


# ***CR 2019/18 - Income tax: deductibility of donations to Evolve Housing Limited under a Payment Direction Deed***

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## Class Ruling

### Income tax: deductibility of donations to Evolve Housing Limited under a Payment Direction Deed

Contents	Para
<b>LEGALLY BINDING SECTION:</b>	
<b>Summary – what this Ruling is about</b>	<b>1</b>
<b>Date of effect</b>	<b>7</b>
<b>Scheme</b>	<b>8</b>
<b>Ruling</b>	<b>25</b>
<b>NOT LEGALLY BINDING SECTION:</b>	
<b>Appendix 1:</b>	
<b>Explanation</b>	<b>27</b>
<b>Appendix 2:</b>	
<b>Detailed contents list</b>	<b>80</b>

#### **Relying on this ruling:**

This publication (excluding appendices) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in the ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this ruling.

Further, if we think that the ruling disadvantages you, we may apply the law in a way that is more favourable to you.

## Summary – what this Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provisions identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### Relevant provisions

2. The relevant provisions dealt with in this Ruling are:

- subsection 26-55(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)
- subsection 26-55(2) of the ITAA 1997
- Division 30 of the ITAA 1997
- Subdivision 30-B of the ITAA 1997
- section 30-15 of the ITAA 1997
- section 30-17 of the ITAA 1997
- section 30-45 of the ITAA 1997
- subsection 30-45(1) of the ITAA 1997
- section 30-120 of the ITAA 1997
- subsection 30-228(1) of the ITAA 1997
- Subdivision 30-DB of the ITAA 1997
- section 30-247 of the ITAA 1997
- section 30-248 of the ITAA 1997

- subsection 995-1(1) of the ITAA 1997.

## Class of entities

3. The class of entities to which this Ruling applies is Landlords who:

- participate in the Affordable Housing Initiative, and
- make a donation amount to Evolve Housing Limited pursuant to a Payment Direction Deed.

## Qualifications

4. The Commissioner makes this Ruling based on the precise scheme identified in the Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 8 to 24 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled, and
- this Ruling may be withdrawn or modified.

## Date of effect

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7. This Ruling applies from 30 June 2018. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

## Scheme

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8. The following description of the scheme is based on information provided by the applicant.

9. Evolve Housing Limited (Evolve Housing) was registered on 25 September 2007 as an Australian public company limited by guarantee.

10. Evolve Housing is a registered Public Benevolent Institution (PBI), registered under the *Australian Charities and Not-for-profits Commission Act 2012* effective from 3 December 2012.

11. Evolve Housing is endorsed as a Deductible Gift Recipient (DGR) effective from 1 October 2007.
12. Evolve Housing is a not-for-profit housing provider in Australia. The objects of Evolve Housing are to provide for the relief of poverty, sickness, destitution, helplessness and distress in the community including through the development and delivery of innovative housing services and solutions to assist members of the community in need. Evolve Housing provides housing solutions to eligible people on very low to moderate incomes who are unable to access appropriate housing in the private market. This includes social and affordable housing.
13. Evolve Housing operates a profit for purpose real estate agency division, which trades as Echo Realty, in furtherance of Evolve Housing's objective of providing affordable housing to disadvantaged members of the community. Echo Realty operates as a separate unit within Evolve Housing, which operates its other units in the overall context of its activities and status as a PBI and DGR.
14. Echo Realty manages affordable housing portfolios in New South Wales with most of the portfolios in the high need area of Western Sydney. Echo Realty manages properties owned by Evolve Housing, Local Government, developers and property investors.
15. Evolve Housing, through Echo Realty, will provide a professional property management service to Landlords and Tenants while reinvesting any profits back into the community to support benevolent activities carried out in other divisions of Evolve Housing.
16. The Affordable Housing Initiative involves Evolve Housing coupling Landlords who would like to 'make a difference' with Tenants who are on low to moderate incomes, are priced out of the market and are at risk of becoming homeless or are currently experiencing homelessness.
17. The Affordable Housing Initiative is a series of arrangements between Landlords, Tenants and Evolve Housing (through Echo Realty, in its capacity as the Landlords' agent and as a DGR).
18. Under the Affordable Housing Initiative, it is proposed that instead of the Landlord making cash donations to Evolve Housing, the Landlord will enter into a Payment Direction Deed (PDD) with Evolve Housing.
19. Under the PDD, Echo Realty in its capacity as the Landlord's agent, will be authorised to deduct amounts (Monthly Donation amounts) from the Landlord's rental income and transfer that amount to Evolve Housing as a DGR.
20. A donation by a Landlord is not directly connected to any one Tenant or any other person. The donation received by Evolve Housing becomes part of the 'general pool of funds' used to finance the operations of the organisation, including the payment of rental subsidies to Tenants. The Landlord has no control over how the funds will be deployed by Evolve Housing.

