



# ***TR 2011/D5 - Income tax: school or college building funds***

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This document has been finalised by TR 2013/2.

 There is a Compendium for this document: **TR 2013/2EC** .



## Draft Taxation Ruling

### Income tax: school or college building funds

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Contents	Para
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**PROPOSED LEGALLY  
BINDING SECTION:**

<b>What this Ruling is about</b>	<b>1</b>
----------------------------------	----------

<b>Ruling</b>	<b>7</b>
---------------	----------

<b>Previous Ruling</b>	<b>74</b>
------------------------	-----------

<b>Date of effect</b>	<b>75</b>
-----------------------	-----------

**NOT LEGALLY BINDING  
SECTION:**

**Appendix 1:**

<b>Explanation</b>	<b>78</b>
--------------------	-----------

**Appendix 2:**

<b>Your comments</b>	<b>211</b>
----------------------	------------

**Appendix 3:**

<b>Detailed contents list</b>	<b>213</b>
-------------------------------	------------

**ⓘ This publication provides you with the following level of protection:**

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation 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.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### What this Ruling is about

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1. This Ruling explains the Commissioner's views on the requirements for a fund to be a school or college building fund that comes within the scope of Item 2.1.10 of the table in subsection 30-25(1) of the *Income Tax Assessment Act 1997* (ITAA 1997)<sup>1</sup> (Item 2.1.10).

2. In particular, it discusses factors relevant to determining:

- if a fund has been established and maintained solely for the acquisition, construction or maintenance of a school or college building; and
- if a building is used as a school or college by an entity specified in Item 2.1.10.

3. It does not set out the relevant administrative processes for endorsement, or what constitutes a gift. These are explained in *GiftPack* (NAT 3132) and *Taxation Ruling TR 2005/13 Income tax: tax deductible gifts – what is a gift*, respectively.

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<sup>1</sup> All legislative references are to the ITAA 1997 unless otherwise indicated.

4. The Ruling applies to persons seeking to establish or maintain a school or college building fund, and to persons seeking to claim income tax deductions for a gift made to a school or college building fund.<sup>2</sup>

5. It is important to note that whilst the outcome of previous applications for approval or endorsement of a school or college building fund may provide guidance, they are not to be relied upon as determining the outcome in a particular situation, even if the application for endorsement is from a fund connected with the same school or college. Each application has to be assessed on its own merits, in the light of its features and relevant circumstances existing at the time.

6. In this Ruling, abbreviations of certain key terms have commonly been used to help minimise repetition. Unless the context restricts their scope:

- the word 'school' is used to denote 'school or college';
- the word 'used' denotes 'used or to be used'; and
- the entities specified in Item 2.1.10 are collectively referred to as 'qualifying bodies'.

## Ruling

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### Legislation

7. Gifts to a school building fund are deductible if:
- the fund, or the entity that legally owns the fund, or the government body constituted by the persons who control the fund, is endorsed under Subdivision 30-BA, and
  - the fund satisfies the requirements of Item 2.1.10 of the table in subsection 30-25(1).
8. The requirements of Item 2.1.10 that must be satisfied are that:
- the fund must be a public fund established and maintained **solely** for the acquisition, construction or maintenance of a school building; and
  - the building for which the fund is established and maintained must be used, or it must be intended that it will be used, as a school by a government, a public authority or a non-profit society or association as described in Item 2.1.10.

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<sup>2</sup> Gifts of \$2 or more to school or college building funds are, subject to the requirements of section 30-17, allowable deductions.

**What is a public fund?**

9. The school building fund must be a public fund. What constitutes a public fund is discussed in *Taxation Ruling TR 95/27 Income tax: public funds* (see paragraphs 5 to 7 of that Ruling).

**Meaning of ‘established and maintained solely’**

10. The word ‘solely’ refers to the purposes or objects for which the fund is established and maintained; that is, the fund must be established and maintained solely to acquire, construct or maintain a building that is used as a school by a qualifying body.

11. A fund will not satisfy Item 2.1.10 if it is established or is maintained with the intention of acquiring, constructing or maintaining a building:

- that is to be used both as a school by a qualifying body and for some other purpose (unless the use for that other purpose is integral to use of the building as a school, or is only minor or occasional);
- that is not to be used as a school; or
- that is to be used as a school but not by a qualifying body.

**What is a ‘building’?**

12. For the purposes of Item 2.1.10, a building is a permanent structure, roofed and usually with walls and flooring, that provides protection from the elements for students and teachers, and for relevant equipment and services the school provides and uses in its operation.

13. In the context of its use in Item 2.1.10, ‘building’ includes a part of a building, and fixtures of the type described in paragraph 14 of this Ruling. Part of a building may be added to an existing building, and in the context of Item 2.1.10 a gift deductible school building fund could have the purpose of acquiring, constructing or maintaining the addition where it is an addition to a building used as a school.

**Fixtures**

14. Fixtures that become part of a building for the purposes of Item 2.1.10 are items attached to a building so as to form part of it permanently or for an indefinite or substantial period of time rather than for a temporary purpose.

15. Examples of fixtures include ducted heating systems, fixed air conditioning systems and permanently fixed carpets. Items such as books, computers, furniture, training equipment and laboratory equipment that are not fixed to the building will not be a fixture for the purposes of this Ruling.

## **What is a ‘school or college’?**

16. For the purposes of Item 2.1.10, a ‘school or college’ is an institution that has as its primary function or essential purpose providing regular, ongoing and systematic instruction in a course of training that is not, or is no more than incidentally, recreational in character. It must be a place of education, imparting knowledge and training the minds of those who attend. Although every ‘school or college’ provides regular, ongoing and systematic instruction, not every provider of this type of instruction is a ‘school or college’.

17. A ‘school or college’ must be an institution, and so have a real, separate, institutional existence, even if within or as part of another institution, school or college.

18. The instruction or training provided by a school or college would generally be given by qualified persons, in accordance with a set curriculum, and with some form of student assessment and correction. A school or college is likely to provide instruction or training towards a qualification or result recognised more widely than solely by the institution itself.

## **What is a building ‘used or to be used as a school or college by a government, a public authority, or a non-profit society or association’?**

19. The use of a building as a school by a qualifying body requires the qualifying body to conduct a school for instruction or training as described in paragraphs 16 to 18 of this Ruling, and requires the building to be a place identifiable as the school conducted by the qualifying body. This requires the building to be **used as the school** and not just a place used for the purposes of or beneficial to the school.

### ***Building not used for instruction***

20. A building owned or controlled by a qualifying body which, if looked at in isolation, would not be considered to be a building used as a school because it is not specifically used for regular and systematic instruction can still be accepted as a building used as a school if:

- it forms an integral part of the operation of the school; and
- it is used for school purposes.

21. A building forms an integral part of the operation of a school by a qualifying body if it is used for activities that are not in themselves instructional but are part of or naturally go with the operation of the school.

22. A building used as a school can also include an element which, if it were a separate building or part of a building acquired, constructed or maintained on its own account, would not be accepted as being used as a school. However, the relevant element has to be an integral part – both in terms of its use and structurally – of a school building.

***Building used both as a school and for other purposes***

23. The requirement in Item 2.1.10 that a fund must be established and maintained solely to acquire, construct or maintain a building that is used as a school by a qualifying body does not mean that the building can never be used for or as anything else.

24. However, any other use of the building must be either integral to its use as a school, or be only minor or occasional other use. Whether other use is integral or is only minor or occasional is a question of fact.

25. In determining the extent of other use acceptable under Item 2.1.10, Taxation Ruling TR 96/8 considered in some contexts that a building (or part of a building) was used as a school provided any other use of the building was less than 50% on a time basis compared to the time for which the building was used as a school. This rule (the 'more than 50% use' rule) is no longer considered correct in law.<sup>3</sup>

*Other use that is 'integral to' use as a school*

26. Other use of a building is integral to its use as a school if it is for activities that are part of or naturally go with the operation of the school. Activities that are part of or naturally go with the operation of a school are decided on a case by case basis in light of all the facts and circumstances of the operation of the particular school.

*Other use that is 'minor or occasional'*

27. Other use of a building is 'minor or occasional' if its use other than as a school by the qualifying body or some other entity is minor in quantitative terms (even if regular) or only occurs from time to time.

28. Any 'minor or occasional' use other than as a school must not:

- materially limit or affect the use of the building as a school;
- materially affect the cost of acquiring, constructing or maintaining the building; or
- otherwise be a material purpose of the fund.

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<sup>3</sup> The date of effect of this ruling, discussed at paragraphs 75 to 77, means it has a solely prospective effect so that the 'more than 50% rule' is only inapplicable for gifts to school building funds on and after the date the final ruling issues. It continues to apply for gifts before the date of effect of the final ruling.

29. Where a building has been purposely adapted to allow use other than as a school, and the adaptation is materially inconsistent with or beyond what is required for its use as a school, that other use will not be 'minor or occasional'.

## ***Multi-purpose complexes***

30. A building (or a part of a building) in a multi-purpose complex must satisfy the same requirements as any other building before it can be characterised as a building used as a school. These requirements are discussed in paragraphs 12 to 29 of this Ruling.

31. Where use of an area such as a common area in a multi-purpose complex is shared by a school with others, the school building fund can only use its funds to contribute towards the cost of that common area if it is used as a school – that is, where any other use is either integral to its use as a school, or is only minor or occasional other use (see paragraphs 26 to 29 of this Ruling).

32. A donation directly to a school building fund for a building (or part of a building) which is used as a school even though it is also part of a multi-purpose complex is tax deductible. However the school building fund must not be for the acquisition, construction or maintenance of any part of the multi-purpose complex that is not used as a school.

## **Qualifying bodies**

33. For the purposes of Item 2.1.10, the use of a building as a school must be by a government, by a public authority, or by a society or association which is carried on otherwise than for the purposes of profit or gain to the individual members of the society or association.

34. The use of a building as a school by a government or a public authority requires identification of the government or the public authority as the user of the building as a school. The use of a building as a school by a body that is a non-profit society or association is determined by reference to the constituent and governing documentation of the organisation and to its actual activities and operations.

35. Multiple trustees do not, as such, constitute a society or association. Consequently, a school that is conducted by several trustees is not, by that fact alone, conducted by a society or association. However, where trustees conducting a school act for and according to the purposes of a society or association, that society or association may be regarded as conducting the school through the trustees. In these circumstances, the society or association can be regarded as using as a school a building the trustees use as the school.

**Multi-purpose fundraising appeals**

36. A donation to a gift deductible school building fund can only be deductible if the donation is established by the donor at or before the time the gift to the school building fund is made.

37. If a donation to a school fundraising appeal is partly for a school building fund and partly for other purposes, the part that is intended as a gift to the school building fund will only be tax deductible if the donor establishes how the donation is to be allocated at or before the time the donation to the appeal is made.

38. A donation will not be tax deductible if an entity other than the donor determines the amount that is to be allocated to the school building fund and the donor does not approve or direct the allocation by or at the time the gift is made. For example, a donor who gifts a single amount to multiple funds cannot claim a tax deduction if the fundraisers are the ones who decide, after the time the gift is given, the amount or proportion to be allocated to the school building fund. If the relative proportion of a donation which will be allocated to the school building fund is specified by the fundraisers before the donation is made and the donation is made by the donor on that basis, it will be accepted that the donor has approved or directed the allocation at the time the gift was made.

