



INTERPRETATION STATEMENT

GST - unconditional gifts

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This Interpretation Statement provides guidance on the meaning of “unconditional gift” for GST purposes. A payment made to a GST-registered non-profit body that is an “unconditional gift” is not “consideration” for a supply of goods or services and is not subject to GST.

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

REPLACES

- “GST and Unconditional Gifts”, *Tax Information Bulletin* Vol 2 No 4 (November 1990, p 3); and
- “GST and Unconditional Gifts”, *Tax Information Bulletin* Vol 3 No 1 (July 1991, p 11).

Table of Contents

Summary.....	2
Introduction.....	4
Analysis.....	5
What does “voluntarily made” mean?.....	7
What payments are made for the carrying on or carrying out of the purposes of the relevant non-profit body?.....	10
What if the payment is made for a specified purpose?.....	10
What is an “identifiable direct valuable benefit”?.....	11
What does it mean for a benefit to arise “in respect of” a payment?.....	15
What does “arises or may arise” mean?.....	17
Can a single transaction be split into an unconditional gift and consideration for a supply?.....	18
Examples.....	18
References.....	25
Related rulings/statements.....	25
Subject references.....	25
Case References.....	25
Legislative References.....	26
Appendix - Legislation.....	26
Goods and Services Tax Act 1985.....	26

Summary

1. This Interpretation Statement provides guidance on the meaning of “unconditional gift” in s 2. A payment made to a GST-registered non-profit body that is an “unconditional gift” is not “consideration” for a supply of goods or services and is not subject to GST.
2. Knowing whether payments are unconditional gifts is important for non-profit bodies that are carrying on taxable activities. Non-profit bodies do not have to return GST on payments that are “unconditional gifts”. This also means those payments are not taken into account when a non-profit body is determining whether or not the body exceeds the GST registration threshold and needs to register for GST.

3. A payment made to a non-profit body is an “unconditional gift” where:
 - the payment is voluntarily made for the carrying on or carrying out of the non-profit body’s purposes, and
 - no “identifiable direct valuable benefit” in the form of a supply of goods and services to the payer (or an associated person) arises or may arise in respect of the payment.
4. Unconditional gifts generally do not include payments made to a non-profit body under a statutory or other legal obligation, including payments made under contractual obligations. This is because those payments are not usually considered to be “voluntarily made” given they are required to be made. They are not made from a person’s own free will. However, a payment made under a sense of moral obligation may still be regarded as being voluntarily made.
5. An “identifiable direct valuable benefit” is an advantage or gain in the form of a supply of goods or services to the payer (or an associate of the payer) which is:
 - clearly able to be defined or identified;
 - sufficiently closely connected to the payment;
 - useful, important and of real value;
 - capable of being valued; and
 - not of only nominal worth.
6. The benefit must not be in the form of a supply of goods or services to the payer (or an associated person) “in respect of” the payment. Where the benefit will arise regardless of whether the payment is made, there will not be a sufficient link between the benefit and the payment. An unsolicited “thank you” gift made by a non-profit body to a donor thanking them for making a donation is also an example of a benefit that does not have a sufficient connection with the payment made.
7. However, where there is a sufficient link between the identifiable direct valuable benefit and the payment so that the payment is made “in respect of” the benefit, the payment is not an “unconditional gift”. The payment will instead be “consideration” for the supply of the goods or services comprising the benefit and will be subject to GST.
8. On occasions payments may be made to a non-profit body that are not “unconditional gifts” and are not “consideration” for a supply of goods or services. Such payments are not subject to GST.
9. It is sufficient that an identifiable direct valuable benefit “arises or may arise”. This means that the benefit need not arise when the payment is made, instead the benefit can arise in the future or be contingent on a future event or action occurring after the

payment is made. For such a benefit to negate an “unconditional gift” there needs to be a sufficient link between the benefit and the payment.

