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AUSTRALIA

VIII. TAX LAWS

A. GENERAL

NGO's meeting the requirements set out in Section 23(e) to (j) of the Income Tax Assessment Act are exempt from income tax. More stringent tests are established under Section 78 for donations to NGO's to be income tax deductible.

1. Exemption from National income taxes

The Australian Taxation Office has primary responsibility to determine if an NGO is exempt from income tax on its income. Adverse decisions can be challenged via the courts. To be exempt from income tax an NGO must be:

- a religious, scientific, charitable or public education institution;
- a public hospital or a hospital carried on by a society of association otherwise than for the purposes of profit or gain to the individual members;
- a registered trade union;
- a society, association or club which is not carried on for the purpose of profit or gain to its individual members and is:
 - a friendly society
 - for the encouragement of music, art, science or literature
 - for the encouragement or promotion of a game or sport
 - for the encouragement or promotion of animal races
 - established for community service purposes (not being political purposes or lobbying purposes)
 - established for the purpose of promoting the development of aviation or tourism, or of the agricultural, pastoral, horticultural, viticultural, manufacturing or industrial resources of Australia
- a fund established by will or instrument of trust for public charitable purposes;
- a fund established for the purpose of enabling scientific research to be conducted by or in conjunction with a public university or public hospital.

Fringe Benefits Tax

Australia also has a Fringe Benefits Tax (FBT) which imposes tax on an employer on benefits provided to employees. Certain NGO's qualify for exemption from FBT which provides to employees of such NGO's a widely used tax planning technique of substituting tax exempt benefits for salary. The Government has rejected a recent inquiry recommendation that this tax loophole be repealed.

2. State and local income taxes

There are no state and local income taxes in Australia. However, there is a range of other State and local (non-income) taxes and charges. Each State or local Government body makes its own determination regarding exemption. Such taxes and charges include payroll tax; stamp duty on transfer of assets - particularly real estate; land tax; sewerage, water and local Government rates; State imposed bank charges etc. Inconsistent application of exemptions and the need to apply for each exemption is considered a burden on NGO's.

3. Zero rating for VAT

Australia has a National Wholesale Sales Tax (WST) rather than a VAT.

WST is a single stage tax imposed at the wholesale level on goods but not services. Rates vary from 12% to 45%. NGO's can qualify for exemption either by virtue of their status or for goods used in certain activities. Goods must be retained by the qualified NGO for their designated useful life or WST will be payable. Exemption from WST follows certain of the Income Tax provisions but can vary.

4. Duties, customs, excises

Generally, there are no exemptions available to NGO's for import duties, customs and excises.

B. DONOR DEDUCTIONS

All donors are allowed an income tax deduction for contributions exceeding \$2 to qualified NGO's.

1. There are no limits on contributions by businesses.
2. There are no limits on contributions by individuals. However, in both cases, such contributions cannot be used to create a carryforward loss.
3. An income tax deduction against the income of an estate is allowable for donations to qualified NGO's. Testamentary gifts are generally non-deductible for income tax purposes except in very limited circumstances of certain cultural bequests.

There are no State or National death taxes in Australia.

For capital gains tax purposes (part of income tax) where an asset passes, by virtue of death to a tax-exempt body, the deceased is deemed to have disposed of the asset immediately prior to death and capital gains tax is payable on any taxable gain. A recent inquiry recommended that this provision be amended to allow a tax free transfer.

4. There are no special State or local tax laws other than those noted in A.2 above.

C. ENDOWMENT ISSUES

1. As all income of qualified NGO's are tax exempt, earnings on endowments (interest and dividends) are also tax exempt.
2. Technically, endowments may be invested in majority ownership of businesses and dividends and other payments from such subsidiaries will be free of income tax. However, the Australian Taxation Office is wary of such arrangements and they are the subject of close scrutiny to ensure that the NGO continues to meet its objectives.

