



THE TAX INSTITUTE

15 March 2022

Commissioner of State Revenue Victoria
State Revenue Office Victoria
Southern Cross Tower
121 Exhibition Street
Melbourne VIC 3000

By email: consultation@sro.vic.gov.au

Dear Commissioner of State Revenue Victoria,

Draft Revenue Ruling LTA-009 | Land tax – charity exemption

The Tax Institute welcomes the opportunity to make a submission to the State Revenue Office (**SRO**) in relation to draft revenue ruling *LTA-009 Land tax – Charity exemption (Draft Ruling)*.

In the development of this submission, we have closely consulted with our Victorian State Tax Committee and National Not-for-Profit (**NFP**) Technical Committee to prepare a considered response which represents the views of the broader membership of The Tax Institute.

The Tax Institute welcomes guidance that will assist charitable institutions (and other impacted landholders) to understand their eligibility for exemptions from land tax pursuant to sections 37 and 74 of the *Land Tax Act 2005* (Vic) (**the Act**). It is important to ensure that such entities have access to guidance material that is simple to understand, readily accessible and supports them to satisfy the Commissioner to the extent required to access the exemption. This will reduce the cost of seeking an exemption (an important aspect of the policy of the exemption) and otherwise to ensure any non-landholding charity involved in the process, for example, as an occupant of the land, is not excessively burdened by the process.

We consider that the Draft Ruling requires certain revisions to better achieve this objective. In particular, the analysis of the occupation requirement requires clarification and clearer guidance is needed in relation to tenancy arrangements involving social housing providers.

In addition, we consider that the Draft Ruling should better reflect the distinction between the *activities* and *purposes* of a charity. If the intention is to distinguish between charitable purposes and those that are incidental or ancillary to them, the guidance must be clear in this regard. We also consider that the Draft Ruling would provide greater assistance if the evidentiary requirements were further clarified and structured cumulatively.

The Tax Institute also reiterates its longstanding view that all levels of government should strive towards harmonisation of the rules and requirements that impact charities. We suggest that the approach in the Draft Ruling could be slightly refined to better align the eligibility requirements with the federal government and Australian Charities and Not-for-profits Commission's (**ACNC**) requirements.

We would be pleased to continue to work with the SRO on further development of the Draft Ruling to ensure it provides the most useful advice and guidance for charities and their advisers.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all. Please refer to **Appendix B** for more information about The Tax Institute.

If you would like to discuss any of the above, please contact Tax Counsel, Julie Abdalla, on (02) 8223 0058.

Yours faithfully,



Jerome Tse

President

APPENDIX A

We have set out below our detailed comments and observations for your consideration to ensure that the Draft Ruling provides the most effective and practical advice for charities and their advisers.

Lease of land by a charity to another charity

Feedback from our members indicates that the wording in paragraph 9 of the Draft Ruling has resulted in some confusion regarding whether landlords that are charities, that grant leases to other charities are still eligible for the exemption despite having '*given up exclusive possession of the land*'. While it is understood that it is the tenant's use of the land that is relevant, and that the landlord is still eligible for the exemption if a charitable tenant uses the land exclusively for charitable purposes, the language of the Draft Ruling is somewhat ambiguous and confusing. We recommend that the Draft Ruling be amended to address this ambiguity.

Social housing

This issue is particularly relevant in the context of charitable institutions that provide social housing. We understand that many social housing arrangements involve the grant of a lease as a mechanism to protect the rights of a tenant and the ability of a landlord to enforce certain rights (including eviction). Paragraph 9 of the Draft Ruling clearly states that the tenant is in occupation of the land when a lease is granted. However, paragraph 10 of the Draft Ruling appears to contradict this clear statement, by suggesting that there may be other factors that indicate a charity is using and occupying the land, notwithstanding the existence of a valid lease.

We consider that the current wording in paragraphs 9 and 10 creates unnecessary confusion about the SRO's approach to charitable institutions that provide social housing. The fundamental purpose of the social housing model is to provide affordable housing to those in need. The charitable purpose of social housing providers is primarily achieved through the mechanism of granting leases. If the strict statement in paragraph 9 is applied to them, that is, that the grant of a lease by a charity means the charity is no longer in occupation, then land tax would be inequitably imposed in such circumstances. We consider that this interpretation undermines the effective and crucial provision of affordable social housing, and the policy intent of the exemption.

The Tax Institute supports the adoption of a more flexible approach. That is, while the charitable institution may not be in exclusive possession when they have provided a lease for the purposes of social housing, there may be other grounds contained in the list at paragraph 10 of the Draft Ruling that still allow the charitable institution to access the exemption.