10. Amounts donated to a non-profit body for a specified purpose with stipulations as to how the funds are to be used may be unconditional gifts, provided no identifiable direct valuable benefit arises or may arise in the form of a supply of goods and services for the payer (or an associated person).
11. Where a single supply of goods or services is made for an agreed consideration it cannot be split into two parts - with one part being an unconditional gift (and not subject to GST) and the other part being consideration for a supply of goods and services (and subject to GST). The value of a supply is determined by the consideration paid, and there is no ability under the Act for a portion of the agreed consideration to be notionally treated as an unconditional gift.
12. A payment made by the Crown or a public authority to a non-profit body is not an unconditional gift.
13. This Interpretation Statement updates and replaces the Commissioner’s guidance on unconditional gifts in:
 - “GST and Unconditional Gifts”, *Tax Information Bulletin* Vol 2 No 4 (November 1990, p 3 and Appendix B); and
 - “GST and Unconditional Gifts”, *Tax Information Bulletin* Vol 3 No 1 (July 1991, p 11).
14. The Commissioner’s guidance on payments to state schools in “GST and Unconditional Gifts”, *Tax Information Bulletin* Vol 2 No 4 (November 1990, Appendix B) was previously replaced by BR Pub 03/04 Payments made by parents or guardians of students to state schools – GST treatment (and its successor public rulings). The Commissioner’s current guidance on payments to state schools is found in [BR Pub 18/06 Goods and Services Tax - Payments made by parents to state and state integrated schools](#).
15. While the issue of whether koha is an unconditional gift is not specifically addressed in this Interpretation Statement some of the analysis may be helpful. Further guidance on the GST treatment of koha can be found on Inland Revenue’s website at <https://www.ird.govt.nz>.

Introduction

16. “Unconditional gift” is a defined term in the Act.

17. The specific terms of the “unconditional gift” definition must be applied. The analysis of whether or not a payment falls within the definition is in some respects similar to, but is not the same as, the analysis of whether a payment is a gift:
- at common law or for income tax purposes (eg, under the donation tax credit provisions); or
 - for other GST purposes (eg, under the “donated goods and services” definition).

However, when used cautiously and given appropriate weight, case law from other gifting contexts (like income tax, or insolvency) can be helpful in interpreting the definition.

18. The issues which commonly arise in relation to the “unconditional gift” definition and which are addressed in this Interpretation Statement are as follows:
- What does “voluntarily made” mean?
 - What payments are made for the carrying on or carrying out of the purposes of the relevant non-profit body?
 - What if the payment is made for a specific purpose?
 - What is an “identifiable direct valuable benefit”?
 - What does it mean for a benefit to arise “in respect of a payment”?
 - What does “arises or may arise” mean?
 - Can a single transaction be split into an unconditional gift and consideration for a supply?
19. These issues are discussed in detail in the next part of this Interpretation Statement.

Analysis

20. GST is charged on the supply of goods and services made by a registered person, in the course or furtherance of a taxable activity, by reference to the value of the supply (see s 8). A taxable activity involves the supply of goods and services for a consideration (see s 6(1)(a)). The value of a supply is determined by reference to the consideration for the supply (see s 10). Therefore, for a supply of goods and services to be subject to GST there needs to be “consideration”.
21. “Consideration” is defined in s 2 as:

consideration, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but

does not include any payment made by any person as an unconditional gift to any non-profit body
[Emphasis added]

22. A payment made by any person as an “unconditional gift” to any non-profit body is not “consideration” in relation to any supply of goods and services. Such a payment is not subject to GST whether or not the non-profit body is GST-registered.
23. “Unconditional gift” is defined in s 2 as:
- unconditional gift** means a payment voluntarily made to any non-profit body for the carrying on or carrying out of the purposes of that non-profit body and in respect of which no identifiable direct valuable benefit arises or may arise in the form of a supply of goods and services to the person making that payment, or any other person where that person and that other person are associated persons; but does not include any payment made by the Crown or a public authority
24. The two definitions have common elements and case law indicates that conclusions on the “consideration” issue and the “unconditional gift” issue ought to be consistent. That is, a payment that is not an “unconditional gift” because it is a payment made in respect of a supply of goods or services will be “consideration” (*Case U37 (2000) 19 NZTC 9,353 (TRA)* at [33]). Payments that are consideration are subject to GST.
25. “Consideration” is broadly defined, and whether there is a sufficient connection, link or nexus to a supply of goods or services to be “consideration” for the purposes of the Act can sometimes be a difficult question. On occasions payments may be made to a non-profit body that are not “unconditional gifts” and are not “consideration” for a supply of goods or services. Such payments are not made in relation to a supply of goods or services and so are not subject to GST. (For example, see *New Zealand Refining Co v CIR* (1995) 17 NZTC 12,307 (HC), and *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA)).
26. Another example is state schools where students have a statutory right to free education. Payments by parents to state schools are not “consideration” for the supply of education services that are an integral part of the curriculum. Therefore, in that situation there is no need to consider whether the parents’ payments are “unconditional gifts” (see further [BR Pub 18/06 Goods and Services Tax - Payments made by parents to state and state integrated schools](#)).
27. Practically, for most non-profit bodies, simply confirming a payment is an “unconditional gift” will resolve whether the payment is subject to GST. In circumstances where it is not clear whether a payment is an unconditional gift, it may then be relevant to consider the wider question of whether the payment is, in fact, “consideration” for a supply of goods or services. Where the payment is not an unconditional gift but is paid in respect of a supply of goods or services then the payment will be consideration for that supply and subject to GST