D. COMMERCIAL/BUSINESS/ECONOMIC ACTIVITIES

1. There is no taxation imposed limit on NGO's engaging in commercial/business/economic activities.
2. Business activities are permitted to be conducted directly by the NGO.
3. All income of a qualified NGO is exempt from income tax including income from commercial/business/economic activities.
4. There are no tax rules regarding "related" and "unrelated" commercial/business/economic activities of NGO's.

E. REPORTING

1. Provided an NGO maintains its tax exempt status, no tax reporting is required.
2. In order for a donor to claim an income tax deduction for a donation over \$2, substantiation by way of a receipt issued by the NGO is required. The receipt does not need to be provided to the Taxation Office in the donor's income tax return, but must be produced upon request.
3. There are no separate reporting rules relating to foundations because of their endowments.

F. MISCELLANEOUS

1. There are **no** income tax imposed limits on administrative expenses or salaries.
2. There are **no** income tax imposed special accounting rules. Accounting and reporting policies are set by the NGO, professional accounting bodies and auditors.

XII. CONCLUSION

As to the most important legal (and other) issues facing the NGO sector, I refer you to the final comprehensive report of the Industry Commission into "Charitable Organisations in Australia".

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INCOME TAX ASSESSMENT ACT 1936 1973

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(b) the consideration for the sale or disposal of the share was less than the amount that, in the opinion of the Commissioner, was the value of the share at the time of the sale or disposal, the consideration shall, for the purposes of the application of sub-section (2), be deemed to have been that amount.

(6) Where a person has sold or otherwise disposed of a share in a company that has, in accordance with a declaration lodged by the company under sub-section (6) of section 77D, expended moneys paid on the share by the person in making a payment to another company for the purpose specified in paragraph (e) of that sub-section and the Commissioner is satisfied that an amount included in the payment has been expended by the last-mentioned company on mining or prospecting outgoings, sub-section (2) of this section has effect as if that amount had been expended on mining or prospecting outgoings by the firstmentioned company.

(7) This section does not apply in relation to moneys paid by a person on a share if the Commissioner is satisfied that-

(a) the share is included in shares that, at the time of, or within three months after, the making of the payment, were listed for quotation on the official list of a stock exchange in Australia; and

(b) at the time of the making of the payment-

(i) no contract, agreement, arrangement or understanding; and

(ii) no right, power or option (including a contingent right, power or option),

that, in any way, directly or indirectly, related to, affected, or depended for its operation on the right of the person to sell or otherwise dispose of that share was or had been entered into by, or granted to, a prescribed company.

[*78]

Gifts, calls on mining shares, pensions, &c.

Sub-section (1) amended by No. 46, 1938, s. 8; No. 17, 1940, s. 6; No. 58, 1941, s. 13; No. 22, 1942, s. 9; No. 50, 1942, s. 13; No. 10, 1943, s. 10; No. 3, 1944, s. 8; No. 6, 1946, s. 12; No. 44, 1948, s. 8; No. 48, 1950, s. 9; No. 44, 1951, s. 14; No. 90, 1952, s. 12; No. 45, 1953, s. 7; No. 43, 1954, s. 8; No. 62, 1955, s. 8; No. 101, 1956, s. 11; No. 65, 1957, s. 17; No. 70, 1959, s. 6; No. 58, 1960, s. 6; No. 94, 1961, s. 10; No. 39, 1962, s. 9; No. 69, 1963, s. 26; No. 33, 1965, s. 4; No. 143, 1965, s. 6; No. 50, 1966, s. 8; No. 60, 1968, s. 12; No. 93, 1969, s. 10; No. 93, 1971, s. 4; No. 51, 1973, s. 22; No. 52, 1973, s. 8; and No. 165, 1973, s. 19.

