

**EXPOSURE DRAFT - FOR COMMENT AND DISCUSSION ONLY | HUKIHUKI HURANGA
- MŌ TE TĀKUPU ME TE MATAPAKI ANAKE**

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QUESTIONS WE'VE BEEN ASKED | PĀTAI KUA UIA MAI

GST – Registered members of unregistered unincorporated bodies

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This Question We've Been Asked considers whether a member of an unincorporated body who is registered for GST can claim input tax deductions for expenditure incurred by the unincorporated body if the unincorporated body is not itself registered for GST. It also considers whether members can claim input tax deductions for contributions they make to the unincorporated body.

Key provisions | Whakaratonga tāpua

Goods and Services Tax Act 1985 – ss 2 (“person”, “unincorporated body”), 3 (“contributory scheme”, “participatory security”), 3A, 6, 8, 20(3C), 51, 57.

Question | Pātai

Where an unincorporated body is not liable to or does not register for GST:

- 1) Can individual members claim input tax deductions for their share of the cost incurred by the unincorporated body?
- 2) Can individual members claim input tax deductions for their contributions to the unincorporated body?

Answer | Whakautu

Question 1

No. An input tax deduction can be claimed only by the person who acquired the goods and services. An unincorporated body is treated as a person for GST purposes and is the person who acquired the goods and services, even if the unincorporated body is not registered for GST.

Question 2

No. In most cases, the members of an unincorporated body will also not be able to claim an input tax deduction for contributions made to the unincorporated body. Where the contributions are made to establish a new unincorporated body, they are not made in exchange for a supply. Where contributions are made to acquire an interest in an existing unincorporated body from another member, there is a supply. However, the new member will be able to claim an input tax deduction only if the:

- existing member makes that supply in the course or furtherance of their own separate taxable activity; and
- new member acquires the supply for use in making taxable supplies in the course or furtherance of their own separate taxable activity; and
- interest is not an exempt supply of a participatory security in a contributory scheme.

Explanation | Whakamaramatanga

1. The Commissioner has been asked whether members of an unincorporated body who are registered for GST can claim an input tax deduction for:
 - their share of costs incurred by the unincorporated body; or
 - their contributions to the unincorporated bodyif the unincorporated body is not separately registered for GST.
2. An unincorporated body includes a partnership, a joint venture and the trustees of a trust. It also includes other groups of persons if the group is sufficiently organised.
3. Where an unincorporated body that carries on a taxable activity is registered, the members of that body cannot be registered or liable to register in relation to the body's taxable activity. Where an unincorporated body is not carrying on a taxable activity or is not registered for GST purposes the legislation does not prevent a member from registering for GST. However, the member can still become a registered person only if they are carrying on a taxable activity. In determining whether a member is carrying on a taxable activity, it is necessary to look at the member's activities separately from the activities of any unincorporated body they are a member of. This is because, where activities are carried on collectively by a group of persons, the "person" who is carrying on those activities is the unincorporated body and not any of the members individually.
4. A member who is registered for GST, is not able to claim input tax deductions for goods and services acquired by the unincorporated body. That is because the individual members are not the "person" that acquired those goods and services.
5. A member who is registered for GST is also unlikely to be able to claim an input tax deduction for contributions they make to the unincorporated body. This is because the contributions are unlikely to be consideration for any supply. Input tax deductions are allowed only where the:
 - contribution is made for an interest in an existing unincorporated body; and
 - person receives, in exchange for their contribution, a supply of an interest in that body (being a chose in action) from an existing member of that body who is registered for GST and making that supply in the course or furtherance of their own separate taxable activity; and
 - interest is not a participatory security in a contributory scheme; and

- person acquired that interest for use in making their own separate taxable supplies.
6. All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.
 7. Examples | Taura illustrating the principles discussed are at [53].

What is an unincorporated body?

8. An “unincorporated body” is defined as an unincorporated body of persons, including a partnership, a joint venture and the trustees of a trust (s 2). The definition is inclusive, such that a body that does not fit within the description of a partnership, a joint venture or the trustees of a trust could still be an unincorporated body for the purposes of the definition (*Case U19* (1999) 19 NZTC 9,186).