28. It is recognised that the “unconditional gift” definition should be read together as a whole to determine if a payment is an “unconditional gift”. However, to assist with understanding the meaning of “unconditional gift”, the definition can be broken down into the following elements:
- a payment;
 - voluntarily made;
 - to any non-profit body;
 - for the carrying on or carrying out of the purposes of the relevant non-profit body;
- and
- in respect of which no identifiable direct valuable benefit arises or may arise in the form of a supply of goods and services;
 - to the person making that payment or any other person where that person and that other person are “associated persons”.
29. As set out in the definition of “unconditional gift”, any payments made to a non-profit body by the Crown, or a “public authority” are not unconditional gifts (even if such payments satisfy all of the elements set out above). This Interpretation Statement does not consider the meaning of the term “public authority” as defined in s 2.
30. Similarly, payments are not unconditional gifts where a relevant benefit is supplied to an associated person of the person making the payment. This Interpretation Statement does not consider the meaning of the term “associated person” as set out in s 2A.
31. While the definition of “unconditional gift” refers to benefits arising in the form of supplies of goods *and* services, that phrase is to be read as also referring to supplies of goods *or* supplies of services (see s 2(2)).

What does “voluntarily made” mean?

32. The first part of the definition of “unconditional gift” requires the payment to be “voluntarily made”. These words (and others used in the definition, discussed later in this Interpretation Statement) are not defined in the Act and so they need to be given an ordinary meaning that is consistent with the purpose of the definition of “unconditional gift” (see s 5 of the Interpretation Act 1999).
33. Dictionary definitions of “voluntarily” and “voluntary” indicate that for a payment to be voluntarily made it must be made by one’s own free will and not be required to be

made. For example, the *Shorter Oxford English Dictionary on Historical Principles* (6th ed, Vol 2, 2007, Oxford University Press Inc, New York) defines:

- “voluntarily” as:

1 Of one’s own free will or accord; without compulsion, constraint or undue influence by others; freely, willingly; ...

- “voluntary” as:

2 Of an action: performed or done of one’s own free will, impulse or choice: not constrained, prompted, or suggested by another. Also more widely, left to choice, not required or imposed, optional. ... **c** LAW. Of a conveyance, a disposition etc; made without money or consideration being given or promised in return.

34. Therefore, an ordinary meaning of “voluntarily made” is that it refers to a payment that is made freely by choice, is not required to be made or is optional.
35. This meaning is consistent with comments made by Judge Sinclair in *Case 8/2018* (2018) 28 NZTC 4,015 (TRA). Judge Sinclair considered that a payment is voluntary if it is not made under a statutory or other legal obligation. In Her Honour’s view, such other legal obligation to make a payment can include an obligation under a contract. She considered this to be consistent with the approach taken by the Court of Appeal in *Turakina Maori Girls College Board of Trustees v CIR* (1993) 15 NZTC 10,032 when referring to consideration as being provided either pursuant to contract or voluntarily.
36. *Case 8/2018* concerned whether amounts paid to the taxpayer by the parents of children attending a private school were consideration for a supply of education services or unconditional gifts. Judge Sinclair found that the payments by the parents were made voluntarily and not pursuant to any contractual obligation. However, the payments were not unconditional gifts because they were payments made in return for the supply of education services (discussed further below).
37. In the Commissioner’s view a payment is not voluntarily made if it is made under a legal obligation. A legal obligation includes a statutory obligation and in most instances it also includes an obligation under a contract. Occasionally, where the facts support it, a payment made under a contract may still be “voluntarily made”, for example where the contract simply records a gratuitous promise to make a payment. However, the absence of a contract does not necessarily mean that a payment is voluntarily made.
38. A payment of money made under a sense of moral obligation does not mean that the payment is not voluntarily made. Similarly, a payment made under a deed of gift that records the terms of a donor’s voluntary promise to make a gift is considered to be voluntarily made.