21. A description of the Affordable Housing Initiative is:

- The Landlord enters into a standard property management agreement with Echo Realty. Under the agreement, the Landlord must pay certain fees and costs for the services provided by Echo Realty.
- Echo Realty identifies prospective Tenants that meet certain eligibility criteria for participation in the Affordable Housing Initiative.
- Echo Realty and the prospective Tenant determine how much the prospective Tenant can afford to pay as monthly rent and the rental subsidy, being the difference between what the prospective Tenant can afford to pay and market rent.
- Just prior to the prospective Tenant entering into the residential tenancy agreement, Evolve Housing provides a subsidy letter to the prospective Tenant where Evolve Housing will be responsible for providing financial assistance to the Tenant (that is, the rental subsidy). The letter confirms the details of the subsidy arrangement and stipulates the amount Evolve Housing will fund by way of subsidy to the Tenant and the amount the Tenant is required to pay as rent.
- Evolve Housing will provide the rental subsidy to the Tenant by way of crediting payment to the Landlord of the rent payable under the subsidy letter. The rental subsidy amount will be paid from the general pool of funds available to Evolve Housing.
- Evolve Housing identifies a suitable Landlord for the proposed tenancy and enters into a PDD with the Landlord, where it is agreed that Evolve Housing acting in its capacity as the Landlord's agent through Echo Realty, will be authorised to deduct a Monthly Donation amount from the Landlord's rental income.
- The amounts deducted representing the Monthly Donation amount will be transferred to Evolve Housing's donation income and receipted as such to the Landlord, and recorded as such in Evolve Housing's and Echo Realty's accounting systems.
- A standard residential tenancy agreement between the Landlord and the Tenant is entered into.
- The rent stipulated under the residential tenancy agreement is market rent.
- During the lease period, the Tenant pays their share of the rent obligation to Echo Realty as the Landlord's agent.

- In accordance with the property management agreement Echo Realty collects the rent from the Tenant, deducts various outgoings (for example, council rates, water rates, management fees) and remits the net rent amount (rent under the tenancy agreement less outgoings) to the Landlord.
  - Management fees payable by the Landlord to Echo Realty are subject to negotiation with Landlords and typically are determined as a percentage of the gross rental income (that is, the market rent).
  - Where the Monthly Donation amount as agreed with the Landlord under the PDD, is equivalent to the subsidised amount as agreed with the Tenant under the subsidy letter, Evolve Housing will not be required to fund the difference between the market rent and Tenant's subsidised rent.
22. Landlords are not required to enter into a PDD.
23. Under the PDD:
- The Landlord directs Echo Realty, as agent for the Landlord, to deduct the Monthly Donation amount from each monthly rental payment and pay the Monthly Donation amount to Evolve Housing.
  - Evolve Housing agrees to accept the Monthly Donation amount as a donation to further its charitable purposes and issue a receipt in the name of the Landlord for the donation amount received.
  - The PDD can be revoked by the Landlord at any time, by giving Echo Realty and Evolve Housing at least 5 business days' written notice.
  - Evolve Housing acknowledges that the PDD does not constitute an ongoing agreement by the Landlord to donate the Monthly Donation amount and that the Payment Direction may be revoked at any time.
  - The Landlord acknowledges that:
    - (a) each Monthly Donation amount is a donation to Evolve Housing
    - (b) a Monthly Donation amount may be used for any purpose and at the absolute discretion of Evolve Housing which is consistent with its obligations under the ITAA 1997
    - (c) Evolve Housing has not made any representations with respect to the allocation of any particular Monthly Donation amount to a particular purpose or property, and

- (d) by paying each Monthly Donation amount in accordance with the written directions of the Landlord, Echo Realty will have discharged all of its obligations under the PDD in respect of the Monthly Donation amount.

24. The Landlord, or any associate of the Landlord, does not receive any advantage or benefit from Evolve Housing, in its capacity as Evolve Housing or as the Landlord's agent, the Tenant or any other party as a consequence of making the donation to Evolve Housing.

## Ruling

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25. Amounts deducted from the Landlord's gross rental receipts and paid to Evolve Housing, in accordance with a valid and executed Payment Direction Deed under the Affordable Housing Initiative, are tax deductible gifts under section 30-15 of the ITAA 1997.