**Fund administration**

39. Where the relevant endorsed entity is not the gift deductible school building fund itself, it must maintain a separate gift fund for donations and contributions to the school building fund (unless it is an ancillary fund).

40. A school building fund cannot be used for purposes other than the purpose of acquiring, constructing or maintaining a building that is used, or to be used, as a school by a qualifying body.

41. All donations to the school building fund must go into the fund. The fund may also include other amounts (such as income from interest on amounts in the fund, or earnings from minor or occasional use of the building other than as a school), but it cannot include general school revenue.

**Ancillary funds**

42. A school wanting to raise money for a range of purposes that would individually satisfy deductible gift requirements can establish an ancillary fund, gifts to which are deductible under Item 2 of the table in section 30-15.

43. Taxation Ruling TR 95/27 explains the requirements that a fund must satisfy in order to be an ancillary fund. The gift is deductible when made because it is a gift to a qualifying ancillary fund, not because a part of it then goes to a school building fund.



## **Disbursements from a school building fund**

44. Only disbursements that are directly and essentially related to the acquisition, construction or maintenance of a building used as a school are legitimate charges against a school building fund. For the purposes of this Ruling, disbursements related to acquiring, constructing or maintaining of a building used as a school are disbursements that are related to:

- obtaining the use of a building for the purpose of using it as a school;
- keeping the building fit for that purpose; and
- fund administration costs as outlined at paragraphs 53 to 55 of this Ruling.

## ***Acquisition and construction costs***

45. Acquisition costs include the costs incurred in negotiating, completing and financing the purchase of a building to be used as a school, and the repayment of the capital of, and interest charges on, a loan incurred in the purchase of the building.

46. The cost of land that is directly required for the construction of a building to be used as a school is also a legitimate charge against a school building fund as a cost of the school building if the entity purchasing the land is, at the time of acquisition of the land, committed to commencing construction within a reasonable period.

## ***Maintenance costs***

47. For the purposes of Item 2.1.10, maintenance of a school building means keeping the building in proper or good condition.

48. To be an acceptable maintenance disbursement from a school building fund, the disbursement must relate only to the maintenance of the school building and not to:

- changes to the structure of the building (although these could relate to acquiring or constructing a part of a school building, and so be included in the purpose of the fund) or
- general operating costs of a school such as water and electricity charges (which cannot be included in the purposes of a gift deductible school building fund).

Acceptable maintenance disbursements include:

- the cost of cleaning the school building;
- insurance premiums for the school building (but not the contents); and

- repairs, painting and plumbing upkeep on the school building.

49. Maintenance of a school building does not include the maintenance of sports equipment, playgrounds, sports fields, landscaping or car parks, as these are not school buildings, even if they are required elements of the school complex for the purposes of obtaining or maintaining necessary local government approval (such as of building plans).

50. Where maintenance costs relate in part to a school building and in part to maintenance of something else, a reasonable apportionment of those costs is acceptable in establishing that the school building fund is liable only for the part that relates to the school building.

### ***Security costs***

51. The cost of acquiring or constructing a building includes the cost of installing and maintaining security alarms and lighting, and window and door security such as grilles, provided the items are part of, or a fixture to, the building that is used as a school.

52. Expenditure on non-fixture items such as security guards, guard dogs, mobile communications and similar equipment are not acceptable disbursements as it is not on the acquisition, construction or maintenance of a school building.

### ***Fund administration costs***

53. Administration costs that are an acceptable charge against the fund are limited to costs paid in an arms length transaction specifically and solely to establish or maintain the fund (and for no other purpose). These include:

- direct costs of establishing or promoting the fund, such as advertising costs;
- direct costs of operating the fund, such as bank charges, stationery costs and accounting and audit fees relating specifically to the fund;
- fees paid for professional direction of a planned giving or fundraising program specifically for the fund; and
- the remuneration of a fund administrator specifically to administer the fund.

54. Fund administration costs that are not acceptable and must not be disbursed from a school building fund include general administration costs that the school would incur regardless of the existence or otherwise of the fund.

55. Excessive fund administration costs can indicate that the sole purpose of the fund is not to acquire construct or maintain a school building.

### ***Buildings on land that is leased***

56. A building on land that is leased can be a building that is acquired for the purposes of Item 2.1.10. The building is considered to have been acquired at the time the lease was entered into. A building on land that is leased can also be a building that is constructed for the purposes of Item 2.1.10.

57. Rent or lease payments are acceptable expenditure of the fund as long as they are no more than the fair rent or appropriate payment for the period over which the building is to be used as a school.

58. The requirement that the fund provides money solely for the acquisition, construction or maintenance of the building will not be met where the rent or lease payments are part of arrangements that provide for use of the land or buildings other than as a school (unless that other use is integral to use as a school or no more than minor or occasional). Similarly, construction costs must not provide for use of the building other than as a school (unless that other use is integral to use as a school or no more than minor or occasional).

59. Maintenance of a building on leased land is also acceptable expenditure unless that expenditure is directed not only to maintenance arising while the building is used as a school but to maintenance in other periods as well.

### **Investments by school building funds**

60. A school building fund can invest or lend its funds provided the investment or loan is:

- a bona fide and temporary application of funds that will assist the fund to achieve its objects within a reasonable period of time; and
- integral to the purpose of the fund.

This will be a question of fact in the circumstances of each case.

## Examples

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### **Example 1: what is a building?**

61. *Primary School intends building an indoor sports complex on school grounds as part of its facilities to support its sports curriculum. The complex will include a gym, a basketball court and an in-ground swimming pool, all enclosed by walls and a roof. The complex (including the in-ground swimming pool) is a building for the purposes of Item 2.1.10 as it is a permanent structure forming an enclosure that provides protection from the elements. Acquiring, constructing or maintaining the indoor sports complex can be included in the purposes of a gift deductible school building fund.*

### **Example 2: building integral to the operation of a school**

62. *Country College constructs a stand alone toilet block adjacent to a building containing several classrooms. The toilet block is for the use of students, teachers and visitors to the school. The toilet block is not used for instruction but forms an integral part of the operation of the school and as such is a building used as a school for the purposes of Item 2.1.10. Acquiring, constructing or maintaining the stand alone toilet block can be included in the purposes of a gift deductible school building fund.*

### **Example 3: building integral to the operation of a school**

63. *Religious College, a denominational school, plans to build a chapel on college grounds. The chapel will only be used by teachers and students for religious services and prayer as part of the conduct of the school. The chapel is integral to the operation of the denominational school and as such is a building used as a school. Acquiring, constructing or maintaining the chapel can be included in the purposes of a gift deductible school building fund.*

### **Example 4: building integral to the operation of a school**

64. *ABC Primary School has a school tuck-shop facility operated during school time for students and teachers. Orders are taken by the tuck-shop and delivered appropriately during school time to support and not conflict with school activities. The tuck-shop, considered in isolation, is not used as a school, but it forms an integral part of the operation of the school and is used for school purposes. The tuck shop facility is a building used as a school for the purposes of Item 2.1.10. Acquiring, constructing or maintaining the tuck-shop can be included in the purposes of a gift deductible school building fund.*

**Example 5: building not integral to the operation of a school**

65. *XYZ School has a facility that makes food available for purchase during school time by students and teachers. However, unlike ABC Primary School in Example 4, XYZ School has a take-away food facility, owned by the school and operated adjacently to it, but equally available to the non-school community and also operating at times and on days when the school does not operate. The take-away food facility is not integral to the operation of the school and as such is not a building used as a school for the purposes of Item 2.1.10. Acquiring, constructing or maintaining the take-away food facility cannot be included in the purposes of a gift deductible school building fund.*

**Example 6: building not integral to the operation of a school**

66. *Junior Primary School decides to support working parents in its school and local community by building and operating a child care centre from a stand alone building on school grounds. The child care centre offers before and after school care to the students of the school but it is also open to the public and offers care to students of other schools or of no school. As a child care centre, it is not a school for the purposes of Item 2.1.10 and the centre building will not be used as a school. Although it is available to school students for after school care, the centre is available for public use and the centre building is materially adapted for its use as a child care centre. As such, acquiring, constructing or maintaining the child care centre building or its equipment or fixtures cannot be included in the purposes of a gift deductible school building fund.*

**Example 7: other use that is integral to use as a school**

67. *123 State School uses its classrooms after school hours several times a year to enable teachers to conduct parent-teacher interviews. Although the use of the classrooms in this way is use of a building, or part of a building, for an activity that is not instructional, it is integral to the operation of the school. It does not affect the characterisation of the classrooms as a building or part of a building used as a school. Acquiring, constructing or maintaining the classrooms can be included in the purposes of a gift deductible school building fund.*

**Example 8: other use that is integral to use as a school**

68. *As a service to parents of its students, Little Primary School provides a supervised before and after school care service for its students. This care does not involve the provision of any instruction or training. Little Primary School uses the existing school hall and facilities. Although the use of the school hall is use for an activity that is not instructional, it is use that is integral to the operation of the school. Acquiring, constructing or maintaining the school hall can be included in the purposes of a gift deductible school building fund.*

**Example 9: other use that is minor or occasional**

69. *Academic State School hires out some of its classrooms for one morning every weekend to a local community group that conducts a yoga class. Existing furniture is rearranged and any additional equipment required is brought in by the community group. Whilst this use is not use as a school, it is minor or occasional (though regular) and does not affect use of the building as a school building. As such, it does not affect the characterisation of the building as a building used as a school, so acquiring, constructing or maintaining the classrooms can be included in the purposes of a gift deductible school building fund.*

**Example 10: other use that is minor or occasional**

70. *The school committee of Big College has decided to allow use of its newly constructed school hall outside of school hours to generate additional funds. A Rotary Club meeting is held at the facility once a week on a weekday evening. Two or three times in the year, this will need to be changed to another night or venue when a school function requires use of the facilities. In addition, a local repertory group will produce plays to be performed at the facility four times a year, with sessions each evening for a period of 2 to 3 weeks each time. A local ladies fitness group will also use the facility one evening each fortnight. Although these uses are not use as a school, they are minor or occasional (even if considered collectively) and do not affect the characterisation of the building as a building used as a school. Acquiring, constructing or maintaining the hall can be included in the purposes of a gift deductible school building fund.*

**Example 11: other use that is minor or occasional**

71. *Religious College from Example 3 changes its plans for the chapel. Although it will still be for use by its teachers and students for religious services and prayer it will also be available for public hire for the conduct of wedding services, but only on weekends and only when it is not required for school purposes. The building will not require any special adaptations or modifications to cater for this.*

*The proposed use of the chapel on weekends for weddings is minor or occasional other use as it is not significant, it will not limit or affect the use of the building as a school, and it will not affect the cost of acquiring, constructing or maintaining the building.*