Therefore, we recommend that paragraph 10 be more clearly drafted to make clear that, in the case of social housing providers, the provision of a lease will not be considered to negate occupation by the charity where other factors such as those listed in items a to g in paragraph 10 are present. In addition, we understand that social housing providers increasingly use a mixed model of housing including both affordable and standard rentals for business purposes as well as social inclusivity and best practice. We recommend that the SRO provides clear guidance on how land tax will be treated in such mixed housing developments.

If the Commissioner's view is that grant of exclusive possession to a tenant is enough to see the charity no longer in occupation (and therefore ineligible for the exemption), a legislative amendment is likely required to allow social housing providers access to the exemption.

Exclusively for charitable purposes

The Tax Institute is concerned by the apparent confusion of activities and purposes throughout the section titled '[e]xclusively for charitable purposes.' A charity can only have charitable purposes, and purposes incidental and ancillary to those purposes. Incidental and ancillary purposes are those which, while not charitable themselves, are directly related to the achievement of the objective of the charity. Paragraph 12 of the Draft Ruling accepts that for the purposes of land tax, such purposes are charitable.

We consider that the activities by which a charity achieves those purposes are merely activities. This is a fundamental principle of charity law that was made clear in *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 (**Word Investments**). This principle was restated with clarity by the Administrative Appeals Tribunal in *Global Citizen Ltd v Commissioner of the ACNC* [2021] AATA 3317 at paragraph [97]:

A purpose or object is something that one strives toward or the reason that something exists. The Macquarie Dictionary defines purpose as 'the object for which anything exists or is done, made, used etc; an intended or desired result; end or aim'. An activity is defined as the state of action; or doing. In terms of a charity an activity is what the entity actually does day-to-day and over time'.

The Draft Ruling refers to *Wesley Mission Melbourne Ltd v Commissioner of State Revenue* [2004] VCAT 419 (**Wesley Mission**). We consider that the decision in *Wesley Mission* is distinguishable as a payroll tax case and, to the extent it provides authority on the fundamental distinction between activities and purposes in charity law, it is inconsistent with the decision in *Word Investments*. Accordingly, we consider that *Wesley Mission* should not be relied upon. Similarly, we also consider that the decision in *Shire of Derby-West Kimberley v Yungngora Association Inc* [2007] WASCA 233 is not a leading authority in light of the *Word Investments* decision. As a result, The Tax Institute recommends that these cases are not cited as authoritative precedents in the ruling.

Further, The Tax Institute recommends that the final sentence of paragraph 15 be removed. This sentence suggests that activities have a charitable or non-charitable nature in and of themselves. The High Court clearly rejected this notion in the *Word Investments* decision. In addition, the language of section 74 of the *Land Tax Act* refers to use and occupation exclusively for *charitable purpose* (our emphasis). If the relevant land is used and occupied by a charity, then such use and occupation can only be for charitable purposes as a charity cannot have independent non-charitable purposes.

If the SRO's intention is to separate use that is for a charitable purpose and use that is for a purpose that is incidental or ancillary to a charitable purpose, (which would appear to be contrary to its acceptance of such purposes as charitable in paragraph 12 of the Draft Ruling), then it is important for the Draft Ruling to provide clear guidance on this point. For example, the Tax Institute considers that this section of the Draft Ruling, which focuses on commercial activities conducted by charities, should be expanded to also provide advice concerning activities that are integral to a charity's operations such as administrative work, marketing, fundraising, etc. If the SRO's approach is to characterise activities themselves, which we do not consider to be the correct approach for the reasons detailed above, then it is important for guidance to be provided on the treatment of the use of land for these activities – all of which are, in our view, in furtherance of a charitable purpose.

Further, It is common for a charity to use office space or a building that results in charitable, administrative and potentially commercial activities being undertaken in the same physical location. In these instances, we consider that charities would benefit from advice regarding the availability of a partial exemption, and the criteria that the Commissioner would consider when making such a determination (for example, use of relative floor area, comparison of financial returns for each division etc.).

Opportunity Shops

The Tax Institute acknowledges that this Draft Ruling is a consolidation of previous rulings and the language in relation to opportunity shops is taken from LTA 005. However, we recommend that paragraph 20 be removed in its entirety as the factors listed there are anachronistic and not reflective of modern practices. The Tax Institute does not consider that the Draft Ruling should specifically contemplate opportunity shops.