What is a partnership?

9. The concept of a partnership is defined by the Partnership Law Act 2019 and case law as follows.
10. A “partnership” is the relationship that exists between persons carrying on a business in common with a view to profit (s 8(1) of the Partnership Law Act).
11. “Business” includes every trade, occupation or profession (s 7(1) of the Partnership Law Act). This can include isolated or one-off ventures.
12. Any business must be carried on “in common”. This requires that the parties are carrying on a business together for their common benefit and that they have, as regards the business, expressly or impliedly accepted that they are acting jointly, rather than independently, and that each person’s actions bind the others. The express intentions of the parties are relevant, but should be considered in the context of the other terms of the arrangement and the conduct of the parties when dealing with each other and third parties.
13. Co-ownership of property does not by itself create a partnership in relation to the use of the property (s 12(1) of the Partnership Law Act). Whether the co-ownership of a single asset gives rise to a business and, therefore, a partnership, may depend on the degree of effort required to manage the asset, the type of decisions and nature of

decision-making, the method of dealing with third parties, as well as the financial arrangements between the co-owners in respect of income and expenditure.

What is a joint venture?

14. There is no particular legal definition of a joint venture (*United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 and *Commercial Factors Ltd v Scenic Hotel Group Ltd* [2019] NZHC 2370). However, case law indicates that a joint venture has the following features.
15. The term usually refers to a situation where parties come together for a particular common commercial goal (*Commercial Factors*). There must be a joint undertaking where plans are worked through for the benefit of and with input from each party (*Commerce Commission v Fletcher Challenge Ltd* [1989] 2 NZLR 554 (HC)).
16. Joint ventures are fundamentally, but not always, formal contractual associations (although the contract does not need to be in writing). Joint ventures are usually distinguishable from partnerships because they are not formed to conduct a general and ongoing business but tend to have a finite and confined purpose (*Commercial Factors*).
17. To have a joint venture, something more is needed than mere fortuitous co-ownership as would have occurred if somehow each side independently purchased 50% of an asset without reference to the other (*Fletcher Challenge*). There must also be something more than mere passive co-ownership, where each party advances money and is interested merely in a return without any participation in decision-making (*Fletcher Challenge*).

What is a trust?

18. A trust is a creation of the law of equity. A trust is not a legal entity distinct from its trustee. Instead, a trust is a fiduciary relationship where a trustee holds property for the benefit of the beneficiaries of the trust or, where the trust is a charitable trust, for the specified charitable purposes. Although a trustee has legal ownership over the trust property, it holds the property subject to the beneficial interests of the beneficiaries and must act in the best interests of the beneficiaries of the trust. A trustee may be an individual (that is, a natural person) or an entity such as a company. There may also be multiple trustees, who can be removed and replaced from time to time.

What is an unincorporated body that is not a partnership, a joint venture or the trustees in a trust?

19. The Commissioner considered the nature of unincorporated bodies that are not partnerships, joint venture or the trustees in a trust in [QB 19/11: GST - administrative or management services provided by an unincorporated body to its members](#) (Question We've Been Asked, Wellington, Inland Revenue, June 2019). In summary an unincorporated body of this type will usually:
- be formed by its members for one or more common purposes;
 - have some definition of the mutual rights and obligations of its members;
 - have agreed rules, setting out matters such as:
 - how the body is governed and decisions made;
 - how the body's funds may be used;
 - what happens when members join and leave the group;
 - have a structure recognised as a collective entity of its members; and
 - have a name and bank account.
20. QB 19/11 stated a significant degree of regulation governing the relationship between the members must exist, relying on *Case P70* (1992) 14 NZTC 4,469 for this proposition. On review, the Commissioner considers the reference to a "significant degree of regulation" is not an accurate representation of the conclusion in *Case P70*. In that case, the Taxation Review Authority stated the test for an unincorporated association as follows:
- An unincorporated association as His Honour says [in *Taunton Syndicate v CIR* (1982) 5 NZTC 61,106] is akin to an unincorporated company. Even though it may lack such detailed definition of mutual rights and obligations of its members some definition of mutual rights and obligations is essential.
21. To the extent that [QB 19/11](#) states "a significant degree of regulation" must exist, that is no longer the Commissioner's view. Instead, the Commissioner considers an unincorporated body must have some definition of the mutual rights and obligations of the members (as stated at [19]). This change in view does not otherwise affect the conclusions in QB 19/11.