**Example 12: other use that is not integral to use as a school nor minor or occasional**

72. *Exceptional College is a school of 1,000 students conducted by a qualifying body that is also affiliated with a related church body. Exceptional College intends to construct a large auditorium with a 3,000 seat capacity. Considerable expenditure will be incurred on items such as lighting and staging equipment so that the auditorium can be used for public church services that will be held every weekend. The auditorium complex will include administration offices solely for church use and a gift shop. Exceptional College will use the auditorium for college assemblies, student award presentations and the occasional student artistic presentation.*

*The intended use of the auditorium complex does not meet the requirements of Item 2.1.10. Although the school will use the auditorium, it will also be used and will be materially adapted for use for public church services much beyond what is needed for school use. Use for church services is not integral to the operation of Exceptional College, will be regular and not minor in quantitative terms. As such, the use of the auditorium other than as a school is not integral or minor or occasional to its use as a school. Acquiring, constructing or maintaining the auditorium complex or its equipment or fixtures, including the church offices and the gift shop, cannot be included in the purposes of a gift deductible school building fund.*

**Example 13: acquisition and construction costs**

73. *Secondary College plans to acquire four house properties on land next to the College grounds with a view to demolishing them to make way for a new classroom building. It has a development plan for the new building professionally prepared, and intends using funds from a school building fund it has already established. Acquisition of the house properties takes some time: two are acquired almost immediately, but despite ongoing activity by the College to seek their acquisition the remaining two prove more difficult to acquire. The College committee decides to rent the acquired houses until the other two have been acquired. After 18 months, all houses are acquired and demolished in order to allow construction to begin.*

*Although the funds used to acquire the house properties are not actually used to acquire or construct a building to be used as a school, they are used to take the first step towards that end. Use of the funds to purchase the house properties is acceptable, as there is a clear and evident intention to acquire all four houses in a timely manner, for construction to begin when all the houses are acquired, and for this to occur within a reasonable period from when they are all acquired.*

## Previous Ruling

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74. This Ruling replaces *Taxation Ruling TR 96/8 Income tax: school and college building funds*. It clarifies the Commissioner's position on issues that have arisen since the issue of TR 96/8 and considers emerging issues for school building fund arrangements. In particular, it explains a change in the Commissioner's position on how to determine whether a building is used as a school building.

## Date of effect

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75. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the 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 Ruling (see paragraphs 75 to 77 of *Taxation Ruling TR 2006/10 Income tax, fringe benefits tax and product grants and benefits: Public Rulings*).

76. Gifts made before the final Ruling issues to funds which had a purpose of acquiring, constructing or maintaining buildings which were school buildings only by application of the former 'more than 50% use' rule will continue to be treated as having been made to a gift deductible school building fund. After the final Ruling issues, the former 'more than 50% use' rule cannot be applied in ascertaining whether a fund is a gift deductible school building fund. From that time, a fund which has a purpose of acquiring, constructing or maintaining buildings which are not school buildings unless the 'more than 50% use' rule is applied will not be a gift deductible school building fund in relation to any further gifts to it.

77. The Commissioner invites comments on the implications (on matters such as existing or planned acquisitions or construction of buildings) of using the issue date of the final Ruling as the date from which the 'more than 50% use' rule can no longer be applied.

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**Commissioner of Taxation**5 December 2011

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## Appendix 1 – Explanation

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

### Legislation

78. Item 2.1.10 of the table in subsection 30-25(1) provides that gifts to a school building fund are deductible, subject to fund endorsement requirements being met, if the fund is:

a public fund established and maintained solely for providing money for the acquisition, construction or maintenance of a building used, or to be used, as a school by:

- (a) a government; or
- (b) a public authority; or
- (c) a society or association which is carried on otherwise than for the purposes of profit or gain to the individual members of the society or association.

79. In effect, there are three requirements for a fund to qualify as a gift deductible school building fund:

- the fund, or the entity that legally owns the fund, or the government body constituted by the persons who control the fund, must be endorsed by the Commissioner under Subdivision 30-BA;
- the fund must be a public fund established and maintained solely for providing money for the acquisition, construction or maintenance of a school building; and
- the building for which the fund is established must be used, or it must be intended that it will be used, as a school by a government; a public authority; or a society or association which is carried on otherwise than for the purposes of profit or gain to the members of the society or association.

### What does endorsement under Subdivision 30-BA require?

80. A gift to a school building fund that meets the requirements of Item 2.1.10 is deductible if the fund is:<sup>4</sup>

- an entity or government entity endorsed by the Commissioner under Subdivision 30-BA as a deductible gift recipient; or

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<sup>4</sup> Section 30-17. The requirement for endorsement under section 30-17 was introduced by the *A New Tax System (Tax Administration) Act 1999* and applies for the purposes of deductibility of gifts made on or after 1 July 2000.

- legally owned by an entity endorsed under Subdivision 30-BA as a deductible gift recipient for the operation of the fund; or
- under the control of one or more persons who constitute a government entity that is endorsed under Subdivision 30-BA as a deductible gift recipient for the operation of the fund.

Gifts cannot be deductible if the fund is not endorsed in such a way, even if the fund otherwise meets the requirements of Item 2.1.10.

81. An entity is entitled to endorsement by the Commissioner under Subdivision 30-BA if it meets the requirements of that Subdivision. The requirements in Subdivision 30-BA, including those discussed in further detail in paragraphs 83 to 85 of the Explanation, must be met both at the time of endorsement and at all later times as they are continuing requirements.

82. For a gift deductible school building fund:

- the entity to be endorsed must have an ABN (paragraphs 30-125(1)(a) and (2)(a));
- the fund must not be described by name in Subdivision 30-B as a gift deductible entity (paragraph 30-125(1)(b) and subsection 30-125(2)) as if it is described in this way gift deductibility will be in accordance with that provision of the law and not Item 2.1.10;
- the fund must be required (by law, by its constituting or governing documents or by its rules) to transfer the following assets to another gift deductible fund if the organisation is wound up or its endorsement is revoked<sup>5</sup> (paragraphs 30-125(1)(c) and (2)(d) and subsections 30-125(6) and (7)):
  - surplus gifts and deductible contributions made for the principal purpose of the organisation; and
  - money received by the organisation because of such gifts or contributions.

83. If the entity that is endorsed is not the gift deductible school building fund itself, but is the entity that legally owns the fund, or is the government body constituted by the persons who control the fund, the entity must:

- maintain a gift fund receiving all gifts made for the principal purpose of the fund, and receiving no other amounts;

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<sup>5</sup> Unless it is established by an Act and that Act (or another Act) does not provide for winding up or termination: paragraphs 30-125(1)(c) and 30-125(1)(d).

- use that fund only for the principal purpose of the fund (section 30-130) – that is, a gift deductible school building fund must be established and maintained solely for the purpose of providing money for the acquisition, construction or maintenance of a school building (as described in Item 2.1.10);
- the gift fund of an endorsed entity owning a gift deductible school building fund must receive all fund gifts and the gift fund must be used only for providing money for the acquisition, construction or maintenance of a school building as described, or to pay any balance to another gift deductible fund if the gift deductible school building fund is wound up or if relevant endorsement is revoked.

84. Guidance on the gift fund requirements for a deductible gift recipient is provided in the publication *GiftPack* (NAT 3132), which is a publication listed in the Schedule of documents containing precedential ATO views. The former ruling on gift fund requirements, Taxation Ruling TR 2000/12 *Income tax: deductible gift recipients – the gift fund requirement*, was withdrawn by TR 2000/12W as it was no longer current after the gift fund requirements were relaxed under amendments made by *Tax Laws Amendment (2006 Measures No 7) Act 2007*.

85. Any applicable endorsement may be revoked with effect from as early as the day on which the entity first ceased to be entitled to endorsement (section 426-55 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953)).

## What is a public fund?

86. The requirements for a fund to be a public fund are discussed in Taxation Ruling TR 95/27 (in particular see paragraphs 5 to 7 of that Ruling). Although the explanation in the Ruling considers the requirements under former subsection 78(4) of the *Income Tax Assessment Act 1936* (ITAA 1936), it applies equally to a public fund as specified in Item 2.1.10. Gifts to a school building fund which is not a public fund will not be deductible.

## Meaning of ‘established and maintained solely’

87. In order to come within the scope of Item 2.1.10, the public fund must be established and maintained *solely* to provide money for the acquisition, construction or maintenance of a building used as a school by a qualifying body.

88. Item 2.1.10 replaces Item 2.1.10 in table 2 of former subsection 78(4) of the ITAA 1936 for gifts made on or after 1 July 2000. It is in substantially the same terms as the replaced provision, except that it requires the fund to be established ‘solely’ rather than ‘exclusively’ for the relevant purpose.

89. Subsection 1-3(2) states that where provisions have been rewritten and different wording is used as a result, the ideas are not taken to be different simply because different forms of the words are used. Neither the legislation itself nor the explanatory memorandum to the Bill that introduced the current provision<sup>6</sup> indicate that the use of 'solely' in place of 'exclusively' was intended to achieve a change in the operation of the provision.

90. The word 'solely' is not defined in the legislation, so it takes its ordinary meaning. The *Australian Oxford Dictionary*<sup>7</sup> defines 'solely' to mean 'one and only; single. exclusive...'. The *Macquarie Dictionary*<sup>8</sup> defines it to mean 'exclusively or only'.

91. The Commissioner's view is that the use of 'solely' in the new provision in place of 'exclusively' in the replaced provision has not changed the operation of the provision. As a result, judicial consideration of the meaning and effect of 'exclusively' in earlier or similar provisions applies equally to the meaning and effect of 'solely' as it is used in Item 2.1.10.

92. In *Cobb & Co Ltd v. Commissioner of Taxation* (1959) 101 CLR 333; (1959) 12 ATD 111; 7 AITR 534 (*Cobb & Co Ltd*), Windeyer J considered the meaning and effect of the word 'exclusively' in the phrase 'a public fund established and maintained exclusively for providing money for the acquisition, construction or maintenance of a building used or to be used as a school' by a qualifying body.

93. He concluded that 'exclusively' referred to the purposes or objects for which a fund was established or maintained rather than the use of the building acquired with the fund money. To come within the provision, the fund had to be established and maintained exclusively to provide money for the acquisition, construction or maintenance of a building used as a school – not for a building used exclusively as a school. He said at CLR 336-7; ATD 113; AITR 536:

The word 'exclusively' in the Act properly refers to the purposes or objects for which the fund is established or maintained. It does not refer to the use of the building. For example, a fund to acquire a building and also to provide books, etc, would be outside the provision, and so would a fund for the acquisition of a building and the endowment of a scholarship. But to be within the provision a building has only to be used as a school.

94. Windeyer J clearly holds that 'exclusively' properly refers to the purpose or objects for which the fund is established or maintained; that is, to provide money to acquire, construct or maintain a building that is used as a school by a qualifying body.

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<sup>6</sup> Explanatory Memorandum to the Tax Law Improvement Bill 1997.

<sup>7</sup> *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

<sup>8</sup> *The Macquarie Dictionary*, 2001, rev. 3<sup>rd</sup> edn, The Macquarie Library Pty Ltd, NSW.

