

CR 2010/9 - Income tax: assessable income - Keno commission received by registered NSW Clubs



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Class Ruling

Income tax: assessable income – Keno commission received by registered NSW Clubs

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	7
Scheme	8
Ruling	32
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	33
Appendix 2:	
<i>Detailed contents list</i>	61

① 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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.

What this Ruling is about

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

Relevant provision(s)

2. The relevant provision dealt with in this Ruling is:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997).

All legislative references in this Ruling are to the ITAA 1997 unless otherwise stated.

Class of entities

3. The class of entities to which this Ruling applies is NSW clubs:

- which are not income tax exempt; and
- which are in receipt of commissions paid by members of their club under the arrangements for the conduct of Keno in NSW Clubs as described in the scheme part of this Ruling.

Qualifications

4. 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 31 of this Ruling.

5. 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.

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Date of effect

7. This Ruling applies from 23 November 1998 to 30 June 2012. The Ruling continues to apply after 30 June 2012 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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).

Scheme

8. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- the application for Class Ruling dated 27 October 2003;
- the Notice of Alteration of Conditions of Keno Licence and the schedule to that notice effective from 23 November 1998;
- an updated Keno Licence granted on 27 June 2007 to Clubkeno Holdings Pty Limited and Jupiters Gaming (NSW) Pty Ltd (formerly named Club Gaming Systems Pty Limited);
- Notices of Alteration of Conditions of Keno Licence dated 11 September 2007 and 27 March 2009;
- proforma agency deeds between Clubkeno Holdings Pty Limited (CKH), Jupiters Gaming (NSW) Pty Ltd (Jupiters Gaming) and NSW clubs that were used during the period that this Ruling applies;
- a replacement Management Agreement between CKH and Jupiters Gaming dated 13 May 2008;
- a copy of the Keno rules effective from 1 September 2002 and a copy of the Keno rules effective from 25 September 2009;
- brochures entitled 'Keno It's easy to play!' and 'How to Play Keno';
- a Keno entry form;
- a proforma Keno receipt ticket;
- information provided by KPMG in correspondence dated 3 August 2004;
- information provided by KPMG in correspondence dated 21 April 2005 in respect of five clubs, being a representative sample of the NSW clubs intended to come within the Class of entities to whom this ruling is to apply;

- information provided by KPMG in correspondence dated 24 May 2005, in respect of five clubs, being a representative sample of the NSW clubs intended to come within the Class of entities to whom this ruling is to apply.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

Statutory and administrative regime for the conduct of Keno

NSW legislation

9. The conduct of public lotteries in NSW is governed by the *Public Lotteries Act NSW 1996* (PLA) and the regulations made under the PLA. The game of Keno is included in the meaning of public lottery in section 5 of the PLA.

10. Under section 12 of the PLA, the Minister administering the PLA may grant a licence to conduct the game of Keno. The grant of the licence may be subject to conditions that are specified in the licence. The Minister may, while the licence is in force, alter the conditions of the licence by imposing additional conditions or by amending, substituting or revoking conditions (subsection 15(1) of the PLA).

11. Section 13 of the PLA lists the matters to which the conditions of the licence may relate, including:

- the approval or appointment of the licensee's agents by the Minister or any other person;
- the payment of and accounting for commission;
- the maximum amount or rate of commission;
- the application of and accounting for subscriptions received by licensees, including the payment of prizes from the subscriptions, the deposit of subscriptions and the accounts to be kept in respect of subscriptions;
- the authorisation of agents to charge subscribers to a public lottery for providing such ancillary services in connection with subscriptions as may be approved by the Minister;
- the display by the licensee's agent, of the rules and of other information relating to the conduct of a public lottery; and
- the amount payable in respect of each entry in a public lottery.