78. (1)** The following shall, subject to section 77B, sub-section (11) of section 77D and section 79C, be allowable deductions:-

(a) Gifts (not being testamentary gifts) of the value of Two dollars and upwards of money or of property other than money which was purchased by the taxpayer within twelve months immediately preceding the making of the gift,

made by the taxpayer in the year of income to any of the following funds, authorities or institutions in Australia:-

(i) a public hospital, or a hospital which is carried on by a society or association otherwise than for the purposes of profit or gain to the individual members of that society or association;

(ii) a public benevolent institution;

(iii) a public fund established before 23rd October, 1963 and maintained for the purpose of providing money for hospitals or institutions specified in sub-paragraph (i) or (ii), or for the establishment of such hospitals or institutions, or a public fund established and maintained for the relief of persons in Australia who are in necessitous circumstances;

(iv) a public authority engaged in research into the causes, prevention or cure of disease in human beings, animals or plants, where the gift is for such research, or a public institution engaged solely in such research;

(v) a public university or a public fund for the establishment of a public university;

(vi) a residential educational institution affiliated under statutory provisions with a public university, or established by the Commonwealth;

(vii) a public fund established and maintained for providing money for the construction or maintenance of a public memorial relating to the war that commenced on 4 August 1914 or to the war that commenced on 3 September 1939, being a fund that was established on or before 21 August 1973;

(viii) a public institution or public fund established and maintained for the comfort, recreation or welfare of members of the armed forces of any part of His Majesty's dominions, or of any allied or other foreign force serving in association with His Majesty's armed forces;

(ix) the Commonwealth or a State, when made for purposes of defence;

(x) a university, college, institute, association or organization which is an approved research institute for the purposes of section 73A, where the gift is for purposes of scientific research as defined in that section;

(xi) the United Nations Appeal for Children;

(xii) the Queen Elizabeth the Second Coronation Gift Fund;

(xiii) the Australian Elizabethan Theatre Trust;

(xiv) the Australian Academy of Science;

(xv) 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 or college by a government or 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 that society or association;

(xvi) the Duke of Edinburgh's Study Conference Account maintained by the Department of Labour and National Service;

(xvii) the Australian and New Zealand Association for the Advancement of Science;

(xviii) the Australian Administrative Staff College;

(xix) the Commonwealth, when made for the purposes of research in the Australian Antarctic Territory;

(xx) the Royal Australasian College of Surgeons;

(xxi) the Royal Australasian College of Physicians;

(xxii) the Australian Regional Council of the Royal College of Obstetricians and Gynaecologists;

(xxiii) the New South Wales College of Nursing;

(xxiv) the College of Nursing, Australia;

(xxv) the Council for Christian Education in Schools;

(xxvi) the National Trust of Australia (New South Wales), the National Trust of Australia (Victoria), The National Trust of Queensland, The National Trust of South Australia, The National Trust of Australia (W.A.) , the National Trust of Australia (Tasmania), the Northern Territory National Trust and the Australian Council of National Trusts;

(xxvii) a public library, public museum or public art gallery, or an institution consisting of a public library, public museum and public art gallery or of any two of them;

(xxviii) the Sydney Opera House Appeal Fund;

(xxix) the Sidney Myer Music Bowl Trust;

(xxx) the Industrial Design Council of Australia;

(xxxi) a public fund established and maintained exclusively for the purpose of providing money to be used in furnishing persons in Australia with marriage guidance through a voluntary organization or through a branch or section of such an organization, being an organization, branch or section that the Attorney-General, upon being satisfied that the organization, branch or

section is willing and able to engage in marriage guidance and that marriage guidance constitutes or will constitute the whole or the major part of its activities, has approved in writing for the purposes of this sub-paragraph;

(xxxii) the Australian National Committee for World Refugee Year;

(xxxiii) the Council for Jewish Education in Schools;

(xxxiv) the Art Gallery Society of New South Wales;

(xxxv) the Productivity Promotion Council of Australia;

(xxxvi) the Australian Postgraduate Federation in Medicine, the College of Radiologists of Australasia, the Australian College of General Practitioners and the College of Pathologists of Australia, where the gift is for the purpose of education or research in medical knowledge or science;

(xxxvii) the Ian Clunies Ross Memorial Foundation;

(xxxviii) the Australian National Committee for the Freedom from Hunger Campaign;

(xxxix) the Australian Institute of International Affairs;

(xl) the Australian National Travel Association;

(xli) the National Safety Council of Australia;