95. The same analysis applies to the function of the word ‘solely’ in the current provision. It serves to exclude from the scope of the provision a fund that is established or is maintained with the *purpose* of acquiring, constructing or maintaining a building:

- that is to be used both as a school by a qualifying body and for some other purpose unless the use for that other purpose is integral to use as a school, or is only minor or occasional. (What is ‘integral’ or ‘minor or occasional’ is discussed at paragraphs 150 to 164 below);
- that is not to be used as a school; or
- that is to be used as a school but not by a qualifying body.

96. In these circumstances, the requirements of Item 2.1.10 will not be satisfied. To satisfy Item 2.1.10 the fund has to be established and maintained *solely* for the acquisition, construction or maintenance of a building used as a school.

97. The effect of the word ‘exclusively’ in circumstances where it was used to qualify the words ‘established and carried on’ was discussed in *SSAU Nominees Pty Ltd v. Federal Commissioner of Taxation* [1986] VR 355; 82 FLR 379. The issue in that case concerned a sales tax exemption for ‘goods for use... by a society, institution or organization established and carried on exclusively or principally for the promotion of the interests of a university or school conducted by an organization not carried on for the profit of an individual’. Ormiston J said that when a term such as ‘exclusively’ qualifies the expressions ‘established’ and ‘carried on’, the purpose for which the organisation is established or carried on must be tested with reference to the exclusive purpose that is described in the item. He noted that the inquiry in the case was concerned with whether SSAU Nominees Pty Ltd was established and then carried on exclusively (or principally)<sup>9</sup> for the purpose of promoting ‘the interests of a university or school conducted by an organization not carried on for the profit of an individual’ – this was the purpose as described in the relevant item.

98. To a similar end, the presence of ‘solely’ in Item 2.1.10 confines the purpose or object for which the fund was established and is maintained to the purpose stipulated in the item – that is, for a building used, or to be used, by a qualifying body and as a school. The term ‘solely’ means the intended use of the building (or part of a building) as a school forms part of the purpose or object of the fund. The language of the provision does not separate the building from its intended use.

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<sup>9</sup> Unlike Item 2.1.10 which refers only to ‘solely’, the case considered the operation of Item 63B(1) in Div. X of the First Schedule to the *Sales Tax (Exemptions and Classifications) Act 1935* where exemption from liability for sales tax was based on an examination of goods for use ‘exclusively or principally’.

99. As such, a fund which is established or maintained for any purpose other than the stipulated purpose is excluded from the operation of the provision. The stipulated purpose includes things incidental to but not collateral to or independent of that purpose. So, for instance, the purpose of meeting conveyancing costs of acquiring a school building would ordinarily be part of the purpose of acquiring that building.

### **What is a ‘building’?**

100. The word ‘building’ is not defined for the purpose of ITAA 1997 so its ordinary meaning is applied unless the statutory context indicates otherwise.

101. The *Australian Oxford Dictionary*<sup>10</sup> defines building to mean:

1. a permanent fixed structure forming an enclosure and providing protection from the elements etc (e.g. a house, school, factory or stable).

102. In *Cobb & Co Ltd*, Windeyer J considered the meaning of ‘building’ in a former school building fund deduction provision.<sup>11</sup> He said at CLR 337:

Numerous cases were cited to show that sometimes a wall or an embankment or similar structure falls within the term ‘building’; and sometimes it does not. I need not go through the cases. In each of them the meaning of ‘building’ depended upon its context and the circumstances and purpose of the particular instrument in which it appeared. No doubt a stone wall is built; and in that sense it is a building. No doubt too the school oval could be said to have been built... But, for the purposes in hand, this involves a strained and inappropriate use of the word ‘building’. And moreover, what I have to consider is the meaning of the composite expression ‘building used or to be used as a school’.

103. In the context of its use in Item 2.1.10, a building does not include everything that may be described as built in some sense of that word. For the purposes of the item, a building is a permanent structure of a kind that provides protection from the elements for students, teachers, and relevant equipment and services the school provides and uses in its operation. It is roofed and usually with walls and flooring (but see paragraph 106 of this Ruling).

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<sup>10</sup> *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

<sup>11</sup> Former subparagraph 78(1)(a)(xv) of the ITAA 1936.

104. In the context of its use in Item 2.1.10, 'building' extends to include a part of, and fixtures to, such a building. This means a gift deductible school building fund may be directed not only to acquiring, constructing or maintaining an entire building (or several such buildings) but to acquiring, constructing or maintaining a part of a building, such as an addition to a building, or fixtures to a building, if the part, the addition or the fixtures are used or are part of what is used as a school by a qualifying body.

105. A structure such as an outdoor swimming pool, a sports oval or a tennis court does not come within Item 2.1.10 as it is not a structure forming an enclosure and providing protection from the elements. However, an indoor swimming pool (surrounded by walls and a roof) that is a building or a part of a building and used as a school would qualify.

106. Although a building would usually be expected to have walls, flooring and a roof, there are circumstances where a structure can be accepted as a building for the purposes of Item 2.1.10 even if it does not have walls. For example, a covered outdoor learning area that does not have any walls but is made of galvanised steel with colour bond roofing, has guttering and downpipes, and is fixed to the land by posts embedded in a concrete floor might be used for outdoor classes of a school and school assemblies. Even though it does not have walls, it is a building for the purposes of Item 2.1.10 because it is in the nature of a building: it is a structure with the function of a building used as a school (albeit with an atypical design influenced by environmental and particular operational factors), it is fixed to the ground, it has a roof and its size and method of construction indicate that it is not intended to be in place on an interim or short term basis or for a temporary purpose.

### **Fixtures**

107. In *Australian Provincial Assurance Co. Ltd. v. Coroneo* (1938) 38 S.R. (N.S.W.) 700,<sup>12</sup> Sir Frederick Jordan said at 712:

The question whether a chattel has become a fixture depends upon whether it has been fixed to land, and if so for what purpose. If a chattel is actually fixed to land to any extent, by any means other than its own weight, then prima facie it is a fixture;... the test of whether a chattel which has been to some extent fixed to land as a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period... or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose...

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<sup>12</sup> Quoted with approval by Lockhart J in *Feltex Commercial Interiors Pty Ltd v. Federal Commissioner of Taxation* (1990) 90 ATC 4925; (1990) 21 ATR 920.

108. Fixtures to a building that become part of a building for the purposes of Item 2.1.10 are items that are attached to a building so as to form part of it permanently or for an indefinite or substantial period of time rather than for a temporary purpose.

109. They ordinarily include ducted heating systems, fixed air conditioning systems and carpets permanently fixed to the floor. The fact that an item cannot be detached from the building without substantial damage to the item or to the building is a strong indication of the item being attached to the land as a fixture.

110. Non-fixture elements in fitting out a school ordinarily include computers, furniture, training equipment and laboratory equipment. Although these items may be expensive and substantial, they do not come within the scope of Item 2.1.10 if they are not fixtures.

111. Where a fund is for the 'acquisition, construction or maintenance' of only part of a building, or for fixtures which form part of a building, that part of the building or the building of which it or the fixtures form a part must be used as a school.

### **What is a 'school or college'?**

112. As the ITAA 1997 does not define the words 'school' and 'college' or the composite term 'school or college', their ordinary natural meaning applies.

113. In the *Australian Oxford Dictionary*,<sup>13</sup> the principal definition of 'school' is 'an institution for educating or giving instruction, especially for children'. A 'college' is defined as 'an establishment for further or higher education, sometimes part of a university'.

### **'Institution'**

114. In *Stratton v. Simpson* (1970) 125 CLR 138, Gibbs J considered the meaning of 'institution' and said at 157-159:

In its ordinary sense 'institution' means 'an establishment, organisation, or association instituted for the promotion of some object, especially one of public utility, religious charitable, educational etc' (The Shorter Oxford English Dictionary). It means, as was said in *Mayor etc of Manchester v McAdam*, 'an undertaking formed to promote some defined purpose...' or 'the body (so to speak) called into existence to translate the purpose as conceived in the mind of the founders into a living and active principle'. Although its meaning must depend on its context, it would not ordinarily connote a mere trust'.

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<sup>13</sup> *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.



115. For the purposes of this Ruling, the word ‘institution’ is used in the sense described by Gibbs J in the preceding paragraph. In addition, although no particular structure is prescribed for an institution, the decision in *Pamas Foundation (Inc) v. DFC of T*<sup>14</sup> makes it clear that it involves more than mere incorporation.

### **‘School or college’**

116. Although there are no court or tribunal decisions on the meaning of ‘school’ or ‘college’ in the context of the school building fund deduction provisions, there are a number of decisions in other contexts that help guide interpretation for the purposes of these provisions.

117. In *Cromer Golf Club Limited v. Downs and Another* (1973) 47 ALJR 219; [1972-73] ALR 1295 (*Cromer*) Barwick CJ interpreted the meaning of ‘school’ in its use in a provision of the *Public Works Act 1912* (NSW) that allowed the resumption of land for school sites. That use did not depend on a specific definition of ‘school’ and so its interpretation depended on its ordinary meaning in light of that legislative context. The meaning of ‘school’ in the context of resumption of a site required a use apt to include all the different things that might properly be included in the site of a school, not just its buildings or structures. He said at ALJR 221; ALR 1299:

It seems to me that a ‘school’ is a place where people, whether young, adolescent or adult, assemble for the purpose of being instructed in some area of knowledge or of activity. Thus there are drama schools, ballet schools, technical schools, trade schools, agricultural schools and so on.

118. In *Barry v. Hughes (Inspector of Taxes)* [1973] 1 All ER 537 (*Barry v. Hughes*) Pennycuik VC took a more restrictive approach when he considered the meaning of ‘educational establishment’ (which term, in the context of the legislation he was considering, included a university college or school) in order to determine whether child allowance could be given to a child on the basis that they attended a ‘university, college, school or other educational establishment’. The child attended a full time intensive training unit which primarily involved on the job training in factory process work but also included brief periods of academic instruction. Pennycuik VC distinguished education (including education in a trade or profession) in an educational establishment of any kind from instruction in purely manual work skills, saying at 543:

...an educational establishment must, I think, be an establishment whose primary function is that of education. In this context, and especially against the background of the legislation which has now culminated in s 10 of the 1970 Act, I think it is clear that ‘education’ denotes training of the mind, in contradistinction to training in manual skills.

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<sup>14</sup> (1992) 35 FCR 117; 92 ATC 4161; (1992) 23 ATR 189.

119. Pennycuik VC's comments in *Barry v. Hughes* were used by the Board of Review in *Case M11 80 ATC 78 (Case M11)* to support a decision that in offering its Professional Year programme, the Institute of Chartered Accountants in Australia was not a school, college, university or other place of education within the meaning of those terms as contained in then subsection 159U(5) of the ITAA 1936. Member Voumard (with whom the other members agreed) said at ATC 82;

There is a statement in *Barry v. Hughes* (supra, at p. 543) that 'an educational establishment must be an establishment whose primary function is that of education'. I would not have thought education was the primary function of the Institute. Its principal objects, as set out in para. 3 of its Supplemental Royal Charter (Exhibit D), are 'to advance the theory and practice of accountancy in all its aspects, including in particular auditing and financial management; to recruit, educate and train a body of members' (not, be it noted, candidates for membership) 'skilled in these arts; to preserve at all times the professional independence of accountants in whatever capacities they may be serving; to maintain high standards of practice and professional conduct by all its members; and to do all such things as may advance the profession of accountancy whether in relation to public practice, industry, commerce, the public service, or otherwise.' On any view of this statement it could not be said that education is the Institute's primary function, and this provides another reason for finding that it is not a 'place of education'..