12. Subsection 4(1) of the PLA defines commission, in relation to a public lottery, as an amount:

- (a) paid to, deducted by or retained by an agent in connection with a subscription to the public lottery (whether or not in the person's capacity as an agent of the licensee conducting the public lottery), and
- (b) determined by or in accordance with, and identified as commission in, the conditions of the relevant licence or the rules of the public lottery.

Keno Licence

13. CKH and Jupiters Gaming are the holders of a licence for the conduct of the game of Keno (the Keno Licence) in NSW clubs which are registered clubs under the *Registered Clubs Act 1976 (NSW)* (Clubs Act). CKH and Jupiters Gaming are referred to in this Ruling as the Licensees.

14. The conditions of the Keno Licence held by the Licensees under section 12 of the PLA were altered by the Minister with effect from 23 November 1998. An updated Keno Licence was issued to the Licensees on 27 June 2007. Subsequent alterations to the conditions of the Keno Licence were made on 11 September 2007 and 27 March 2009. The alterations made on 11 September 2007 allowed for NSW hotels to be appointed and approved to conduct the game of keno. The relevant licence conditions for the purpose of this Ruling are those conditions applicable during the period of application of this Ruling (see paragraph 7 of this Ruling).

15. The responsibilities of the Licensees are set out in the conditions of the Keno Licence and include the following:

- to do all such things as are necessary to ensure the effective and efficient conduct of games of Keno, including, before appointing a club (as an agent of the Licensee), furnishing to the Minister the terms and conditions of any such proposed appointment and obtaining approval of such terms and conditions of appointment;
- the design of games of Keno which shall be subject to approval by the Minister;
- making rules for the conduct of games of Keno and proposing any changes thereto, for approval by the Minister;
- taking such steps as are considered necessary by the Minister to ensure the observance of the rules;
- engaging and training staff as deemed necessary by the Minister for the efficient conduct of games of Keno;

- obtaining, installing, maintaining and operating devices and equipment as are deemed necessary by the Minister to ensure the security and continued integrity of the games of Keno and obtaining and providing to clubs approved devices and equipment on the terms and conditions as approved by the Minister;
- arranging and controlling the distribution and acceptance of entry forms and receipt tickets and undertaking quality control of entry forms and receipt tickets;
- arranging for the display, as approved, in the premises of all clubs of the winning numbers as they are drawn for each game of keno.

16. The Keno Licence contains conditions in relation to the receipt of the amount payable by a subscriber to participate in a game of Keno. The relevant definitions in the Keno Licence are:

- 'Commission' means an amount paid to a [Club] by Subscribers in the [Club's] own right (and not as agent of the Licensees) ...
- 'Gross Subscription' means the amount prescribed by the Minister to be paid by a subscriber for entry to a game of Keno, ... and includes the amount of Commission received and retained by the [Clubs] ...
- 'Net Subscription' means the amount which the [Clubs] hold and deal with as agent of the Licensees in accordance with this Licence and the Rules, being the Gross subscription less the Commission...

17. The Keno Licence provides for:

- a club to receive the Gross Subscription from subscribers and hold the Gross Subscription as agent of each subscriber (and not as agent of the Licensees) until the relevant entry is completed;
- the clubs to charge subscribers a Commission, for acting as agent of the subscriber, and authorise the club to deduct and retain the Commission;
- the apportionment of Net Subscriptions received or held by the Licensees or held by a club on behalf and as agent of the Licensees. The Net Subscriptions are apportioned between the Keno Prize Fund, the payment of duty to the Treasurer of NSW and the Licensees;
- the Minister to approve the application of, and accounting for, money received:
 - as Net Subscriptions, and
 - by clubs in respect of Commissions,

- the review (by the Licensee and a person nominated by the Minister) of the apportionment of Gross Subscriptions, including the quantum of the Commission paid to clubs.

18. A review of Gross Subscriptions was undertaken in March 2001 by the Licensees through a committee chaired by the Minister's nominee. Representatives from the New South Wales Treasury and the Department of Gaming and Racing were also members of the committee. The quantum of the commission was confirmed by the Minister after considering the Committee's report.

