



THE TAX INSTITUTE

THE MARK OF EXPERTISE

2 October 2015

Ms Gess Sottile
Assistant Director
Technical Excellence Services
Australian Taxation Office
PO Box 9977
MOONEE PONDS VIC 3039

By email: nfpadvisorygroup@ato.gov.au

Dear Ms Sottile,

Current operation of the 'in Australia' special condition for certain deductible gift recipients and income tax exempt entities – Discussion Paper

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to the *Current operation of the 'in Australia' special condition for certain deductible gift recipients and income tax exempt entities - Discussion Paper* (**Discussion Paper**).

The main points we wish to raise are set out below.

1. Inconsistency between the 'in Australia' special condition for deductible gift recipients and income tax exempt entities

There is inconsistency between the 'in Australia' special condition that applies to an entity eligible for 'deductible gift recipient' (**DGR**) status to which special condition (a) in Item 1 of section 30-15 of the *Income Tax Assessment Act 1997* (Cth) (**1997 Act**) applies and the equivalent special condition in sections 50-50(1)(a), 50-55(1)(a), and 50-75(1)(a) of the 1997 Act that applies to income tax exempt entities that are not a DGR.

We question the desirability of the difference in the threshold applying to an entity eligible for DGR status under Division 30 (**DGR Threshold**) and one eligible for exemption from income tax under Division 50 (**Income Tax Threshold**) (especially as the DGR Threshold appears to be lower of the two whereas DGR status is generally

considered to be a more difficult concession to obtain than income tax exemption). This causes confusion and uncertainty in the not-for-profit sector. We understand there may be policy reasons going back some time that have resulted in these differences. However with a pending change to the 'in Australia' condition (see comments below), it may be an opportune time for the policy to be revisited and for the special condition in Division 30 and Division 50 to be aligned.

While we appreciate that to truly align the two thresholds a legislative change will be required, we submit that the ATO could reduce the gap between the two thresholds by interpreting section 50-75 of the 1997 Act broadly.

Section 50-75 allows distributions of the following amounts to be disregarded when determining whether an entity incurs its expenditure or pursues its objectives principally in Australia:

- amounts received by the entity as a gift (either money or property) or a government grant; and
- distributions from a fund referred to in a table in Subdivision 30-B that is operated by the entity.

The effect of section 50-75 appears to be that an entity can incur some expenditure and pursue some objects overseas (to the extent it is funded by the sources specified above) and this expenditure or pursuit of objects will be disregarded when applying the Income Tax Threshold.

The primary source of binding ATO guidance on section 50-75 was contained in TR 2000/11 which has now been withdrawn. We submit that this is an area that requires binding guidance from the ATO as many organisations rely on section 50-75 to meet the Income Tax Threshold. A replacement binding ATO product should be issued (along with practical examples of how the interaction between the Income Tax Threshold and section 50-75 operates) to provide the not-for-profit sector with certainty on this important issue.

2. ACNC Approach

While the determination of DGR status is a matter for the ATO, it has come to our attention that material available from the Australian Charities and Not-for-profits Commission (**ACNC**) expresses a contrary view to that which we understand has been the position of the ATO since 2011 on the interpretation of the DGR Threshold. The following statement is contained in the ACNC's 'registration application guide' (https://www.acnc.gov.au/ACNC/Register_my_charity/Start_Reg/Guide_registration/ACNC/Reg/Guide_registration.aspx?hkey=fe2d18fd-8c9d-47ed-a623-e5aa67b1ad8b):

Completing the form

If you are seeking endorsement as a DGR, you will need to indicate in the registration application form:

*that your organisation (or part) was established and operates in Australia, **and pursues its purposes and has its beneficiaries principally in Australia...***

[Emphasis added]

Similar interpretations of the DGR Threshold are also contained in the following ACNC forms (both attached to this submission):

- Question 3 on the DGR Schedule which is completed with new registration applications; and
- Question 21 on the Change Charity Subtype form.

Obviously, a difference in the statements between the two regulators creates confusion and uncertainty in the not-for-profit sector. Also, some organisations may be incorrectly forming the view that they are not eligible for DGR status on the basis of the information provided by the ACNC.

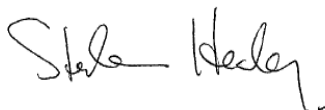
We suggest that the ACNC and ATO work together to ensure the discrepancy is rectified as soon as possible.

3. Status of legislation in relation to the 'in Australia' special condition

We request an update in relation to the current status of the legislation to amend the 'in Australia' special condition as a result of the 2009-10 Federal Budget un-enacted measure '*Philanthropy — reforming the 'in Australia' requirements that apply to tax exempt entities*'.

If you would like to discuss any of the above, please contact either me or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours sincerely



Stephen Healey

President

CC Ms Jodie Wearne, Treasury
Mr Murray Baird, Assistant Commissioner, Australian Charities and Not-for-profits Commission