26. A Landlord can claim a deduction for their donation amounts, however the donation amounts cannot add to or create a tax loss under subsection 26-55(2) of the ITAA 1997.

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**Commissioner of Taxation**

6 March 2019

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## Appendix 1 – Explanation

**ⓘ** *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.*

### **Donation amounts are gifts**

27. The issue of what is a gift for the purposes of Division 30 of the ITAA 1997 is dealt with in Taxation Ruling TR 2005/13 *Income tax: tax deductible gifts*.

28. The word '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 as established by case law.

29. The courts have determined that a payment is a gift if it has the following characteristics and features:

- the donor transfers money or property
- the donor makes the transfer voluntarily
- the transfer arises by way of benefaction, and
- there is no material benefit or advantage for the donor.

30. These characteristics are not absolute and may involve a matter of degree. In determining whether a transfer is a gift it is necessary to consider the whole set of circumstances that provide context and explanation for the transfer.

### **Transfer of money or property**

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

32. In each case it is necessary to ascertain whether a transfer has occurred, what property has been transferred and when the transfer took place. This is to ensure that ownership of identifiable property has been divested and transferred to the recipient.

33. The giver must have proprietary rights in the property just prior to its transfer. When money or property is transferred to the recipient, the recipient must receive full title, custody and control of the property so that the recipient is entitled to deal with the property in its own right.

34. The transfer may still be a gift when it is made by way of an agent. In an agency relationship, an agent has an authority or capacity to create or affect legal relations between a principal and third parties. Generally speaking, what a person may do themselves, the person may do by an agent. If an agent discloses his principal's name (or at least the existence of a principal) to the third party with whom he is dealing, the agent himself is not normally entitled to the



benefit of, or be liable under, the contract. Therefore, an agent does not have beneficial interest in the property being transferred.

35. Under the terms of the PDD, the Landlord directs Echo Realty, in its capacity as agent for the Landlord, to deduct a specified donation amount from each monthly rental payment and pay it directly to Evolve Housing. Nothing prevents a transfer from being a gift where it is made through an agent, as long as the beneficial interest remains with the donor just prior to the transfer and beneficial interest transfers to the recipient. This is the case with this arrangement. The Landlord retains beneficial interest in the money just before it is transferred to Evolve Housing.

36. When the money is transferred, Evolve Housing has full beneficial ownership and control of the money. Evolve Housing has absolute discretion regarding how the amount may be used, consistent with its purposes. The amount does not have to be used to pay subsidies on that Landlord's particular property. It forms part of the general funds used to finance the operations of the organisation, including payment of rental subsidies to tenants generally.

37. The gift is made by the Landlord when Echo Realty transfers the donation amount to Evolve Housing.

### **Transfer made voluntarily**

38. A transfer must be made voluntarily in order for it to be a gift. It must be the act and will of the giver and there must be nothing to interfere with or control the exercise of that will. However, a transfer made under a sense of moral obligation is still made voluntarily.

39. A transfer is not made voluntarily if it is made for consideration or because of a prior obligation imposed on the giver by statute or by contract. Nonetheless, a transfer that has the other attributes of a gift will not fail to be considered a voluntary transfer merely because the means used to give effect to the benefaction have contractual or similar features.

40. Even though the arrangement for the donation to Evolve Housing under the PDD has a contractual nature, the donation is voluntary.

41. A Landlord is under no obligation to enter into the PDD and the PDD is revocable. The PDD does not constitute an ongoing promise to make donations to Evolve Housing.

### **Arises by way of benefaction**

42. A gift should intend and confer benefaction on the recipient. Benefaction means that the recipient is advantaged materially without any detriment arising from the terms of the transfer.

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

44. A gift ordinarily proceeds from detached and disinterested generosity. There may be a variety of reasons and motivations behind the giver making a gift. However, the fact that the giver has a personal motive for making the gift, such as a strong interest or emotional involvement in the work of the recipient, will not disqualify a transfer from being a gift.

45. In cases where the giver gives a gift for self-interested commercial or fiscal reasons rather than conferring benefaction on the recipient, it contradicts any objective to confer benefaction. However, a motive of seeking a tax deduction does not, by itself, disqualify a transfer from being a gift.

46. The donation by the Landlord is a transfer of money which materially benefits Evolve Housing with no detriment.

47. There is little commercial reason for the Landlord to provide the donation. The donation has no link with management fees owing to Echo Realty by the Landlord; as such fees are required and paid under the terms of the property management agreement between Echo Realty and the Landlord. Additionally, the Landlord has the right to receive market rent under the residential tenancy agreement, which is payable irrespective of whether the Landlord decides to make a gift or not. Therefore, the gift confers benefaction to Evolve Housing.