19. The Keno Licence stipulates that the procedures and system by which a club shall be concerned in the promotion, organisation and operation of games of Keno shall be approved by the Minister.

Agency Deed

20. The agency deed between each club and the Licensees authorises each club to operate the game of Keno on their premises as agents for the Licensees. The deed also defines the relationship between each club and the Licensees:

The relationship between the Licensees and the Club will be that of principal and agent but only for the Purpose and in respect of each Licensee only to the extent expressly set out in this Deed, and in particular the Club will have no right or authority to conduct keno on its own behalf, or to enter into any arrangements, understandings or agreements on behalf of either or both of the Licensees or to authorise any statements or representations on behalf of either or both of the Licensees whatsoever other than as may be specifically authorised or directed pursuant to this Deed.

The purpose is defined as:

...the proper conduct of Keno by the Licensees and its operation on the Premises in accordance with this Deed, the Act, Regulations, Rules and the Operating Manual.

Keno rules

21. Part 4 of the PLA requires the Licensees to make, publish and display rules for the conduct of Keno which are not inconsistent with the PLA, the regulations made under the PLA or conditions of the license. The Keno rules must be approved by the Minister and displayed by the Licensees, or their agents, in a prominent position at each place where Keno entries are accepted.

22. The Keno rules were drawn up and effective from 23 November 1998. These rules have been amended from time to time and the current Keno rules are effective from 25 September 2009 (Keno Rules). A brochure explaining how to play keno is made available to subscribers.

23. The Keno Rules define the Gross Subscription, Net Subscription and Commission in the same terms as the Keno Licence.

24. The Keno Rules state that:

- each Gross Subscription must be paid by the subscriber to a club, and the club will hold the Gross Subscription as agent of the subscriber until the entry is completed;
- the Commission retained by the clubs is calculated as 44 percent of the Gross Subscription less the Keno prize fund contribution;
- after the Keno entry is completed the club will be entitled to apply the Commission to its own account and will hold the Net Subscription as agent for and on behalf of the Licensees.

The game

25. Keno is a networked numbers game. To enter a game of Keno the subscriber completes an entry form which is accepted by the club and passed through a computer-linked terminal located at the club's premises. The subscriber pays the club for the entry into the game. When the entry is accepted by the Central Site Computer on behalf of the Licensees, the terminal at the club issues a receipt ticket which the club's staff hand to the subscriber and this constitutes the official receipt of entry and completion of the entry process.

The NSW clubs

26. NSW clubs may approach Jupiters Gaming about providing the game of Keno at their premises. The Minister must approve the terms and conditions of an appointment of a club as an agent.

27. The basic package of equipment is provided by Jupiters Gaming to the clubs. During the period of application of this Ruling, the basic package of equipment was either provided free of charge or for consideration. That package contains those items that have been approved by the Minister and are necessary to provide the game of Keno at the clubs' premises (including one Keno terminal, one computer and one monitor together with minimum cabling and training). The club may purchase further Keno terminals from Jupiters Gaming. Other equipment may be purchased from Jupiters Gaming or another supplier.

28. The club may make decisions on some administration or promotional matters in bringing the game to its club. Provided these matters comply with the PLA, regulations made under the PLA, the Keno Rules, and the agency deed, the club may determine:

- how the game will be presented in the club (including positioning of gaming equipment, and dedicated Keno staff and/or gaming room or mixed services);
- the operating hours for the Keno terminals (the game being available from the Keno central site computer between 9am and 2am each day); and
- what additional costs it will incur, such as stationery, promotion or advertising, additional training, additional equipment etc.

29. The clubs may use the Commission paid to them by subscribers in different ways including:

- as part of the club's general assets to be applied for the objects of the club;
- salaries of staff; and
- towards other costs that the club may incur in making the game of Keno available.

