School Building Funds

A recent Sun-Herald headline exclaimed **Elite schools spend $20 million a year on upgrades**. While some capital expenditure by independent schools comes from governments, the larger proportion comes from parents. Much of the parent contribution comes in the form of tax deductible donations to the school building fund. What is the basis for schools being able to offer donors the incentive of tax deductibility?

The legislation

The relevant legislation is found at Item 2.1.10 in subsection 30-25 (1) of the *Income Tax Assessment Act 1997*:

> *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 or college 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*

This is not new legislation. It was found in almost identical form in the *Income Tax Assessment Act 1936*. Gifts to school building funds have been deductible for many decades in Australia. There has been no substantive change in the statutory provision since the beginning. There has been no recent case dealing with the legislation.

Taxation rulings

The Australian Taxation Office has provided its views on the legislation in a series of rulings. Independent schools have for many years relied on Taxation Ruling 96/8. In 2011, the ATO indicated a significant shift in its thinking when it released draft Taxation Ruling TR 2011/D5 for public comment. The draft ruling was poorly thought out and justly criticised. More than a year later, on 13 February 2013, the ATO released a new final ruling on school building funds – TR 2013/2. This document is well written and well argued. It is replete with examples and is likely to remain the ATO view on the subject for many years.

Taxation rulings are the ATO's opinion about the way the provision in the legislation applies. It is not the law in the sense that it may be overruled by the

courts. However, schools can comfortably rely upon the new ruling knowing that they cannot be penalized for doing so, even if the courts subsequently decide on a different interpretation.

Key requirements of TR 2103/2

1. **There must be a school.** Independent schools clearly satisfy this requirement. However, some other organisations which previously sought to squeeze themselves into the description of a school will now find that impossible to do.

2. **There must be a building**; that is, a permanent structure, roofed and usually with walls and flooring, that provides protection from the elements. However, the Ruling accepts that a permanent structure such as a covered outdoor learning area is capable of being a building even though it has no walls. Many such structures were built with BER funding. Further, a part of a building can be a building for this purpose (for example, a floor of a building or a lot in a strata plan). Fixtures are part of a building.

   A swimming pool is not a building but an aquatic centre with an indoor pool qualifies.

3. **The building must be used as a school.** This means that it must be used to provide regular, ongoing and systematic instruction in a course of non-recreational education (indicated by things such as a set curriculum, suitably qualified teachers, enrolled students, some form of assessment and correction, and the creation of externally recognised qualifications). In addition, the extent and character of the use of the building must be such that the building can be described as being "used as a school" as a matter of ordinary language. This is the "gut feel" test. If it looks like a school, swims like a school, and quacks like a school, then it probably is a school.

   The Ruling states that school use must be substantial. Too much non-school use will mean that a building is not used as a school. Any non-school use must not materially limit the school use. It is relevant to compare the amount of time, the number of people, and the actual area involved in school use with non-school use. Also relevant is the extent to which the building has been adapted/modified to accommodate non-school use. These issues must be faced when a school assembly hall is also used as a place of worship for a church at weekends or when the aquatic centre is also used by other schools and by externally run learn-to-swim classes. Another factor that is likely to be relevant here is who has the final control over the use of the building.

4. **The building must be used as a school by a qualifying body.**

   While independent schools normally meet this requirement, care needs to be taken in situations where a third party provides access to a building for purposes which are clearly beneficial to the school. In such situations, the body carrying on the school may not be using the building as a school.

5. **There must be acquisition, construction or maintenance.**

   The requirement for "acquisition" is met if the school has a leasehold interest. This means that the fund can provide money for rent. Acquiring land for a building is also allowed.

   Maintenance includes repairs, painting, plumbing, cleaning as well as buying equipment used for maintenance and the cost of building insurance. Maintaining sports fields, playgrounds and outdoor car parks are not covered.

The governing bodies of independent schools, their senior executives and fundraisers must all become very familiar with the new Ruling. Current school building funds may lose their endorsement as deductible gift recipients if they do not comply with the Ruling.

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