120. Similarly, in *Taxation Case P17 82 ATC 72; Case 81 25 CTBR (NS) 608 (Case P17)*, the Board of Review concluded that specialised and general engineering workshops that enabled a pilot to retain his pilot's licence did not take place at 'a school, college, university or other place of education...' within the meaning of those terms as contained in subsection 159U(5) of the ITAA 1936. The specialised course was held at the premises of a large engineering firm, and the general course was held at the commercial complex of a business which also provided pilot training for some of its employees as an adjunct only to its main business. The Board of Review concluded that the premises were neither a 'school' nor an 'other place of education'. In reaching its decision, the Board of Review took account of the decisions in *Case M11*, *Barry v. Hughes* and *Cromer*.

121. The collocation of the words 'school, college, university' in the provision considered in *Case P17*, and the general concept of a school being a place of organised or systematic instruction given on a regular and continuing basis, were cited as factors that narrowed the relevant meaning of school. The Board of Review said at ATC 76, CTBR 612:

...for the purposes of the definition of 'prescribed course of education', a 'school' does not have its ordinary or general meaning ...a need for a narrower meaning to be attributed to the word flows necessarily from its placement immediately before the words 'college, university...', which connote places of instruction in ascending order of educational gradation. ... a 'school' should be regarded as a place (not being a college or university) at which

organised or systematised instruction, usually in class form, is given on a regular and a continuing basis.

122. The later decision of the Full Federal Court in *Commissioner of Taxation v. The Leeuwin Sail Training Foundation Limited* (1996) 68 FCR 197; (1996) 96 ATC 4721; (1996) 33 ATR 241 (*Leeuwin*) could be seen as casting some doubt on the narrower view adopted by the Board of Review in *Case P17*. In *Leeuwin*, the issue was whether a body running a sail training ship was conducting a school for the purposes of a sales tax exemption provision that contained the composite term ‘school or university’.<sup>15</sup> The sail training operation consisted of highly structured short courses largely conducted on board but with preparatory material and training, and with formal appraisal during and after each training voyage.

123. The Court concluded that the collocation of ‘school’ and ‘university’ did not limit the ordinary natural meaning of ‘school’, and found that the body was conducting a school within that meaning, citing the decision in *Cromer* in support of the position taken. In their joint judgment, Northrop and Finn JJ said at ATC 4726 that they could see no reason why they should give the term a meaning which ‘truncates what we – and the Tribunal – consider to be the ordinary, and in this context, the appropriate meaning of ‘school’.

124. The Court applied the ordinary natural meaning of school referred to in *Cromer*, and endorsed the approach taken by the Administrative Appeals Tribunal below, yet the factors it took into account in determining whether the particular body was a school were closely aligned to elements in the analysis of the Board of Review in *Case P17* referred to in paragraph 121 of this Ruling. Both Northrop and Finn JJ and Carr J placed particular emphasis on the highly structured, systematic, non-sail specific nature of the training provided by the body. Neither *Case M11* nor *Barry v. Hughes* are discussed in *Leeuwin*, and the analysis of the Full Federal Court is such that whether a school could exist only to provide manual skills training<sup>16</sup> did not need to be considered.

125. In concluding that an in-house flight training centre conducted by an airline was a school for the purposes of exemption from sales tax, Jenkinson J in *Australian Airlines Ltd v. Commissioner of Taxation* (1996) 65 FCR 341; (1996) 96 ATC 4324; (1996) 32 ATR 261 considered Barwick CJ’s definition in *Cromer* and said at FCR 346, ATC 4328, ATR 265:

I accept that in its ordinary meaning in this country the word ‘school’ comprehends an institution in which instruction in some area or areas of knowledge or activity is imparted, whether to children or adults, by persons professing the capacity to give that instruction,

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<sup>15</sup> Item 109 of Schedule 1 to the *Sales Tax (Exemptions and Classifications) Act 1992*.

<sup>16</sup> As distinct from education, including in a trade or profession - Pennycuik VC at 543 in *Barry v. Hughes (Inspector of Taxes)* [1973] 1 All ER 537.

the institution having as its reason for existence the imparting of that instruction.

126. On appeal to the Full Federal Court, Jenkinson J's conclusion that a school was being conducted was confirmed: *Commissioner of Taxation v. Australian Airlines Ltd* (1996) 71 FCR 446; (1996) 96 ATC 5187; (1996) 34 ATR 310. In their joint judgment, Sundberg and Merkel JJ said that on the evidence before the primary judge, the centre was plainly a school in the sense described in the dictionary, in *Cromer* and in *Leeuwin*, but noted the following factors in support of its position:

- the centre had defined syllabuses for each course of instruction provided;
- the centre had defined programs of instruction and qualified instructors;
- there was external certification of the syllabuses, the training exercises, the instructors and the equipment;
- the centre had a physically identifiable location, its own administration and was established for the sole purpose of instruction; and
- qualifications obtained at the conclusion of training were portable.

127. Even though the provision of regular and organised or systematic instruction by an institution is necessary for an institution to be a school, not every institution offering such instruction is a school for the purposes of Item 2.1.10.

128. The provision of regular and organised or systematic instruction or training must be the 'primary function' or essential purpose of the institution, in accordance with *Barry v. Hughes* and *Case M11*. An institution whose essential purpose is other than this is not a school or college.

129. However, even if the provision of regular and organised or systematic instruction is the purpose of an institution, it will not be a school or college for the purposes of Item 2.1.10 if that instruction or training is more than incidentally recreational in character or only involves the acquisition of purely manual skills as distinct from training of the mind. Trade training including training in performing trade work is not within this exclusion: in *Barry v. Hughes* Pennycuik VC made it clear that education in a trade or profession is different from instruction in purely manual skills.

130. In *Lloyd v. Federal Commissioner of Taxation* (1955) 93 CLR 645 (*Lloyd*) the High Court considered whether a testamentary gift to the Navy League Sea Cadets was a gift for ‘public educational purposes’ and therefore exempt from estate duty. The majority concluded that it was. In the course of his judgment, Fullagar J commented on the nature of an ‘ordinary school’ and said at CLR 668 that they are institutions:

...characterized by the fact that they exist for the purpose of imparting knowledge as such, whether the ultimate aim of the pupil be vocational or generally cultural or what you will... A ‘nautical school’ (of the kind familiar in England) for the training of officers for the Navy or the Merchant Navy would probably be a public educational institution, but I cannot think of the Navy League Sea Cadets as a nautical school, and the reason is, I think, that the one does, and the other does not, exist for the essential purpose of the communication of knowledge by teachers to pupils.

131. Both Kitto J and Dixon CJ took the view that the term ‘public educational purposes’ encompassed but was not limited to the kind of instruction or training offered by schools and similar institutions. However, for Dixon CJ, even the broader scope of the term ‘public educational purposes’ did not help categorise the gift under consideration as one that came within the exemption. Notwithstanding that there may have been an instructional element in the activities of the Sea Cadet Corps, he said at CLR 661:

...the Sea Cadet Corps seems remote indeed in objects organisation and procedure from anything which may be supposed to fall within the denotation of the expression. Its organisation and discipline are reflected from the Navy. The cadets assemble for comparatively brief periods twice a week. There is no organised course of study, no systematic preparation for a defined end. What is done is for the promotion of the welfare of youth by providing associations interests and discipline arising from the sea and the naval and maritime services.

132. In *Re Madigan v. Federal Commissioner of Taxation* [2003] AATA 519, which considered and applied *Leeuwin*, the Administrative Appeals Tribunal considered sales tax exemption for ships acquired to provide training in sailing or boating activities. The relevant provision of the *Sales Tax (Exemptions and Classifications) Act 1992*<sup>17</sup> exempted ships other than those used for certain purposes including ‘pleasure sport or recreation’. The Commissioner submitted that the vessels were used for the purpose of training customers to participate in sailing or boating activities on either a recreational or sporting basis, and that this use was therefore for the purpose of providing them with pleasure, sport or recreation. In effect, the Commissioner’s position was that if an activity was of itself properly described as pleasure, sport or recreation, training in that activity was also to be characterised as pleasure, sport or recreation.

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<sup>17</sup> Item 59 of Schedule 1 to the *Sales Tax (Exemptions and Classifications) Act 1992*.

133. The Tribunal said that relevant exemption was not concerned with whether a participant in a course run by the taxpayer believed that the experience was recreational or pleasurable, but rather whether the use of the vessels by the applicant in the training of others could be seen objectively as being for a purpose of providing recreation or pleasure to those other persons. From the evidence, it concluded that the vessels in question were acquired for use in a commercial business for use in providing structured training courses. Its purpose was to impart skills to those prepared to pay for such courses irrespective of the motives of the trainees as to the use to which they would put those skills in the future. It held that the use of the vessels was for the purpose of providing training in skills required for the safe handling of boats.

134. Although sales tax exemption was pursued and maintained on the basis that the training provided was not a use of the vessel for purposes of providing pleasure and recreation rather than on the basis that the taxpayer was conducting a school, the Tribunal appears to have accepted the distinction between a school and wider educational purposes discussed in *Lloyd* and consistent with *Barry v. Hughes* and *Case M11*.

135. The Commissioner's view on the meaning of school in the composite term 'school or college' in Item 2.1.10 is that its meaning is coloured by its collocation with 'college' and by the structure of Item 2.1.10, which requires a building to be used as a school or college, not just for the purposes of a school or college.<sup>18</sup> As such, the phrase 'school or college' does not simply assemble the fullest separate meanings of 'school' and 'college', but instead contemplates a certain type of educational institution.

136. For the purposes of Item 2.1.10, a 'school or college' is an institution that has as its essential purpose the provision of regular, ongoing and systematic instruction in a course of training that is not, or is no more than incidentally, recreational in character. It cannot simply be a gathering of persons for some regular and systematic instruction provided as an adjunct to other and different purposes, and it must have a real separate institutional existence of its own, even if within or as part of another institution. The instruction or training would generally be given by qualified persons in accordance with a set curriculum, with some form of student assessment and correction.

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<sup>18</sup> This distinction was highlighted by Windeyer J in *Cobb & Co Ltd v. Commissioner of Taxation* (1959) 101 CLR 333; (1959) 12 ATD 111; 7 AITR 534 when he considered the status of the different parts of a school where school activities could be carried on and concluded that 'if the words of the Act had been 'used for the purposes of a school' the problem would be easier'. In *Case G62 75 ATC 455*, the costs of a school excursion to New Zealand were found to be "for or in connexion with full-time education at a school" and so deductible up to the then limit of \$400 under section 82J of the ITAA 1936.

137. While the instruction or training need not result in a qualification that is recognised beyond the school itself, the fact that it helps support a conclusion that it is instruction or training of such a kind that it can be provided by a school for the purposes of Item 2.1.10. This was clearly material to the *Australian Airlines* cases, discussed at paragraph 125 above.

138. The regular, ongoing and systematic instruction or training provided can be education in religious subjects (see the first dot point in paragraph 139 below).