30. The NSW clubs to which this Ruling applies have a clause in their constituent documents that prevents the club from distributing surplus funds to its members.

Additional commission

31. On an annual basis, as determined by a resolution of the directors of CKH, an additional amount of commission may be paid to the clubs by the Licensees. This amount of additional commission is accepted to be assessable income under section 6-5, in accordance with Taxation Determination TD 1999/38.

Ruling

32. The commission received by a registered NSW Club from the Gross Subscription paid by a member of that registered club under the arrangements described in this Ruling, is assessable income of the club pursuant to section 6-5.

Commissioner of Taxation

24 March 2010

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.

33. Section 6-5 provides that assessable income includes income according to ordinary concepts (ordinary income).

34. Whether a receipt is ordinary income depends upon its quality in the hands of the recipient: *Scott v. Federal Commissioner of Taxation* (1966) 117 CLR 514; *GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation* (1990) 170 CLR 124. Generally, payments or other benefits received for, in respect of, or in connection with services provided are assessable as ordinary income.

35. An amount of ordinary income is non-assessable non-exempt income, if a provision of the ITAA 1997 or the *Income Tax Assessment Act 1936* states that it is not assessable income and is not exempt income (section 6-23 of the ITAA 1997).

36. For the income years commencing on or after 1 July 2000, section 59-35 provides that an amount of ordinary income is not assessable and not exempt income if:

- the amount would be a mutual receipt, but for the entities constituent document preventing the entity from making any distribution, whether in money, property or otherwise to its members; and
- apart from this section the amount would be assessable income only because of section 6-5.

Principle of mutuality

37. The principle of mutuality recognises that where a number of people associate for a common purpose, and contribute to a common fund in which they are all interested, the surplus remaining, after the fund has been applied to the common purpose, is not income or profit: see *Social Credit Savings and Loans Society Ltd v. Federal Commissioner of Taxation* (1971) 125 CLR 560, *Sydney Water Board Employees' Credit Union v. Federal Commissioner of Taxation* (1973) 129 CLR 446.

38. The essence of the mutuality principle is that you cannot derive any gain, and thus any income, from dealings with yourself. This principle of mutuality may extend to the provision of facilities or mutual services by an organisation to a member, or other mutual dealings with a member, for which the member makes a payment. Generally, receipts from non-members or third parties are not mutual income.

39. In 2004, the Full Federal Court in *Coleambally Irrigation Mutual Co-operative Ltd v. FC of T* 2004 ATC 4835 held that the principle of mutuality does not apply where the members of an entity are prevented from obtaining the value of the entity's assets. Therefore, when an entity's constituent documents prohibit the distribution of surplus funds to members the principle of mutuality will not apply.

Mutual receipts – not assessable and not exempt income

40. Following the Full Federal Court decision in *Coleambally*, section 59-35 of the ITAA 1997 was inserted by the *Tax Laws Amendment (2005 Measures No. 6) Act 2006*, effective for income years commencing from 1 July 2000. This measure reinstated the long standing practice of the Tax Office treating the mutuality principle as applying to not-for-profit community organisations that would otherwise have had the benefit of the mutuality principle but for the inclusion of clauses in their governing documents that prohibit the distribution of surplus funds to members.

41. 'Mutual receipt' is not defined in the ITAA 1997. The explanatory memorandum to the *Tax Laws Amendment (2005 Measures No. 6 Bill) 2005* states that mutual receipts are those receipts arising out of mutual dealings (see *Royal Automobile Club of Victoria v. Federal Commissioner of Taxation* [1973] VR 651; 73 ATC 4153; (1973) 4 ATR 567 (RACV)). The receipts that are to be considered mutual include those receipts from members in respect of:

- dealings for membership
- goods or services provided by an entity in mutual dealings in pursuance of one of its purposes.

