is not considered to be a separate fund and its existence does not prevent Z Community Foundation from being a public fund entitled to be endorsed as a deductible gift recipient.

Date of Effect

19. When the final Determination is issued, it is proposed to apply to both before and after its date of issue. However, this Determination does 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 Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Your comments

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

Comments by Date: **5 November 2003**
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Commissioner of Taxation
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Not previously issued in draft form.

Related Rulings/Determinations:
TR 95/27; TR 92/20

Subject references:
- ancillary funds
- charitable trusts
- deductible gift recipients
- gifts & donations
- public funds
- sub-funds
- trusts

Legislative references:
- ITAA 1997 30-15
- ITAA 1997 Subdiv 30-B
- ITAA 1997 30-125
- TAA 1953 Pt IVAAA

ATO References
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