139. Examples of commonly encountered arrangements and their characterisation:

- A **Sunday School**, an **Adult Religious Education or Bible Study Centre** or a **theological college** can be a 'school or college' for the purposes of Item 2.1.10, provided it is a separate institution and it is established with the purpose of giving regular, ongoing and systematic instruction in a course of training. Such a purpose could be represented by, for example, a formal curriculum towards a qualification recognised by the related church or more widely.
- A **yoga school** is not usually a school for the purposes of Item 2.1.10. Yoga is a recreational activity and does not necessarily involve systematic instruction or study having the purpose of imparting knowledge as such.
- A **child care centre** that is not integrated into the operation of a school (see Example 6 at paragraph 66 of this Ruling) is not a school for the purposes of Item 2.1.10 as it lacks the element of regular, ongoing and systematic instruction and lacks the purpose of systematically imparting a course of knowledge as such. However, a **pre-school kindergarten** may qualify as a school where it has the relevant purpose and elements of regular and systematic instruction and these are its primary function or essential purpose.
- A **riding school** is not a school within the meaning of its use in Item 2.1.10 as it trains persons to take part in a recreational sport. Similarly, places where instruction is provided in **dressmaking, woodwork, ceramics and cookery** as domestic or recreational pursuits would not qualify as schools, although they could if they were offered as vocational courses involving education rather than just recreational or domestic instruction. The distinction is based on the nature of the instruction provided.
- A **film and television school** where systematic training and instruction is provided in film and television operations may qualify as a school provided the training and instruction is by way of vocational courses

involving education and any recreational component to instruction is only minor or incidental.

- **Schools for opera, ballet and drama** may qualify as a school where they provide vocational courses involving education – that is, where there is a curriculum and examinations, their primary function or essential purpose is systematically imparting a course of knowledge as such by regular and systematic instruction, their purpose is not merely training in manual skills, and it can be said that the instruction of the students is no more than incidentally of a recreational kind (for example, a drama school which provides systematic instruction to qualify professional actors, which may be distinguished from the training offered by any recreational or amateur opera, ballet or theatrical body).

**What is a building ‘used or to be used as a school or college by a government, a public authority, or a non-profit society or association’?**

140. A building is used as a school by a qualifying body if the requirements of operating the school control its use.<sup>19</sup> The use of a building as a school by a qualifying body requires the qualifying body to conduct a school, and requires the building to be a place identifiable as the school conducted by the qualifying body. This in turn requires the building to be used as the school and not just a place used only for the purposes of or beneficial to the school. It is not enough for a building to be used sometimes for instruction in the course of operation of a school. For example, a local scout hall that is hired by a nearby school for a few hours every weekday for art classes is not a building whose use is controlled by the requirements of operating the school. It is just used for the purposes of the school.

141. Some sports facilities (if they constitute a building) could be accepted as being a building used as a school. Factors that could affect the characterisation of the building include: whether the school syllabus requires organised training; whether physical education is part of the general school curriculum set out by the relevant school registration authority; whether the subject is examinable; and whether certificates of achievement are issued by the school. Generally, a sporting facility such as a gymnasium would be accepted as a school building.

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<sup>19</sup> A school building fund may be for only a part of the building or buildings so used.



***Building not used for instruction***

142. Buildings owned or controlled by a qualifying body which are not used for instruction but form an integral part of the operation of a school and are used for school purposes can be buildings used as a school. Examples include a school chapel in a denominational school, a school's administration office in the school, residential accommodation of a boarding school or facilities for students or staff of the school or an assembly hall of the school. Their use is accepted as integral to the qualifying body's use of buildings in the school complex as a school. However, a hostel for staff or students run by an organisation independent of the school and having its own purposes (whether for profit or not) would not be a building used as a school by a qualifying body as the building is not owned or controlled by the qualifying body and is not used by reference to a purpose of operating a school that includes the hostel.

143. A building used as a school can also include an element which, if it were a separate building or part of a building acquired, constructed or maintained on its own account, would not be accepted as being a building that is used as a school. For example, inclusion of a garage for staff cars as an integral part – both in terms of its use and its architecture – of a new school building would be accepted. However, a fund established solely to build a garage for staff cars, even if it is located on school grounds, would not qualify as the building is not being used as a school.

144. Where a new school complex is being constructed, the requirements of Item 2.1.10 can be satisfied for each of the buildings used as a school even if the buildings are not all constructed at the same time but are constructed at intervals as finance becomes available.

***Building used both as a school and for other purposes***

145. The sole purpose requirement for the establishment and maintenance of the public fund does not mean that a building used as a school by a qualifying body that is acquired, constructed or maintained from a fund that satisfies the requirement can never be used other than as part of operating the school.

146. In *Cobb & Co Ltd*, Windeyer J said at CLR 337:

A school building that on occasions is used for the purposes other than teaching – for example, for educational conferences, parents' meetings, etc – may still be properly said to be used as a school. And the occasional gratuitous use of a school building for the meetings of an outside body is not necessarily incompatible with its being a building used as a school.

147. TR 96/8 considered that in some contexts a building (or part of a building) was used as a school provided any other use of the building was less than 50% on a time basis compared to the time for which the building is used as a school (TR 96/8 paragraphs 13 – 14). As explained in that Ruling, this percentage rule applied only to use other than as a school by the qualifying body using the building as a school: in other situations, use of a shared building or shared part of a building had to be ‘primarily or principally’ as a school and working this out by determining time used was no more than a possible method (TR 96/8 at paragraphs 61 – 64).

148. The ‘more than 50% use’ rule has been applied by some taxpayers in wider contexts than its original statement and to use other than by a qualifying body using a building as a school. The rule is no longer considered correct in law. The comments of Windeyer J, cited in paragraph 146 of this Ruling, clearly restrict acceptable other use of a building to use which is integral to (rather than collateral to or independent of) its use as a school, or no more than minor or occasional. In its claimed application, the ‘more than 50% use’ rule has proved impractical to administer and has raised difficult problems, particularly where use for different purposes involves very different numbers of users, where a building is not used for any active purpose for significant amounts of time, where a building is substantially adapted for its use other than as a school, and where actual use of the building is not reliably or consistently recorded.

149. For the purposes of Item 2.1.10, a building is taken to be used as a school by a qualifying body as long as any other use of the building allowed or intended is integral to (rather than collateral to or independent of) use as a school, or no more than minor or occasional.

*Other use that is ‘integral to’ use as a school*

150. In this Ruling, we have used the term ‘integral to’ rather than ‘incidental to’ in order to emphasise the nature of the connection required. Nonetheless, several court decisions on the meaning of ‘incidental’ help explain the meaning of ‘integral’ in the sense that it is used in this Ruling.

151. Although in a different context, in *Rothmans of Pall Mall (Australia) Ltd v. Australian Broadcasting Tribunal* (1985) 5 FCR 330, the Full Federal Court considered the meaning of ‘incidental’ and cited with approval the Shorter Oxford English Dictionary definition of ‘occurring or liable to occur in fortuitous or subordinate conjunction with something else’, noting that the Macquarie Dictionary definition was almost identical.

152. In *Navy Health Limited v. Deputy Commissioner of Taxation* (2007) 163 FCR 1; 2007 ATC 4568; (2007) 68 ATR 215, the Federal Court considered the meaning of ‘incidental’ in the context of establishing whether the objects of a health fund were charitable. It said that reference to an object that is incidental or ancillary to a main object does not mean that the lesser object is merely a minor one in quantitative terms: it means an object that is not of substance in its own right, but only something that tends to assist, or that naturally goes with, the achievement of the main object. This is the sense in which use other than as a school may be integral to use as a school.

153. For the purposes of this Ruling, use of a building is integral to its use as a school if it is used by the qualifying body which uses it as a school for activities that are not in themselves instructional but are part of or naturally go with the operation of the school. Use of a building for school prize giving or for school fundraising activities are examples of use for activities which are part of or naturally go with the operation of a school. Other use is not integral to use as a school simply because it is minor in quantitative terms.

#### *Other use that is ‘minor or occasional’*

154. The *Australian Oxford Dictionary*<sup>20</sup> relevantly defines ‘occasional’ as ‘happening irregularly and infrequently...’, and ‘minor’ as ‘lesser or comparatively small in size or importance’.

155. For the purposes of this Ruling, other use is ‘minor or occasional’ and consistent with the fund having the sole purpose of acquiring, constructing or maintaining a building for use as a school by a qualifying body if it is use that is minor in quantitative terms (even if regular) or only occurs from time to time. This other use can be use either by the qualifying body or by some other entity.

156. Any minor or occasional use other than as a school must not materially limit the use of the building as a school, or materially affect the cost of acquiring, constructing or maintaining the building, or otherwise be materially a purpose of the fund. As a simple example, a fund may be established for a building to be used as a school where, at times when the building will not be used as a school, the building will be used as a polling centre in elections. If use as a polling centre does not require any additional features or building or maintenance costs, its occasional use as a polling centre is consistent with the fund being solely to acquire, construct or maintain the building for use as a school. Example 10 at paragraph 70 of this Ruling is an example of a greater degree of use other than as a school that would still come within the scope of ‘minor or occasional’ other use.

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<sup>20</sup> *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

157. In *Farnell Electronic Components Pty Ltd v. Collector of Customs* (1996) 72 FCR 125; 142 ALR 322, Hill J confirmed that the *de minimis* principle is a principle of statutory interpretation. At FCR 128; ALR 324, he quoted, with approval, the following passage from *Halsbury's Laws of England*, 4th ed, vol 44(1) and stated:

*De minimis principle.* Unless the contrary intention appears, an enactment by implication imports the principle of legal policy expressed in the maxim *de minimis non curat lex* (the law does not concern itself with trifling matters)...The principle has been applied, either expressly or by implication, in a wide variety of situations where a trivial failure to comply with a specific condition has been ignored.

158. Where a building is acquired, constructed or maintained from a public fund established and maintained solely for the relevant purpose, whether it is 'used or to be used' by a qualifying body as a school is a question of fact.

159. The decision in *Cobb & Co Ltd* makes it clear that the phrase 'used as' a school is more restrictive than 'used for the purposes of' a school. Any use of a building that is not for, or integral to, the operation of the building as a school must be no more than minor or occasional, and must be use for which the building has not been purposely adapted in any way that is materially inconsistent with or beyond what is required for its use in the operation of the school as a school.

160. If a building is used both as a school and as or for something else, it will be a question of fact as to whether that other use is integral to its use as a school, or no more than minor or occasional.

161. For example, a building that is used by a qualifying body as a school every weekday and by it or by another body as a place of worship on Sundays may qualify where the Sunday worship is by the school members and the school is for adherents of that faith, or where the requirements for the Sunday worship have not materially affected the capacity, features or expense of the building or its maintenance. On the other hand, a Sunday School hall that is used by the qualifying body as a school for religious instruction on Sundays only and which is used extensively for community and social activities on other days of the week will not be used as a school for the purposes of Item 2.1.10 as the non-school use could not be considered other use that is integral to use as a school, or minor or occasional use.