42. Determining if a receipt is non assessable non exempt income under section 59-35 requires consideration of whether that receipt would be a mutual receipt if the organisation receiving the amount was not prohibited by its constituent documents from distributing to its members. If a receipt would not be a mutual receipt even if the organisation could distribute surplus funds to its members, the receipt does not fall within section 59-35.

November 1998 to 30 June 2000

43. The general principle of mutuality does not apply to NSW clubs because they are prohibited, by their governing documents, from distributing surplus funds to their members. Section 59-35 does not apply to income years ending on or before 30 June 2000.

44. In any event, the Commissions are not mutual receipts for the reasons discussed in paragraphs 40 to 42 of this Ruling.

1 July 2000 to 30 June 2012

45. In considering whether section 59-35 will apply to the Commissions received from 1 July 2000 the cases dealing with mutuality are relevant to determining whether the Commissions would be mutual receipts of the clubs but for the clubs constituent documents preventing distributions to members.

46. Whether commissions derived by clubs as a result of members playing Keno on the clubs' premises were properly characterised as assessable income or as mutual receipts was considered by the Full Federal Court in *North Ryde RSL Community Club Ltd. v. Federal Commissioner of Taxation* (2002) 121 FCR 1 (*North Ryde RSL*). Although the arrangement under consideration by the court was the arrangement in existence prior to 23 November 1998, whereby the Keno commission was found by the Full Court to have been paid to the clubs by the Licensees for acting as their agents in providing the game of Keno, the findings of the court are relevant to the current arrangement for characterising the commission paid to the clubs.

47. In *North Ryde RSL* the Full Federal Court stated that in order to determine the capacity in which the Keno commission was received by the club it was necessary to understand the proper relationship between the various parties involved in the game of Keno as regulated by legislation, the licence and the agency deed. It was concluded that the amounts received by the club as Keno receipts and paid to the Licensees were not subscriptions, but payments made in consequence of contractual agency obligations. It was stated by the Full Federal Court at page 17 that the commission:

.... was paid as one component element in the Agency Deed as a return for services performed in the agency. Though the 10% on subscriptions was in fact retained by North Ryde as a matter of administrative convenience, it was no more than a trading receipt on its part. It was in our view, an integral part of the agency approved by the Minister and its receipt from CKH cannot be severed from the totality of the agreement itself. Entry into the agency agreement was the prerequisite for North Ryde being able to provide the facility of playing keno to its members.

48. In *North Ryde RSL* the Full Federal Court confirmed the Commissioner's view that the receipts were not mutual receipts. It was held that when club members paid subscriptions to the club to play Keno, they were availing themselves of a service provided at the club's premises. Those members were neither making subscriptions to the club, nor playing a game operated by or on behalf of the club. Rather, the members were subscribing to a game operated by the Licensees and the subscriptions received by the club were accepted by it as agent of the Licensees. The members were not therefore 'paying for a mutual service to be rendered' by the club and the principle of mutuality did not apply to the subscriptions.¹

¹ At page 17.

49. Under the current arrangement the Keno Licence and the Keno Rules prescribe that the gross subscription amount must be paid by the subscriber each time the member enters a game of Keno. The total amount required to subscribe to play a game of Keno under the current arrangement is the same as that under the former arrangement and includes the commission. The gross subscription amount and the commission amount are set by the Minister, as was the case under the former arrangement. The members are still subscribing for individual games and individual subscriptions must still be paid as prescribed by the Minister. The members' purpose in paying the gross subscription is still to play the game, and that purpose is exhausted in the playing of each individual game. The reasoning of the Full Federal Court in *North Ryde RSL* is relevant in this respect. The Full Court stated at page 18:

[W]hen members subscribed to the game they did not make payment into a common fund for a particular purpose. Neither did North Ryde do so on their account. Each member played individual games for which individual subscriptions were paid. They were not constituting a fund for a purpose. Their purposes were exhausted in the playing of each individual game: cf *Royal Automobile Club of Victoria*, at 660-661.