Who can register for GST?

22. A person becomes liable to be registered for GST where the total value of supplies made in New Zealand in the course of carrying on all taxable activities exceeds \$60,000 (s 51(1)). A person may also become registered where they satisfy the Commissioner that they are carrying on, or intend to carry on, any taxable activity (s 51(3)).
23. A taxable activity is (s 6(1)):
 - any activity carried on continuously or regularly by any person, whether or not for a pecuniary profit; and
 - involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration.
24. A taxable activity does not include any activity carried on essentially as a private recreational pursuit or hobby (s 6(3)). (See for example, *Question We've Been Asked QB 17/04: Goods and Services Tax – Whether a racing syndicate can be a registered person* (Wellington, Inland Revenue, May 2017), where the Commissioner concluded that where a racing syndicate's activity is limited to the ownership (or leasing) and racing of horses, the essence of the activity will most often be the personal interest or pleasure derived from seeing the horse compete in, and potentially win, races, meaning it will be a hobby.)
25. If an unincorporated body of persons is carrying on an activity that is a taxable activity, the unincorporated body will be the "person" that can register (see the definition of "person" in s 2 and *Case U19*).

Can a member of an unincorporated body register for the activity?

26. Where an unincorporated body that carries on a taxable activity is registered, the members of that body cannot themselves be registered or liable to be registered for the body's taxable activity (s 57(2)(a)).
27. Where an unincorporated body is not carrying on a taxable activity or is not registered for GST purposes, s 57 will not apply to stop a member from being able to register. However, a member will still be able to register only if they satisfy the relevant requirements. This means the member, as a separate "person", needs to be carrying on a taxable activity.

28. In determining whether the member is carrying on a taxable activity it is necessary to look at the member's activities separately from the activities of any unincorporated body they are a member of. This is because, where activities are carried on collectively by a group of persons, the "person" who is carrying on those activities is the unincorporated body and not any of the members individually.
29. It is possible that the member's separate taxable activity could be connected to the unincorporated body's activity. For example, a horse trainer could be simultaneously a member of a racing syndicate and paid by that syndicate to train the horse. In that case, however, it is the member's training activities that form their taxable activity, not all the activities of the racing syndicate.
30. A member could also be a registered person due to entirely unrelated or peripherally related activities they carry on separately from the unincorporated body.
31. As for the unincorporated body, a member is unable to register if their only activities are carried on essentially as a private recreational pursuit or hobby.

Can registered members claim input tax deductions for costs incurred by the unincorporated body?

32. Input tax is the GST charged on supplies of goods or services acquired by a person (ss 3A(1)(a) and 8(1)).
33. A registered person is entitled to claim deductions for input tax when calculating the amount of GST that must be paid for each taxable period (s 20). A registered person is allowed a deduction:
 - for input tax in relation to a supply of goods and services made to that registered person; but
 - only to the extent to which the goods or services are used for, or are available for use in, making taxable supplies (s 20(3C)).
34. The reference to making taxable supplies refers to the member's individual taxable supplies (*Case T10 (1997) 18 NZTC 8,055*).
35. Costs incurred by the unincorporated body relate to goods and services the unincorporated body acquired. Given the members did not acquire the relevant goods and services, the members are not entitled to claim input tax deductions for their share of the unincorporated body's costs.

Can registered members claim input tax deductions for contributions to the unincorporated body?

36. A person is able to claim input tax deductions for contributions they make to an unincorporated body only if the:
- payments are consideration for a supply (but not an exempt supply) of goods or services made to the member in the course or furtherance of the supplier's taxable activity (such that GST can be charged on the supply); and
 - goods or services are used by the member in making their own taxable supplies.
- Given these requirements, the Commissioner considers it will be rare for a person to be able to claim an input tax deduction for contributions they make to an unincorporated body.
37. This will be the case whether or not the unincorporated body is registered for GST.