(xlii) the Winston Churchill Memorial Trust;

(xliii) a prescribed institution of advanced education, where the gift is for certified purposes of the institution or for the provision of certified facilities for the institution;

(xliv) the Australian Conservation Foundation Incorporated,

or to a public fund established and maintained under a will or instrument of trust exclusively for the purpose of providing money, property or benefits to or for funds, authorities or institutions referred to, and for the purposes (if any) referred to, in any of the sub-paragraphs of this paragraph, or for the establishment of such funds, authorities or institutions, being a public fund as to which the Commissioner is satisfied that the terms of the will or instrument of trust are such that any moneys (including income derived from investments and proceeds of the realization of investments) paid or accrued to the fund as a direct or indirect result of the particular gift and not applied for the purposes of the fund may not be invested by the trustee otherwise than in a manner in which trustees are permitted by an Act, a State Act or a law of a Territory of the Commonwealth to invest trust moneys without special authorization.

(b)** One-third of the amount of calls paid by the taxpayer in the year of income on shares owned by him in a company carrying on as its principal business afforestation in Australia, other than shares that are, or at the option of the company may become, liable to be redeemed, being calls for use by the company in that business.

(c) Sums which are not otherwise allowable deductions and are paid by the taxpayer during the year of income as pensions, gratuities or retiring allowances to persons who are or have been employees or dependants of employees, to the extent to which, in the opinion of the Commissioner, those sums are paid in good faith in consideration of the past services of the employees in any business operations which were carried on by the taxpayer for the purpose of gaining or producing assessable income.

Substituted by No. 18, 1960, s. 7; amended by No. 164, 1973, s. 18.

(2) For the purposes of the last preceding sub-section-

(a) the value of a gift of property other than money shall be deemed to be the value of the property at the time of the making of the gift or the amount paid by the taxpayer for the property, whichever is the less; and

(b) 'Australia' includes Papua New Guinea.

Substituted by No. 34, 1963, s. 7; amended by No. 51, 1973, s. 22.

(3) A gift to the authority specified in sub-paragraph (xi) or (xxxii) of paragraph (a) of sub-section (1) is not an allowable deduction under this section unless the gift was made before 1st July, 1963.

Added by No. 34, 1963, s. 7; amended by No. 51, 1973, s. 22.

(4) A gift to the authority specified in sub-paragraph (xxxviii) of paragraph (a) of sub-section (1) is not an allowable deduction under this section unless the gift was made before 1st July, 1964.

Added by No. 50, 1966, s. 8; amended by No. 51, 1973, s. 22; and No. 165,

1973, s. 19.

(5) For the purposes of sub-paragraph (xliii) of paragraph (a) of sub-section (1) -

(a) "certified purposes", in relation to a prescribed institution of advanced education, means purposes of the institution that have been certified by the Minister for Education to relate exclusively to tertiary education; and

(b) "certified facilities", in relation to a prescribed institution of advanced education, means facilities that the Minister for Education has certified that he is satisfied are, or are to be, used wholly or principally for purposes of the institution that are certified purposes within the meaning of that sub-paragraph.

Added by No. 165, 1973, s. 19.

(6) A gift to a fund of a kind referred to in sub-paragraph (vii) of paragraph (a) of sub-section (1) is not an allowable deduction by virtue of that sub-paragraph unless the gift was made before 1 July 1974.

[*79]

Five per centum of cost of assets of superannuation fund established for Substituted by No. 103, 1965, s. 18.

Sub-section (1) amended by No. 51, 1973, s. 22.

79. (1) In this section-

"asset" does not include a policy as defined by sub-section (1) of section 4 of the Life Insurance Act 1945-1961;

"dependant", in relation to a member of a superannuation fund, includes the spouse and any child of the member;

"prescribed asset", in relation to a superannuation fund in relation to a year of income, means an asset that was included in the assets of the fund at the end of that year of income;

"superannuation fund" means a provident, benefit, superannuation or retirement fund, not being-

(a) a fund of a kind referred to in paragraph (jaa) of section 23;