50. The arrangement has not changed post-23 November 1998 such that the Keno commission could properly be characterised as contributions by members to a common fund for a common purpose, and thus, subject to the mutuality principle. The fact that the Keno Rules, which govern the playing of keno, require that the commission be paid by the member as consideration for the club acting as agent and holding the gross subscription on behalf of the member until the Keno entry is complete, is consistent with the view that the gross subscription, and any part thereof, is paid for the purpose of enabling the individual subscriber to play a game of Keno rather than being paid as a contribution to a common fund for a common purpose. The commissions are not 'contributions [that] are, in substance, an advance of capital for a common purpose: see *Bohemians Club v. Acting Commissioner of Taxation* [1918] 24 CLR 334 at 337.

51. The payment of commission by a member, in connection with playing a game of Keno, can be distinguished from the payment for a mutual service such as the payment for a subsidised meal provided by the club on the club's premises. The Full Federal Court noted in *North Ryde RSL* that not all receipts received by a club from members on account of services or facilities made available to members are necessarily mutual receipts. At page 17 the Full Federal Court commented that in ascertaining the character of a receipt:

It is the nature of the actual transactions in question, and not the fact that a benefit was received or a service used by members that will determine whether receipts derived are liable to, or are immune from, tax. Where...the service itself was provided to club members by a third party, a close analysis of the actual dealings between member, club and third party must be undertaken when ascertaining whether a club's monetary receipts – whether coming from members or from the third party – are properly to be characterised as mutual receipts.

52. In *RACV* Anderson J. considered the substance of dealings between the members and the appellant in the course of determining whether certain services provided by the appellant were mutual services or trading activities. In particular Anderson J. found that commissions paid to the appellant by an insurance company constituted income from a trading activity on the basis that the consideration for the commission received was the appellant's efforts to channel insurance business to the insurance company:

Both commissions were being paid by Club Motor, an insurance company, for services rendered to it by the appellant. Whether the members paid their premiums direct to Club Motor or to Club Motor via the appellant, there was no payment by members into a common fund in the relevant sense. Nor were members paying for mutual service to be rendered by the appellant. What they were paying for was insurance by Club Motor; each member entering into an individual commercial contract with an insurance company, albeit on advantageous terms.

53. Although the Keno commissions are paid directly to the club by member subscribers, and not by a third party as was the case in *North Ryde RSL* and *RACV*, analysis of the dealings between the member subscriber, the club and the Licensees show that the commission, as part of the gross subscription paid by a member is not a payment by the member into a common fund in the relevant sense. When a member enters into a Keno game the member subscribes to play a single game. That is, each member subscribes by paying the gross subscription towards a sum of money to be awarded to the winner of a game. Each game of Keno entered into is a commercial transaction between the Licensees and the subscriber. As the Full Court said in *North Ryde RSL* at page 18 the subscribers were:

...acting individually, paying the amount prescribed by the Minister and having no greater interest in the subject matter of the payment than the outcome of the game itself.

54. Each transaction generates an amount, in the form of commission, for the club. In substance, the commission represents the club's 'cut' from the gross subscription the member pays to play a game of Keno. The commission is the nature of a receipt from trade, and therefore income. Put another way, the fact that the governing documents provide that the commission be paid directly to the club by the subscriber and, not be paid by the Licensees, does not alter the substance of the arrangement. The individual member is paying the gross subscription to play a game of keno. The club is providing the game to the member on behalf of Licensees.

55. The provision of the Keno game by clubs, on behalf of the Licensees, to members can also be contrasted with the provision of other services, such as dining facilities, provided by the clubs to members. These services are provided by the clubs themselves (even if the club contracts with a third party to provide the actual service) and members pay annual member subscriptions, to contribute to the provision of, and to avail themselves of, these services. These other services are not services that can only be provided legally by the club in its capacity as an agent for a third party. By contrast, when clubs offer Keno as an amenity to members and their guests, the amenity is being provided by the Licensees on the clubs' premises under the terms of the arrangement. The clubs are not providing the game in their own right.