Can input tax deductions be claimed for an initial contribution?

38. In many cases, a member of an unincorporated body will make an initial contribution to become a member of that body. When a person becomes a member of an unincorporated body, they obtain certain rights and agree to certain obligations.
39. Various levels of formality will exist for this bundle of rights depending on the nature of the unincorporated body. For example, the law recognises that a share in a partnership is a fractional interest in the future profits of the partnership business and in a surplus of assets over liabilities on a winding up. The partner does not have title to specific partnership property but has a beneficial interest in the entirety of the partnership assets and in each and every particular asset of the partnership (*Hadlee and Sydney Bridge Nominees Ltd v CIR* (1991) 13 NZTC 8,116 (CA)).
40. While less formal than a partnership, many clubs and syndicates that are unincorporated bodies also have detailed rules setting out the rights and obligations of the members, including the members' rights to any property belonging to the body. At the other end of the spectrum, a joint venture can be entered into in a reasonably informal way, where parties who co-own property agree to manage it in a certain way with a certain purpose in mind.
41. The law expressly recognises that a partnership interest is a chose in action (which is a service for GST purposes (s 2)). While the rights and obligations attaching to a joint

venture or other types of unincorporated bodies such as clubs or syndicates are less formal, the Commissioner considers that those bundles of rights still amount to a chose in action.

42. Whether an initial contribution is consideration for the supply of an interest in an unincorporated body will depend on whether the unincorporated body already exists, or whether it is being newly formed from the initial contributions of the members:
- Where members make initial contributions to a newly formed unincorporated body there are no existing interests in the body to be supplied. Instead, the formation of the unincorporated body by way of the initial contributions creates the interests. In this case, the new members will not have received any supply.
 - Where a new member makes an initial contribution to an existing unincorporated body, 100% of the interests in the body are already owned by the existing members. Therefore, in exchange for their initial contribution, a new member will receive a supply of an interest in the body from the existing members.
43. These conclusions are consistent with the Commissioner's view set out in *Question We've Been Asked QB 16/04: Goods and Services Tax – GST treatment of partnership capital contributions* (Wellington, Inland Revenue, June 2016). The Commissioner considers that outcome will be the same for all unincorporated bodies.
44. If there is no supply, there will be no GST charged, and so no input tax deduction will be allowed. If there is a supply, input tax deductions will only be allowed where:
- the exiting member(s) supplying the interest is registered for GST and making that supply in the course or furtherance of their own separate taxable activity (such that GST can be charged on the supply); and
 - the interest is not a participatory security in a contributory scheme (discussed below); and
 - the person acquired the interest in the body for use in making their own separate taxable supplies (discussed further from [42]).

Is there an exempt supply of a participatory security?

45. Input tax cannot be claimed for exempt supplies. Exempt supplies include various actions relating to a "participatory security" (including issuing, transferring ownership, varying, or paying an amount in respect of the security), which is a financial service (s 3).

46. A participatory security is an interest or right to participate in any capital, assets, earnings or other property of any person where that interest or right forms part of a “contributory scheme” (s 3(2)). A contributory scheme is a scheme or arrangement that involves the investment of money where (s 3(2)):
- the investor acquires or may acquire an interest in or right in respect of property; and
 - that interest or right will be used or exercised in conjunction with any other interest or right in respect of property acquired in similar circumstances; but
 - does not include such a scheme if it has five or fewer investors, provided neither the manager of the scheme nor any associated person of the manager is the manager of another scheme.
47. “Participation” involves some form of sharing with others even if only with the promoter of the scheme (*R v Smith* (1991) 5 NZCLC 67,120 (HC)). The term “investment” in the definition of “contributory scheme” should be read broadly as including any investment of money in the hope of some kind of return, whether in money or otherwise (*Culverden Retirement Village v Registrar of Companies* [1997] 1 NZLR 257 (PC)).
48. Where an unincorporated body meets these requirements, the supply of an interest in the unincorporated body by a member of the unincorporated body to a new or existing member of the unincorporated body is an exempt supply of a financial service and no input tax deduction is allowed. This is consistent with *Question We’ve Been Asked QB 14/03: GST – Transfer of interest in a partnership* (Wellington, Inland Revenue, 2014).