162. The Commonwealth's *Building the Education Revolution* (BER) *Guidelines* outline that primary schools funded as part of the Primary Schools for the 21<sup>st</sup> Century (P21) program must agree to provide community access, at low or no more than incidental additional cost, to school libraries and school multipurpose halls if those, or other, school facilities are funded under this element of the BER. (Charges may cover actual costs such as cleaning due to the community use but not costs of the libraries or multipurpose halls themselves.) This must include reasonable access by any community or other not-for-profit groups in the local community.

163. Community use of facilities by the groups described in the BER Guidelines is unlikely to be more than ‘minor or occasional use’ (even if regular). Such use is provided to the community at low or no cost, and is use that should not limit or affect the delivery of school programs. Under some State and Territory instructions on how the BER Guidelines are to be applied by schools, community use is expressly required not to interfere with the conduct of the school. BER funding is provided for buildings designed for school use and it is unlikely they will have been purposely adapted to allow use other than as a school (see paragraph 29 of this Ruling). In these circumstances, community use of school libraries or multipurpose halls where these are BER funded buildings can generally be expected to be only ‘minor or occasional’ other use.

164. If a building is only used as a school for short periods of time (for example one day in the week) but is not used at all for any other purpose at other times, its use may still be as a school. Where the building is specially adapted for a necessary but infrequent use as a school, and kept for that use only, any fund to acquire, construct or maintain it has the sole purpose of acquiring, constructing or maintaining a building used as a school.

### ***Multi-purpose complexes***

165. In order for a building (or a part of a building) in a multi-purpose complex to be accepted as a building used as a school, it must satisfy the same requirements as other buildings. These are summarised in paragraphs 12 to 29 of this Ruling and discussed in paragraphs 100 to 164.

166. Where a multi-purpose complex has an area such as a common area which is shared by a school with others, the school building fund can only use its funds to contribute towards the cost of the shared area where the use of the shared area is determined only according to and by reference to the purposes of conducting the school and any other use is either integral to use as a school, or is only minor or occasional.<sup>21</sup>

167. Where these requirements are met, a donation to a school building fund where the building (or part of a building) used as the school is part of a multi-purpose complex may be fully tax deductible.

### **Qualifying bodies**

168. Item 2.1.10 requires the building to be used as a school by a government, a public authority, or a society or association which is carried on otherwise than for the purposes of profit or gain to the individual members of the society or association.

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<sup>21</sup> See paragraphs 26 to 29 of this Ruling and paragraphs 150 to 162 of the Explanation.

169. It will generally be readily evident if a building is used by a government or by a public authority.

170. Whether a building is used as a school by a body that is a non-profit society or association is determined by reference to the nature of the society or association and its use of the building. Ordinarily this will be found by reference to the constituent or governing documentation of the organisation, and to its actual activities and operations. This question is not whether the school building fund itself is such a society or association – the question is about the use of the building as a school by the society or association.

171. Although an institution that conducts a school will usually be a society or association operating on a non-profit basis, it cannot be assumed that this is the case: even an institution such as a religious or charitable institution does not as a matter of course constitute a society or association (it may be a body without members that can be described as associated in the body), and a body that is exempt from income tax is not necessarily non-profit (the requirement that a body not be carried on for the profit or gain of its individual members is not a condition of every category of exemption).

172. The fact that a school is conducted by multiple trustees does not mean that it is conducted by a society or association. A society or association connotes a relationship among persons ‘associated’ for a common purpose or to share a common interest. For there to be an association, there must be members who are bound by a contract, the contractual obligations setting out the duties and conferring the rights which bind the members.<sup>22</sup>

173. Multiple trustees do not, as such, constitute an association.<sup>23</sup> Trustees are simply bound by an equitable obligation to act in accordance with the terms of the trust. Their duties under the trust do not depend on their agreement and should the trustees be unable to agree on the exercise of any discretion their duties will prevail.<sup>24</sup> Trustees are only bound by their duty to act as trustees, and the nature of the relationship does not constitute a society or association.

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<sup>22</sup> *Re Thackrah* [1939] 2 All E.R. 4, 6.

<sup>23</sup> *Kibby v. Santiniketan Park Association Inc* [1998] VSC 148; *Kibby v. Registrar of Titles* [1999] 1 VR 861.

<sup>24</sup> *Re Hilton, Gibbs v. Hale-Hilton* [1909] 2 Ch 548.

174. However, in some circumstances a trust may be established where the trustees act for and according to the purposes of the society or association in conducting a school. This could occur, for example, due to fluctuating membership of the society or association. In these circumstances, the society or association may be regarded as conducting the school through the trustees, and so the society or association may be regarded as using as a school any buildings the trustees use as the school. The terms of the trust will include or indicate the basis on which the relevant society or association is established.

175. In all cases, it is necessary to examine the relevant documentation and the organisation's activities and operations to identify that it is a society or association, that it conducts a school, and that it uses the relevant building as the school.

### **Multi-purpose fundraising appeals**

176. If a donation to a school fundraising appeal is partly for the school building fund and partly for other purposes, the part that is a gift to the school building fund is deductible only if the proportion of or amount from the overall donation that is to be allocated to the school building fund is clear from the outset and is established by the donor. If the part that is a gift to the school building fund is not established at or before the time the donor makes that gift, there is no gift to the school building fund and there is no gift deduction. If after a wider donation is received the fundraisers decide how much to allocate to the school building fund, their subsequent advice of the amount allocated to the school building fund cannot make any part of the wider donation a deductible gift to the school building fund.

177. There are various ways in which a donor can establish that part of their wider donation is a deductible gift to a school building fund. For example:

- where an organisation raises funds by using a form by which a donor allocates his or her gift – for example a pledge form by which amounts are given to different purposes including the school building fund – the donor can indicate on that form the proportion or amount of his or her gift which is given to the school building fund. It is that part of the gift which is given to the gift deductible school building fund under Item 2.1.10; or
- the terms of the appeal, usually recorded beforehand in a printed brochure, may state the proportion (or perhaps an amount) of each contribution to the appeal which will be given to the school building fund. When a contribution is made on the basis of those terms, the amount or proportion specified in the terms of the appeal as being for the school building fund will be accepted as the amount given by the donor to the school building fund under Item 2.1.10.

178. Gifts to or for the general fund or funds of a school are not deductible, even if the sum given is subsequently applied towards the cost of construction, acquisition or maintenance of a school building. Similarly, gifts to the funds of a Parents and Citizens Association (or a similar organisation) are not deductible as a gift to a gift deductible school building fund, again even if they are subsequently applied towards the cost of construction or maintenance of a school building.

179. Unless the gift is made to an ancillary fund of the type described in paragraphs 42 and 43 of this Ruling and discussed at paragraphs 182 to 184 of this Ruling, a tax deduction is also denied where a general pledge is made and allocations to a school building fund are subsequently determined by the fund manager from the pool of contributions received. A gift to a gift deductible ancillary fund is deductible because, and when, it is a gift to such a fund, not because of, or at the time of, the particular allocations by the ancillary fund of the gift.

### **Fund administration**

180. Where the relevant endorsed entity is not the gift deductible school building fund itself, the endorsed entity must maintain a separate gift fund for donations and contributions to the school building fund (section 30-130).<sup>25</sup> Such an endorsed entity might have purposes other than those of providing for a school building, so a separate gift fund limits the risk of deductible gifts being applied to other purposes.

181. A school building fund cannot be used for purposes other than the purpose for which it was established and is maintained, and all deductible donations and contributions must go into the fund. Other money received in relation to a school – for example government grants, school fees and other donations – must be kept separate from the school building fund.<sup>26</sup>

### **Ancillary funds**

182. A school wishing to raise money for a number of income tax deductible purposes may establish an ancillary fund, gifts to which are deductible under Item 2 in the table in section 30-15. For example, money raised by such a fund can be subsequently provided to a school building fund (Item 2.1.10) or a public library (Item 12.1.2 or Item 12.1.5 in the table in section 30-100), without the need for the original gifts to have been made partly to one and partly to the other purpose. Gifts to an ancillary fund are deductible when made, not when the fund applies the money to school building or some other relevant deductible purpose.

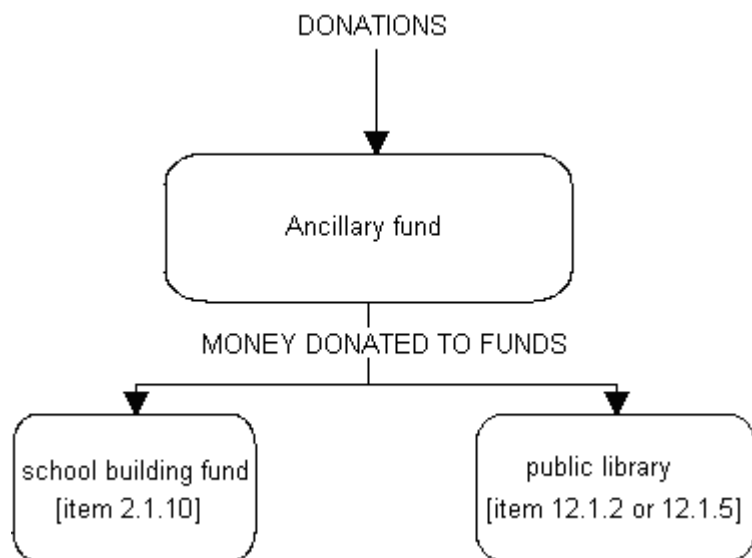
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<sup>25</sup> Although an entity that operates more than one gift fund can pool those funds and maintain a single gift fund: subsection 30-130(3).

<sup>26</sup> Paragraphs 30-130(1)(d) and 30-130(3)(b).



183. The following diagram illustrates the operation of an ancillary fund:



184. For further explanation and discussion of the criteria applicable to ancillary funds under the general gift provisions, see *Taxation Ruling TR 95/27 Income tax: public funds*.

### **Disbursements from a school building fund**

185. Because Item 2.1.10 requires the fund to be established and maintained solely for providing money for the acquisition, construction or maintenance of a building used as a school by a qualifying body, only disbursements that are incidental in the sense that they are directly and essentially related to the acquisition, construction or maintenance of a building used as a school are legitimate charges against that fund.

### **Acquisition and construction costs**

186. Expenditure on the acquisition of a building includes the costs incurred in negotiating, completing and financing the purchase of the building. The repayment of the capital of a loan and the payment of interest charges incurred in the purchase of a building to be used as a school are also expenditures on the acquisition of a building.

187. It also includes site preparation costs (for example, the cost of demolition of an old building on the proposed building site, and excavation costs).

188. The cost of purchasing land as the first step towards the acquisition or construction on that land of a building to be used as a school is also included as part of the cost of acquiring a building, as long as the entity purchasing the land is, at the time it acquires the land, committed to commencing construction within a reasonable period from the date of acquisition. What is 'reasonable' depends on the circumstances. However significant delay or uncertainty may lead to the conclusion that the land is not acquired as part of the acquisition or construction of a building used as a school.

189. Money from a school building fund must not be used to purchase land (other than incidentally) for any purpose other than as the site of a building used as the school. For example, it cannot be used for the purpose of providing recreational space, such as sports grounds since these do not involve a building. Land purchased as the site of a building may only include land which is no more than incidental to that site. As the development of a school may require or be conditional on the availability of land for other purposes, as well as land that is the site of a building used as the school, a gift deductible school building fund will rarely be able to purchase all land required for the purposes of a school development.