56. The fact that the boards of the individual clubs determine:

- whether to make Keno available;²
- how the game will be presented in the club;
- the operating hours for each terminal, and

may incur expenses, such as stationery and advertising, in relation to Keno does not mean that the club is providing the game. The governing documents clearly set out that the game of Keno is provided by the clubs on behalf of the Licensees.

57. The conditions of the Keno Licence support a conclusion that control over the provision of the game in reality resides with the Licensees. The Licensees are responsible for the efficient and effective conduct of the game of Keno, including the appointment of clubs as agents, the design of games of Keno, making the rules for games of Keno (all subject to obtaining Ministerial approval) and ensuring observance of those rules and publication of those rules. The agency deed also shows that each club has no right or authority to conduct Keno on its own behalf.

² The Minister must approve the terms and conditions for appointment of a club before the Licensees makes the appointment.

58. The statutory scheme entails Ministerial scrutiny over the application of and accounting for money received from Net Subscriptions and Commissions, including the process of banking of such money. The procedures and system by which a club is concerned in the conduct of games of Keno is approved by the Minister. The Gross Subscription amount is also approved by the Minister.

59. Although the proceeds of the Commission may be used for the benefit of members, the use to which the Commission received by the clubs is put is not relevant for determining whether the commission is a mutual receipt. The character of the receipt is to be resolved by reference to the nature of the payment in the hands of the recipient: *G.P. International Pipecoaters Pty Ltd v. FCT* (1990) 170 CLR 124.

60. Therefore, having regard to the nature of the transactions and dealings between the parties that comprise the arrangements for making the game of Keno available in NSW Clubs, the Commissions received by the Club for its role in those arrangements are not mutual receipts for the purposes of section 59-35. The Commission is in the nature of a receipt from trade, and therefore, assessable income under section 6-5.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Relevant provision(s)	2
Class of entities	3
Qualifications	4
Date of effect	7
Scheme	8
Statutory and administrative regime for the conduct of Keno	9
<i>NSW legislation</i>	9
<i>Keno Licence</i>	13
<i>Agency Deed</i>	20
<i>Keno rules</i>	21
The game	25
The NSW clubs	26
Additional commission	31
Ruling	32
Appendix 1 – Explanation	33
Principle of mutuality	37
Mutual receipts – not assessable and not exempt income	40
November 1998 to 30 June 2000	43
1 July 2000 to 30 June 2012	45
Appendix 2 – Detailed contents list	61

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

CR 2001/1; TD 1999/38;
TR 2006/10

Subject references:

- assessable income
- commission income
- mutual receipts
- mutuality principle
- non-profit associations and clubs

Legislative references:

- ITAA 1936
- ITAA 1997 6-5
- ITAA 1997 6-23
- ITAA 1997 59-35
- TAA 1953
- Tax Laws Amendment (2005 Measures No. 6) Act 2006
- Copyright Act 1968
- Public Lotteries Act NSW 1996
- PLA NSW 1996 4(1)
- PLA NSW 1996 12
- PLA NSW 1996 13
- PLA NSW 1996 15(1)
- Registered Clubs Act 1976 (NSW)

Case references:

- Bohemians Club v. Acting Commissioner of Taxation [1918] 24 CLR 334; (1918) 24 ALR 92; [1918] VLR 234

- Coleambally Irrigation Mutual Co-operative Ltd v. FC of T 2004 ATC 4835
- GP International Pipecoaters Pty Ltd v. Federal Commissioner of Taxation (1990) CLR 124; (1990) 64 ALJR 392; (1990) 93 ALR 193; 90 ATC 4413; (1990) 21 ATR 1
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NO: 2010/2077

ISSN: 1445-2014

ATOlaw topic: Income Tax ~~ Exempt entities ~~ not for profit and mutual organisations