Evidentiary requirements

The Tax Institute considers that the evidentiary requirements contained in paragraph 28 of the Draft Ruling can be confusing for an applicant (being the owner of the relevant land). In addition to our recommendations about harmonisation in the next section, we recommend that the Draft Ruling should clearly state that the primary evidence required is details of the occupant and user of the land, and the charitable purpose for which the land is used. The Draft Ruling should also break up the requirements into clearer parts, such as (for example, in replacement of items (b) and (c)). We have suggested preferred wording below:

- b. *the governing document of the charitable institution that uses and occupies the subject land(s), being:*
 - i. *for a company or an incorporated association, evidence of its incorporation and a copy of its current Constitution (or Memorandum and Articles of Association, as appropriate);*
 - ii. *for an incorporated association, evidence of its incorporation (as outlined above) and a copy of its Rules of Association (and Statement of Purpose / Objects, if in a separate document);*
 - iii. *for a trust, a copy of the trust deed (including any schedules) and any amendments and alterations to the trust deed; or*
 - iv. *for an unincorporated association, a copy of its rules of association.*

We consider that current items (b) or (c) (as appropriate), (d), and (h) (which should be contained in the relevant constituent documents for the entity), are relevant to determining or verifying whether the occupant/user of land is a charity. Items (a), and (i) and (j) (as appropriate) are relevant to the purpose for which the land is used (or will be used).

We do not consider that items (e), (f) or (g) are relevant or necessary for either of these purposes, in order for the Commissioner to make a determination that land is exempt from land tax under section 74. We therefore recommend that those requirements be removed.

Harmonisation across Australian jurisdictions

One of the primary factors which significantly exacerbates compliance costs for charities and other NFPs is the multiplicity of regulation at the different levels of government and across the various States and Territories. Charities and other NFPs are subject to many different reporting thresholds across multiple regulatory bodies, with the requirements for what activities qualify as charitable varying between government levels. This inconsistency creates unnecessary complexity and a heightened risk of organisations inadvertently either failing to meet their reporting obligations or inequitably not being able access exemptions and other concessions. The increased compliance burden also has the effect of diverting funds from the focus areas of the organisations, reducing their efficiency and ability to assist the community.

We acknowledge that it is ultimately a matter for the legislature to mandate harmonisation of the treatment of a charitable institution for the purposes of section 74 of the Act and a charity registered with the ACNC. However, The Tax Institute considers that, where possible, the SRO should strive to ensure that the requirements for charities are consistent with the ACNC's to minimise the compliance burdens on charities and NFPs. One way in which this could be achieved is by the SRO's accepting an organisation's ACNC registration as evidence of meeting the charitable institution requirements in section 74.

We consider that there should be no barrier to this where a charity is registered with the ACNC for the advancement of education; for the advancement or religion; for the relief of poverty or as a public benevolent institution. These are all squarely within the first three heads of charity noted in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891-1894] All ER Rep 28 (***Pemsel***). In our view, the remainder of charitable purposes listed in the *Charities Act 2013* (Cth) fall under the umbrella of the fourth *Pemsel* head of charity. We consider that if the SRO does not accept this proposition, then only those charities, along with charities that are not registered with the ACNC, which ought to be required to provide further evidence that they are charitable institutions for the purposes of the exemption in section 74. We consider that this would be a significant step towards achieving harmony across governments, minimising the compliance costs for charities.

APPENDIX B

About The Tax Institute

The Tax Institute is the leading forum for the tax community in Australia. We are committed to representing our members, shaping the future of the tax profession and continuous improvement of the tax system for the benefit of all, through the advancement of knowledge, member support and advocacy.

Our membership of more than 11,000 includes tax professionals from commerce and industry, academia, government and public practice throughout Australia. Our tax community reach extends to over 40,000 Australian business leaders, tax professionals, government employees and students through the provision of specialist, practical and accurate knowledge and learning.

We are committed to propelling members onto the global stage, with over 7,000 of our members holding the Chartered Tax Adviser designation which represents the internationally recognised mark of expertise.

The Tax Institute was established in 1943 with the aim of improving the position of tax agents, tax law and administration. More than seven decades later, our values, friendships and members' unselfish desire to learn from each other are central to our success.

Australia's tax system has evolved, and The Tax Institute has become increasingly respected, dynamic and responsive, having contributed to shaping the changes that benefit our members and taxpayers today. We are known for our committed volunteers and the altruistic sharing of knowledge. Members are actively involved, ensuring that the technical products and services on offer meet the varied needs of Australia's tax professionals.