Can input tax deductions be claimed for ongoing payments?

49. Members of unincorporated bodies will often also make ongoing contributions to cover the costs incurred by the body. Whether these payments are consideration for a supply of goods or services depends on the nature of the agreements entered into.
50. If the member’s interest in the unincorporated body does not change because of the further payments, then the member does not receive any supply in exchange for their payment. Instead, the member will simply be contributing capital to the unincorporated body to enable it to acquire the goods and services it requires to carry on its activity. This view is also consistent with the view expressed *Question We’ve Been*

Asked [QB 16/04](#): *Goods and Services Tax – GST treatment of partnership capital contributions* (Wellington, Inland Revenue, June 2016).

51. If the member's share in the unincorporated body increases as a result of the payments or the terms of the agreement are such that the payment is a further instalment toward the acquisition of the member's original share in or membership of the unincorporated body, then the payment is consideration for the further supply of the interest in the unincorporated body.
52. As for the initial contributions, if there is no supply, then no input tax deduction is allowed. If there is a supply, then an input tax deduction is allowed only if the requirements set out at [44] are satisfied.

If there is a supply, is it for use or available for use in making taxable supplies?

53. In most cases, payments made by members of an unincorporated body will be for a supply by a person who is not registered for GST, be for an exempt supply, being the issue of a participatory security, or will not relate to a supply at all. However, it is possible the payment could be in exchange for a supply that is not an exempt supply.
54. If a member who is registered for GST purposes receives a taxable supply that is not an exempt supply of a participatory security in exchange for their contributions to the unincorporated body they can claim an input tax deduction only to the extent to which the goods or services are used for or are available for use in making taxable supplies (s 20(3C)).
55. Whether this is satisfied will depend on the nature of the member's taxable activity. If the member's taxable activity is not related to the activities carried on by the unincorporated body, it is unlikely they will be able to argue that their interest in the unincorporated body is for use in making their taxable supplies. However, if the member's taxable activity involves something that requires the acquisition of an interest in the unincorporated body, they may be able to prove the interest they have is acquired for use in making their taxable supplies. This is a question of fact in each situation.

Examples | Taura

56. Examples | Taura 1–4 illustrate the principles discussed above.

Example 1 – Fudge-making partnership

Sarah and Aroha enjoy experimenting with making different flavours of fudge. Their friends and family love the fudge and encourage Sarah and Aroha to start making it to sell.

Sarah and Aroha decide to establish a partnership to enter into this business venture. They are successful in arranging to have their fudge sold at a couple of local tourist shops.

Fudge sales are less than \$60,000 per year so Sarah and Aroha decide not to register the partnership for GST. However, Aroha is an accountant and is registered for GST in her own name for her accountancy business. Aroha wants to know if she can claim input tax deductions for her share of the fudge-making expenses in her GST returns.

Aroha cannot claim input tax deductions for fudge-making expenses. They relate to goods and services acquired by the partnership for its taxable activity of making and selling fudge, not to Aroha's accounting activities. Aroha also cannot claim an input tax deduction for her initial contribution to acquire a share of the fudge-making partnership because that contribution was made to establish a new partnership.

Example 2 – Bloodstock venture

Jack is a bloodstock breeder and trainer. He sees a promising colt at the Karaka yearling sales that he is interested in buying to race and, potentially, breed from in the future. Jack contacts Jenna, who is also a bloodstock breeder, and Dinesh, who is a doctor but has other interests in bloodstock, and they agree to acquire the colt together for the initial purpose of racing.

Jack, Jenna and Dinesh agree that all decisions regarding the colt, including its management, training, racing, and breeding, must be agreed to by all of them and if they cannot agree, then no action will be taken. Each is obliged to pay their proportionate interest of the gross expenditure and are entitled to their proportionate interest of the gross earning. Jack, Jenna and Dinesh are free to dispose of their interests without any requirement to offer the share to the other co-owners.