### ***Maintenance costs***

190. The term 'maintenance' is not defined for the purposes of the gift provisions so it takes its ordinary meaning. The definition of maintenance in the *Australian Oxford Dictionary*<sup>27</sup> refers to 'maintaining' which in turn means to '...cause to continue; keep up, preserve...'. The *Macquarie Dictionary*<sup>28</sup> refers to the concept of 'maintain' which in turn is defined as including 'to keep in existence or continuance; preserve; to keep in due condition, operation, or force'.

191. For the purposes of Item 2.1.10, maintenance of a building means to keep the building in proper or good condition.

192. To be an acceptable maintenance disbursement from a school building fund, the disbursement must be readily perceived as relating to the maintenance of the school building and not to changes to the building (including 'initial maintenance', that is, capital work on acquisition of a building to ready it for intended use as a school, which may however be acquisition costs of a building). Acceptable maintenance disbursements which may be included in the purposes of a school building fund include:

- the cost of cleaning the building including its floor coverings and windows;

<sup>27</sup> *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

<sup>28</sup> *The Macquarie Dictionary*, 2001, rev. 3<sup>rd</sup> edn, The Macquarie Library Pty Ltd, NSW.

- janitors' and cleaners' salaries and wages to the extent they directly relate to maintaining the building in good condition (see paragraph 193 of this Ruling);
- insurance premiums for the building (but not premiums relating to the contents of the building);
- the purchase of equipment used exclusively for maintaining the school building (for example, a vacuum cleaner); and
- repairs, painting and plumbing upkeep on the building.

193. The maintenance of a school building does not include the maintenance of sports equipment, playgrounds, sports fields, landscaping or car parks, as these are not school buildings, even if they are required elements of the school complex for the purposes of obtaining or maintaining local government approval such as of building plans.

194. Nor does it include general operating costs of a school such as water, gas, electricity, sewerage, contents insurance, and teaching staff salaries, or the general upkeep costs of furnishings. A gift deductible school building fund cannot include a purpose of meeting costs of this type.

195. However, where costs relate, in part, to the maintenance of the building used as a school, an appropriate part of those costs is an acceptable disbursement against the school building fund. For example, if a cleaner's time is devoted 50% to maintaining the building used as a school, with the balance of his or her time devoted to other work such as building security, 50% of the cleaner's salary costs would be a legitimate charge against the fund for maintenance of the building used as a school. The purpose of the fund may extend to meeting that part of the cost that is a cost of maintaining the school building.

## **Security costs**

196. The costs of installing and maintaining security alarms and lighting, window and door security such as grilles are acceptable disbursements if the security equipment is part of or a fixture to the building used as a school. This is a cost of acquiring or constructing the building, and so must be considered in the same way as other costs of that kind in working out the sole purpose of the fund.

197. Expenditure on security guards, guard dogs, mobile communications and similar equipment is not on the acquisition, construction or maintenance of a building used as a school and would not be an acceptable purpose of a gift deductible school building fund. Expenditure of this type may contribute to reducing the need for maintenance or rebuilding of the school building, but this is not sufficient to make it expenditure in acquiring, constructing or maintaining the school building.

***Fund administration costs***

198. The requirement in Item 2.1.10 that the fund has to be established and maintained solely for the acquisition, construction or maintenance of a building used as a school limits the type of fund administration costs that are an acceptable charge against the fund.

199. Administration costs paid to a third party in an arms length transaction specifically to establish or maintain such a fund (and for no other purpose) are acceptable charges. These can include:

- direct costs of establishing or promoting the fund, such as advertising costs
- direct costs of operating the fund, such as bank charges, stationery costs and accounting and audit fees relating specifically to the fund; and
- fees paid for professional direction of a planned giving or fundraising program. However, in a combined fundraising appeal (or multiple purpose appeal), the school building fund can only bear the part of the fees for its share of the total amount raised in the appeal and for no other purpose.

200. Remuneration paid to the administrator of the fund specifically for their services as administrator are also acceptable, as long as the fund is operated solely for the required purpose and the remuneration is no more than the amount that would be paid to a third party in an arm's length transaction specifically to establish or maintain such a fund.

201. Administration costs that are not acceptable charges include general administration costs that the school incurs regardless of the existence or otherwise of the fund. These are not acceptable charges as they are not amounts paid only to establish or maintain the fund itself and for its sole purpose.

202. Excessive fund administration costs can point to a fund having another purpose that is not consistent with the requirement in Item 2.1.10 that the fund have the sole purpose of providing money for the acquisition, construction or maintenance of a building used as a school.

***Buildings on land that is leased***

203. A building need not be owned by a qualifying body to be acquired in the context of Item 2.1.10. The concept of 'acquisition' is not limited only to purchase of a building, but can extend to buildings which are not owned but which are rented or leased by the organisation conducting the school and are used as a school while rented or leased. The legislation requires the public fund to provide money for the acquisition, construction or maintenance of the buildings used as a school by a qualifying body. Rent or lease payments facilitate the use of the buildings as a school in the same way as payments to finance outright purchase. As such, rent or lease payments will be acceptable expenditure as a purpose of the fund where they are no more than the fair rent for the period over which the building is for use as a school, and where the arrangements do not provide any benefit in relation to any other use of the building.

204. Initial repair or reconstruction activities that are of a capital nature can involve the construction of a part of a building and, in the same way as the addition of fixtures, they can be within the sole purpose of a gift deductible school building fund.

205. Where land is leased, a building on the land is considered to be acquired in accordance with its ordinary meaning when the lease of the land is acquired (or when the building is constructed on the land).

206. The lease does not have to be a long term lease. However, as a fund must be solely for the purpose of acquiring, constructing or maintaining a building to be used as a school by a qualifying body, situations in which the building is not to be used permanently as a school may be inconsistent with this sole purpose. When the use of a building as a school is not secured by the fund for the life of the building, the circumstances must be examined to work out whether the sole purpose requirement is met.

207. If the rent or lease payments are part of arrangements to provide other use of the land or buildings, the sole purpose requirement will not be met. For instance, if rent secures a building's use as a school for some time but also secures later use for some other purpose, or enables use for some other purpose to be secured whether by the fund or by anyone else, the fund cannot be a gift deductible school building fund.

208. In the same way, if a building is constructed at a fund's expense for initial use as a school but for use later for other purposes, the sole purpose requirement will not be met and the fund cannot be a gift deductible school building fund. Nor will a fund for maintenance of a building that is directed not only to maintenance arising while the building is used as a school but to maintenance in other periods.

***Investments by school building funds***

209. A school building fund may invest or lend its funds if the fund's controllers are able to establish that they are proceeding with all reasonable speed to achieve the fund's objects, and that the investments or loans from the fund represent a bona fide and temporary arrangement that is in the best interests of the fund. The fund's controllers must also be able to demonstrate that the investment or loan will assist the fund achieve its objects within a reasonable period. In these circumstances investment or lending of funds may be shown to be no more than incidental to, and so a part of, the sole purpose of the fund.

210. If investments are made other than as bona fide and temporary applications of funds with a view to acquisition, construction or maintenance of a building used as a school as soon as reasonably consistent with the objects of the fund, then some other purpose of the fund may exist. For instance, loans may be for unreasonably low returns or on unreasonably inadequate security, and made with the purpose of supporting the borrower or its activities. Similarly, if there is no prospect of the fund acquiring, constructing or maintaining a school building within a reasonable period, the fund may have no real school building purpose.

## Appendix 2 – Your comments

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211. You are invited to comment on this draft Ruling, particularly on the implications of using the issue date of the final version of this Ruling as the date from which the 'more than 50% use' rule can no longer be applied (see paragraph 76 of this Ruling). Please forward your comments to the contact officer by the due date.

212. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

<b>Due date:</b>	<b>2 March 2012</b>
<b>Contact officers:</b>	<b>Kathy Riley</b>
<b>Email addresses:</b>	<b><a href="mailto:kathy.riley@ato.gov.au">kathy.riley@ato.gov.au</a></b>
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## **Appendix 3 – Detailed contents list**

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

	<b>Paragraph</b>
<b>What this Ruling is about</b>	<b>1</b>
<b>Ruling</b>	<b>7</b>
Legislation	7
What is a public fund?	9
Meaning of ‘established and maintained solely’	10
What is a ‘building’?	12
<i>Fixtures</i>	14
What is a ‘school or college’?	16
What is a building ‘used or to be used as a school or college by a government, a public authority, or a non-profit society or association’?	19
<i>Building not used for instruction</i>	20
<i>Building used both as a school and for other purposes</i>	23
<i>Other use that is ‘integral to’ use as a school</i>	26
<i>Other use that is ‘minor or occasional’</i>	27
<i>Multi-purpose complexes</i>	30
Qualifying bodies	33
Multi-purpose fundraising appeals	36
Fund administration	39
Ancillary funds	42
Disbursements from a school building fund	44
<i>Acquisition and construction costs</i>	45
<i>Maintenance costs</i>	47
<i>Security costs</i>	51
<i>Fund administration costs</i>	53
<i>Buildings on land that is leased</i>	56
Investments by school building funds	60
<b>Examples</b>	<b>61</b>
Example 1	61
Example 2	62
Example 3	63
Example 4	64
Example 5	65
Example 6	66
Example 7	67



Example 8	68
Example 9	69
Example 10	70
Example 11	71
Example 12	72
Example 13	73
<b>Previous Ruling</b>	<b>74</b>
<b>Date of effect</b>	<b>75</b>
<b>Appendix 1 – Explanation</b>	<b>78</b>
Legislation	78
What does endorsement under subdivision 30-BA require?	80
What is a public fund?	86
Meaning of ‘established and maintained solely’	87
What is a ‘building’?	100
<i>Fixtures</i>	107
What is a ‘school or college’?	112
<i>‘Institution’</i>	114
<i>‘School or college’</i>	116
What is a building ‘used or to be used as a school or college by a government, a public authority, or a non-profit society or association’?	140
<i>Building not used for instruction</i>	142
<i>Building used both as a school and for other purposes</i>	145
<i>Other use that is ‘integral to’ use as a school</i>	150
<i>Other use that is ‘minor or occasional’</i>	154
<i>Multi-purpose complexes</i>	165
Qualifying bodies	168
Multi-purpose fundraising appeals	176
Fund administration	180
Ancillary funds	182
Disbursements from a school building fund	185
<i>Acquisition and construction costs</i>	186
<i>Maintenance costs</i>	190
<i>Security costs</i>	196
<i>Fund administration costs</i>	198
<i>Buildings on land that is leased</i>	203
<i>Investments by school building funds</i>	209
<b>Appendix 2 – Your comments</b>	<b>211</b>
<b>Appendix 3 – Detailed contents list</b>	<b>213</b>

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Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 95/27; TR 2000/12W;  
TR 2005/13; TR 2006/10

### *Previous Rulings/Determinations:*

TR 96/8

### *Subject references:*

- deductible gift recipients
- gifts
- school or college building funds

### *Legislative references:*

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- ITAA 1936 78(4) former
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