

ALERT

23 JULY 2013

Test case clarifies PBI endorsement criteria

A recent Federal Court decision (**Test Case**) has displaced the previously accepted view that a charity's activities must directly relieve poverty, sickness, suffering or disability for the entity to be entitled to endorsement as a 'Public Benevolent Institution' (**PBI**). A PBI is a sub-category of charitable institution that is eligible for the full range of tax concessions available to registered charities. In particular, PBI endorsement permits organisations to claim the much coveted Fringe Benefits Tax (**FBT**) exemption. FBT-exempt status enables an organisation to provide tax-effective (and more competitive) remuneration packages to its employees.

The issue in question

Prior to the Test Case, the ATO was applying the law in a way that made PBI endorsement contingent on the charity:

- (a) effectuating a purpose to 'relieve poverty, sickness, suffering or disability'; and
- (b) providing its services directly to people in need of relief.

However, underpinning this practice position was significant ambiguity regarding whether the requirement to provide relief or assistance directly was a legal requirement of PBI endorsement.

The Test Case examined the 'direct relief' requirement in the

context of the applicant's appeal against the decision of the Commissioner of Taxation to deny PBI status. The applicant is a charity that engages principally in raising funds. It remits the proceeds of its fundraising activities to its global partners for the purpose of administering programs aimed at relieving poverty in developing countries. Given the remoteness of the applicant's fundraising activities and the ultimate relief of 'poverty, sickness or disability', the essential question before the court was: Does an organisation which carries out charitable activities indirectly qualify as a PBI?

The 'direct relief' requirement

The phrase 'Public Benevolent Institution' first appeared in legislation in the *Estate Duty Assessment Act 1914* (Cth) where it was used to replace the phrase 'charitable'. The legislature introduced the phrase 'PBI' to take the place of 'charitable' in an attempt to move away from the legal meaning of the word 'charitable' (which has a precise technical meaning) and to import a term that was to be understood according to the ordinary use of the term in the English language. The term 'Public Benevolent Institution' is therefore not defined by the *Fringe Benefits Tax Assessment Act 1986* (Cth) and is given its meaning by the common law.



Justice Perram acknowledged that the 'direct relief' requirement was not clearly supported by case law and he considered that the court in this case was not bound by precedent. His Honour extended the High Court's position in the analogous case of *Commissioner of Taxation v Word Investments* (2008) 236 CLR 204 (**Word Investments**), which concerned charitable institutions. *Word Investments* held that an entity was not to be prevented from being 'charitable' merely because it directed funds to other charitable entities. His Honour held that the same reasoning should apply to PBIs. Therefore, a PBI that is engaged in charitable activities should not lose its PBI status if it decides to divide its operations to include a fundraising arm. It follows that an entity which is engaged principally in fundraising activities will not automatically be denied PBI status.

Next steps

The Test Case is a decision of a single judge of the Federal Court and may be subject to appeal. However, if the decision stands, it effectively removes the 'direct relief' requirement that has been vigorously applied by the ATO to date. Nevertheless, fundraising entities seeking PBI endorsement must still ensure that the funds raised by their activities are remitted to organisations that directly relieve 'poverty, sickness or disability'.

The decision is favourable for existing or prospective PBIs that may be considering structuring their organisation to include a 'fundraising arm'. The decision also supports PBIs that intend to form global partnerships or engage local agents to carry out their charitable activities in countries outside Australia.

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