Based on these facts, Jack, Jenna and Dinesh have entered into a joint venture with regard to the colt, which is an unincorporated body. The arrangement does not amount to a partnership because the parties have not agreed to act "in common", or jointly, so that they bind each other. The parties decide not to register the joint venture for GST. Instead, Jack, Jenna and Dinesh want to know whether they can claim input tax deductions for their expenditure in relation to the colt in their personal GST returns.

Jack, Jenna and Dinesh cannot claim input tax deductions for the expenditure relating to the colt in their personal returns. That expenditure relates to goods and services acquired by the joint venture not by Jack, Jenna and Dinesh individually. They also cannot claim input tax deductions for the initial contributions because they were made to establish a new joint venture.

Example 3 – Vintage car syndicate

Manu is a mechanic who loves vintage cars. She hears about a local syndicate that pools money to invest in vintage cars and travels around the country to rallies. Manu invests in the syndicate. At the time Manu invests, the syndicate has 10 members.

The syndicate has written rules about its operation, including requirements for members to contribute to fund the syndicate's activities and rules for distributing any profits from sales of the vehicles. The syndicate has sufficient organisation that it will be an unincorporated body for GST purposes. However, the activities of the syndicate are sporadic and more in the nature of a recreation or hobby. Therefore, the syndicate cannot register for GST.

Manu wants to know whether she can claim an input tax deduction for her contributions to the syndicate in her returns for her mechanic business.

Manu cannot claim an input tax deduction in respect of her initial contribution. Manu's initial contribution is likely to have been consideration for a supply of an interest in the syndicate. However, it will be an exempt supply of a participatory security in a contributory scheme. In addition, none of the other members making the supply are registered for GST, and Manu did not acquire the interest in the syndicate

for use in making taxable supplies in the course or furtherance of her mechanic business.

Manu will also not be able to claim any input tax deductions for her ongoing contributions because they are not made in exchange for a supply.

Draft items produced by the Tax Counsel Office represent the preliminary, though considered, views of the Commissioner of Inland Revenue.

In draft form these items may not be relied on by taxation officers, taxpayers, and practitioners. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.

References | Tohutoro

Legislative references | Tohutoro whakatureture

Goods and Services Tax Act 1985 – ss 2 (“person”, “unincorporated body”), 3 (“contributory scheme”, “participatory security”) 3A, 6, 8, 20, 51, 57

Partnership Law Act 2019 – ss s 7(1), 8(1), 12(1)

Case References

Case P70 (1992) 14 NZTC 4,469

Case T10 (1997) 18 NZTC 8,055

Case U19 (1999) 19 NZTC 9,186

Commerce Commission v Fletcher Challenge Ltd [1989] 2 NZLR 554 (HC)

Commercial Factors Ltd v Scenic Hotel Group Ltd [2019] NZHC 2370

Culverden Retirement Village v Registrar of Companies [1997] 1 NZLR 257 (PC)

Hadlee and Sydney Bridge Nominees Ltd v CIR (1991) 13 NZTC 8,116 (CA)

R v Smith (1991) 5 NZCLC 67,120 (HC)

United Dominions Corp Ltd v Brian Pty Ltd (1985) 157 CLR 1

Other references | Tohutoro anō

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Question We've Been Asked QB 14/03: GST – Transfer of interest in a partnership (Wellington, Inland Revenue, 2014). www.taxtechnical.ird.govt.nz/en/questions-we-ve-been-asked/2014/qb-1403-goods-and-services-tax-transfer-of-interest-in-a-partnership

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About this document

Questions We've Been Asked (QWBAs) are issued by the Tax Counsel Office. QWBAs answer specific tax questions we have been asked that may be of general interest to taxpayers. While they set out the Commissioner's considered views, QWBAs are not binding on the Commissioner. However, taxpayers can generally rely on them in determining their tax affairs. See further [Status of Commissioner's advice](#) (December 2012). It is important to note that a general similarity between a taxpayer's circumstances and an example in a QWBA will not necessarily lead to the same tax result. Each case must be considered on its own facts.