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

48. To constitute a gift, the giver or an associate of the giver must not receive a material benefit or advantage from the transfer. It does not matter whether the material benefit or advantage comes from the recipient or another party.

49. It is a question of fact in each case whether any benefit or advantage is considered material. A benefit or advantage can be material if there is a link between the benefit and the transfer, and the benefit is sufficiently significant in relation to the value of the transfer.

50. The Landlord or an associate of the Landlord does not receive a material benefit or advantage from making the donation to Evolve Housing under the PDD.

51. The Landlord has the right to receive market rent for their property under the standard residential tenancy agreement, which is payable irrespective of whether the Landlord decides to make a gift or not. Further, the Landlord enters a standard property management agreement with Echo Realty whereby management fees owing to Echo Realty by the Landlord are required and paid, regardless of whether the Landlord decides to make a gift or not.

## Donation amounts are gifts

52. Donation amounts paid by the Landlord to Evolve Housing under the PDD have the characteristics and features of a gift. The Landlord is making a voluntary transfer of money, which confers benefaction on Evolve Housing and there is no material benefit or advantage for the Landlord.

## Tax deduction on donation amounts

53. A donor can claim a tax deduction for a gift if the requirements in section 30-15 of the ITAA 1997 are satisfied. The table in section 30-15 specifies the type of gift that can be made, who the recipient of the gift can be, how much can be deducted for the gift, and any special conditions that apply.

## Type of gift

54. Item 1 of the table in section 30-15 of the ITAA 1997 lists the type of gifts that can be made and includes gifts of money. Money includes foreign currency and can be paid in various ways, including by cash, cheque, credit card or electronically.

55. Under the PDD the Landlord directs the agent, Echo Realty, to deduct the donation amount from each monthly rental payment and to pay the donation amount to Evolve Housing.

56. Donation amounts made by Landlords under the PDD are a gift of money.

## Gift recipient

57. Item 1 of the table in section 30-15 of the ITAA 1997 states that gifts of money can be made to recipients who are included in the tables in Subdivision 30-B of the ITAA 1997.

58. Subdivision 30-B of the ITAA 1997 includes section 30-45 of the ITAA 1997. Item 4.1.1 of the table in subsection 30-45(1) of the ITAA 1997 includes recipients who are a 'registered public benevolent institution'.

59. Gifts of money can therefore be made to a recipient that is a registered public benevolent institution.

60. Subsection 995-1(1) of the ITAA 1997 defines 'registered public benevolent institution':

**registered public benevolent institution** means an institution that is:

- (a) a \*registered charity; and
- (b) registered under the *Australian Charities and Not-for-profits Commission Act 2012* as the subtype of entity mentioned in column 2 of item 14 of the table in subsection 25-5(5) of that Act.

61. Gifts to a registered public benevolent institution will however only be deductible if the registered public benevolent institution is also endorsed as a deductible gift recipient, or is named in Subdivision 30-B of the ITAA 1997. This is required by the special conditions in Item 1 of the table in section 30-15 of the ITAA 1997 and by section 30-17 of the ITAA 1997.

62. Evolve Housing is:

- a registered public benevolent institution as defined in subsection 995-1(1) of the ITAA 1997
- a recipient described in Item 4.1.1 of the table in subsection 30-45(1) of the ITAA 1997
- a recipient to whom gifts may be made, as specified in section 30-15 of the ITAA 1997, and
- endorsed as a deductible gift recipient pursuant to section 30-120 of the ITAA 1997.

63. Donation amounts paid by Landlords participating in the Affordable Housing Initiative to Evolve Housing under a PDD are gifts to a registered public benevolent institution that is endorsed as a deductible gift recipient.

64. Gifts made to Evolve Housing by Landlords whilst Evolve Housing is endorsed as a deductible gift recipient will be tax deductible.

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

65. Item 1 of the table in section 30-15 of the ITAA 1997 states the amount you can deduct for a gift of money is the amount you are giving.

66. The value of the gift must however be \$2 or more, as specified in the special conditions in Item 1 of the table in section 30-15 of the ITAA 1997. A donor can add together a series of gifts in an income year to work out whether the gift is \$2 or more.

