

TD 2008/2 - Fringe benefits tax: in determining whether a charitable institution is a rebatable employer for the purposes of paragraph 65J(1)(baa) of the Fringe Benefits Tax Assessment Act 1986, is the institution 'established by a law of the Commonwealth, a State or a Territory' under subsection 65J(3) of that Act because it is incorporated under either the Corporations Act 2001 or under a law of a State or Territory which relates to the incorporation of Associations?

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Taxation Determination

Fringe benefits tax: in determining whether a charitable institution is a rebatable employer for the purposes of paragraph 65J(1)(baa) of the *Fringe Benefits Tax Assessment Act 1986*, is the institution 'established by a law of the Commonwealth, a State or a Territory' under subsection 65J(3) of that Act because it is incorporated under either the *Corporations Act 2001* or under a law of a State or Territory which relates to the incorporation of Associations?

❶ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*. A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes. If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

Ruling

1. No. The mere incorporation of a charitable institution under the *Corporations Act 2001* or a law of a State or Territory which relates to the incorporation of Associations¹ does not mean that the institution is 'established by a law of the Commonwealth, a State or a Territory' under subsection 65J(3) of the *Fringe Benefits Tax Assessment Act 1986*.²

¹ Currently the relevant statutes are: *Associations Act 2003* (NT), *Associations Incorporation Act 1991* (ACT), *Associations Incorporation Act 1984* (NSW), *Associations Incorporation Act 1981* (Qld), *Associations Incorporation Act 1985* (SA), *Associations Incorporation Act 1964* (Tas), *Associations Incorporation Act 1987* (WA) and *Associations Incorporation Act 1981* (Vic).

² All references are to the *Fringe Benefits Tax Assessment Act 1986* unless otherwise stated.

2. A charitable institution will only be 'established by a law of the Commonwealth, a State or a Territory' under subsection 65J(3) when the relevant law specifically constitutes or establishes the institution for purposes that are charitable.³

3. The *Corporations Act 2001* or a law of a State or Territory which is relevant to the incorporation of associations merely creates an artificial legal personality, however it does not of itself establish the charitable institution.

Example 1

4. *The Parliament of Victoria passes an Act which incorporates University A. The Act also specifies the powers and purpose of the University. University A is a charitable institution for the purpose of paragraph 65J(1)(baa).*

5. *The incorporation of and setting the purpose or objects of University A by the Victorian Act constitutes or establishes University A for a charitable purpose.*

6. *Therefore, University A is an institution 'established by a law of the Commonwealth, a State or a Territory' under subsection 65J(3).*

Example 2

7. *XYZ is a non-profit society that is incorporated under the Associations Incorporation Act 1981 (Vic). This Act merely provides for the incorporation of a body corporate and does not set out the powers or the purpose of XYZ. XYZ is a charitable institution for the purpose of paragraph 65J(1)(baa). Its powers and purpose are set out in its own constitution.*

8. *The incorporation by the Associations Incorporation Act 1981 (Vic) does not on its own constitute or establish XYZ for a charitable purpose.*

9. *Therefore, XYZ is not 'an institution established by a law of the Commonwealth, a State or a Territory' within subsection 65J(3).*

Date of effect

10. This Determination applies to FBT years commencing both before and after its date of issue. However, the 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 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

26 March 2008

³ Taxation Ruling TR 2005/21 sets out the Commissioner's views on the meaning of 'charitable institution'.

Appendix 1 – Explanation

① *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Explanation

11. Subsection 65J(1) lists the categories of organisations which are rebatable employers. Excluded from these categories are organisations that are also public benevolent institutions or health promotion charities.
12. Paragraph 65J(1)(baa) provides that a rebatable employer is a charitable institution that is endorsed under subsection 123E(1), other than an 'institution of the Commonwealth, a State or a Territory'.
13. Subsection 65J(3) provides that for the purposes of section 65J, 'an institution established by a law of the Commonwealth, a State or a Territory is taken to be an institution of the Commonwealth, the State or the Territory, as the case requires'.
14. An institution is an establishment, organisation or association, instituted for the promotion of some object, especially one of public or general utility.⁴
15. The ordinary meaning of the word 'establish', according to the Macquarie Dictionary⁵ is 'to set up on a firm or permanent basis; institute; found: *to establish a government, to establish a business, to establish a university*'.
16. In *In re East and West India Dock Company*,⁶ the Court considered whether a dock company was a company 'constituted by Act of Parliament for the purpose of making a railway'. Chitty J said at page 582:

The term 'constituted' is not equivalent to 'incorporated', it is of wider import. It seems to be equivalent to 'established'.
17. In *Renmark Hotel Inc v. FC of T*,⁷ the High Court considered whether the Renmark Hotel was a 'public authority constituted under any....State Act'. Rich J said at page 19:

The word 'constituted' is not the same as 'incorporated'. For the purposes of paragraph 23(d) it is conceivable that an unincorporated body might be constituted under a State Act so as to satisfy the exemption. On the other hand mere incorporation under an Act does not constitute the body. The word 'constituted' immediately follows 'public authority'. It means constituted as a public authority.
18. A charitable institution will not be 'established by a law of the Commonwealth, a State or a Territory' under subsection 65J(3) where the law only gives the institution artificial legal status as an incorporated body.
19. A charitable institution is an institution established and maintained for purposes that are charitable in the technical legal sense.⁸ A charitable institution will be 'established by a law of the Commonwealth, a State or a Territory' where the law sets out the purposes or objects of the organisation which are charitable.

⁴ Refer Taxation Ruling TR 2005/21 at paragraph 24 and at paragraphs 147 to 150.

⁵ *Macquarie Dictionary* [MultiMedia], version 5.0.0, 1/10/01.

⁶ *In re East and West India Dock Company* (1888) LR 38 Ch D 576.

⁷ *Renmark Hotel Inc v. FC of T* (1949) 79 CLR 10.

⁸ Refer to Taxation Ruling TR 2005/21, in particular at paragraphs 7 and 8.

References

Previous draft:

TD 2007/D10

Related Rulings/Determinations:

TR 2005/21; TR 2006/10

Subject references:

- charitable institution
- fringe benefits tax
- rebatable employer

Legislative references:

- FBTAA 1986 65J
- FBTAA 1986 65J(1)
- FBTAA 1986 65J(1)(baa)
- FBTAA 1986 65J(3)
- FBTAA 1986 123E(1)
- TAA 1953
- Corporations Act 2001

- Associations Act 2003 (NT)
- Associations Incorporation Act 1964 (Tas)
- Associations Incorporation Act 1981 (Qld)
- Associations Incorporation Act 1981 (Vic)
- Associations Incorporation Act 1984 (NSW)
- Associations Incorporation Act 1985 (SA)
- Associations Incorporation Act 1987 (WA)
- Associations Incorporation Act 1991 (ACT)

Case references:

- In re East and West India Dock Company (1888) LR 38 Ch D 576
- Renmark Hotel Inc v. FC of T (1949) 79 CLR 10

Other references:

- Macquarie Dictionary [MultiMedia], version 5.0.0, 1/10/01

ATO references

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