67. However, a deduction for a gift cannot add to or create a tax loss for the donor.

68. Subsection 26-55(1) of the ITAA 1997 states there is a limit on the total amount you can deduct for the income year under section 30-15 of the ITAA 1997. The limit is calculated pursuant to subsection 26-55(2) of the ITAA 1997 and in effect means the deduction can reduce the donor's assessable income to nil in the tax year in which the gift is made, but any excess cannot be claimed in that year or carried forward to a later year as a tax loss.

69. Whilst a deduction for a gift cannot add to or create a tax loss for the donor, Subdivision 30-DB of the ITAA 1997, and in particular section 30-247 of the ITAA 1997, allows donors to elect to spread a tax deduction for a gift of money of \$2 or more, over up to 5 years

where the gift was made to a deductible gift recipient that is a registered public benevolent institution.

70. If the donor chooses to spread a deduction the election must be made as specified in section 30-248 of the ITAA 1997, including:

- the election must be in the approved form and must be made before lodging the tax return for the year in which the gift was made
- the election must start in the year the gift was made and can continue up to four years immediately following, and
- the election must contain the percentage to be claimed each year, which may be different in each year, but the total percentage must not exceed 100% over the years.

71. Landlords participating in the Affordable Housing Initiative, who enter into a PDD with Evolve Housing, can claim a tax deduction for their donation amount, where the donation amount is \$2 or more. However, the amount claimed as a deduction by the Landlord cannot add to or create a loss. The Landlord may elect to spread the tax deduction over up to 5 years.

## Record keeping

72. Donors should keep records of all tax deductible gifts they make including the date the gift was made, the name of the deductible gift recipient to which the gift was made, the amount of the gift, a description if the gift was property and any election to spread the gift.

73. Deductible gift recipients are not required by the tax law to issue receipts for gifts, but when they do issue receipts they must include the information specified in subsection 30-228(1) of the ITAA 1997.

74. A receipt issued by a deductible gift recipient for a gift must include:

- the name of the deductible gift recipient
- the ABN of the deductible gift recipient, and
- that the receipt is for a gift.

75. Other useful information that deductible gift recipients can include in a receipt for a gift includes:

- the amount of money donated
- a description of any gifts of property, and
- the date of the gift.

76. If a donor does not have a receipt, they should keep any other statement or record with details of their gift.

77. Under the Affordable Housing Initiative and the PDD, Evolve Housing will issue a receipt, for a tax deductible gift, to the Landlord for the donation amount.

78. Receipts issued by Evolve Housing for gifts must include its name and ABN, and that the receipt is for a gift. Other useful information that Evolve Housing could include in the receipt is the amount of money donated and the date of the gift.

79. Landlords should keep records of all donation amounts paid to Evolve Housing. This includes receipts issued by Evolve Housing for the donation amounts, the PDD and any other records or statements that provide details of the gift. If an election has been made to spread the deduction for the gift, the election, and any variations to the election, should also be kept by the Landlord.

## **Appendix 2 – Detailed contents list**

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80. The following is a detailed contents list for this Ruling:

	<b>Paragraph</b>
<b>Summary – what this Ruling is about</b>	<b>1</b>
Relevant provision(s)	2
Class of entities	3
Qualifications	4
<b>Date of effect</b>	<b>7</b>
<b>Scheme</b>	<b>8</b>
<b>Ruling</b>	<b>25</b>
<b>Appendix 1 – Explanation</b>	<b>27</b>
Donation amounts are gifts	27
Transfer of money or property	31
Transfer made voluntarily	38
Arises by way of benefaction	42
No material benefit or advantage	48
Donation amounts are gifts	52
Tax deduction on donation amounts	53
Type of gift	54
Gift recipient	57
Amount of gift that can be deducted	65
Record keeping	72
<b>Appendix 2 – Detailed contents list</b>	<b>80</b>

## References

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### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10; CR 2016/42;  
CR 2018/19; CR 2018/28

### *Legislative references:*

- ITAA 1997
- ITAA 1997 26-55(1)
- ITAA 1997 26-55(2)
- ITAA 1997 Div 30
- ITAA 1997 Subdiv 30-B
- ITAA 1997 30-15

- ITAA 1997 30-17
  - ITAA 1997 30-45
  - ITAA 1997 30-45(1)
  - ITAA 1997 30-120
  - ITAA 1997 30-228(1)
  - ITAA 1997 Subdiv 30-DB
  - ITAA 1997 30-247
  - ITAA 1997 30-248
  - ITAA 1997 995-1(1)
  - TAA 1953
  - Australian Charities and  
Not-for-profits Commission  
Act 2012
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### ATO references

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