39. Whether a payment is “voluntarily made” depends on the circumstances. Each situation depends on its facts but as a general rule the Commissioner considers, unless there is evidence to the contrary, payments required to be made pursuant to some legal obligation (statutory or contractual) are not voluntarily made in the sense required by the definition of “unconditional gift”.
40. Payments are voluntarily made even where they are solicited by a non-profit body or the non-profit body recommends a certain level of donation. In *Rumney Rugby Football Club v HM Commissioners for Revenue & Customs* [2006] UKVAT V19480, a United Kingdom value-added tax case, a rugby club had a non-exclusive licence to use a ground owned by the council for rugby matches. Notices at the gate suggested recommended levels of donations, but there was no means of enforcing payment and, as the club did not issue tickets for matches, there was no means of determining whether a particular individual had or had not paid. It was held that the gate receipts were voluntary even though there was a recommended level of donation. Accordingly, the payments were donations and not consideration for a supply.
41. Therefore, in summary, for the purposes of the definition of “unconditional gift” the Commissioner considers:
- a payment is voluntarily made if it is made freely by choice, is not required to be made or is optional;
 - a payment is not voluntarily made if it is made under a legal obligation. A legal obligation includes a statutory obligation and in most instances it also includes an obligation under a contract;
 - a payment made under a sense of moral obligation does not mean that the payment is not voluntarily made; and
 - a non-profit body soliciting donations or recommending the amount of a donation does not prevent a payment from being voluntarily made.
42. Establishing if a payment is voluntarily made is a question of fact, and every case falls to be determined by considering all the relevant circumstances.

What payments are made for the carrying on or carrying out of the purposes of the relevant non-profit body?

43. For a payment to be an unconditional gift it must be made to a non-profit body “for the carrying on or carrying out of the purposes of that non-profit body”. “Non-profit body” is defined in s 2:

non-profit body means any society, association, or organisation, whether incorporated or not,—

- (a) which is carried on other than for the purposes of profit or gain to any proprietor, member, or shareholder; and
 - (b) which is, by the terms of its constitution, rules, or other document constituting or governing the activities of that society, association, or organisation, prohibited from making any distribution whether by way of money, property, or otherwise howsoever, to any such proprietor, member, or shareholder
44. *Case X19* (2006) 22 NZTC 12,255 (TRA) suggests that if the recipient is a “non-profit body”, then an amount can only ever be used for the carrying out of the purposes of that non-profit body. The Court noted that this was because, to come within the definition of a “non-profit body”, the body must not be permitted to distribute any of its property or money to any proprietor, member or shareholder. The Court went on to say that if the body’s constitution does not provide this, then it cannot be a non-profit body for the purposes of the Act.
45. Therefore, in practice, the requirement for a payment to be made to a body “for the carrying on or carrying out of the purposes” of that body will necessarily be met if the body is a “non-profit body”. Not-for-profit entities, including charitable entities registered under the Charities Act 2005, will generally meet the requirements of the “non-profit body” definition.

What if the payment is made for a specified purpose?

46. A question that has been asked is whether the phrase “for the carrying on or carrying out of the purposes of that non-profit body” limits “unconditional gifts” to payments made for the general purposes of a non-profit body, or also includes payments made to a non-profit body for a specified purpose.
47. The courts have recognised that payments made with a direction or condition as to how the funds are to be used may still fall within the definition of “unconditional gift”. In *Case U37*, the payment was conditional on its use for renovations and repairs of leased premises. Although the payment was found not to be an unconditional gift (because it was “consideration”) Judge Barber commented that the condition attached to the payment would not have disqualified it from being an “unconditional gift” (see Example 5 - Donation to school with conditions at [96]).

48. The word “unconditional” in the context of the defined term “unconditional gift” refers to whether any benefit supplied to the payer (or an associated person of the payer) is conditional on them making the payment. It does not refer to any conditions or stipulations that the payer may attach to the payment. Amounts paid to a non-profit body for a specified purpose can still meet the definition of “unconditional gift” in s 2, so long as there is no identifiable direct valuable benefit in respect of the payment in the form of a supply of goods or services to the payer (or an associated person of the payer).
49. An unconditional gift is made when the payment is made to the non-profit body. At common law if there is a condition to be satisfied before a gift can be made, that is referred to as a condition precedent. In that case the gift is not made until the condition is satisfied. When a payer makes a gift of money with a stipulation as to how that money is to be spent then that is a condition subsequent. In that case the gift is made when the payment is made, not when the condition is satisfied. (See *Broadbent v Chief Executive of The Ministry of Social Development* [2017] NZHC 1499 from [41].)
50. Actions undertaken by a payee to satisfy a condition attached to a payment will not prevent the payment from being an unconditional gift so long as no identifiable direct valuable benefit arises in the form of a supply of goods and services to the payer (or an associated person) in respect of the payment.
51. Sometimes circumstances can arise where money is loaned to a non-profit body or placed on trust before it is “given” outright to the non-profit body. Sometimes this might occur while a condition precedent is being satisfied. A loan is not an “unconditional gift”. Similarly, funds held in trust for a non-profit body have not been transferred to the non-profit body, and so no payment has been made to the non-profit body. Understanding when an unconditional gift is made will depend on the facts and a careful consideration of the legal arrangements actually entered into and carried out.

What is an “identifiable direct valuable benefit”?

52. A payment will not be an unconditional gift where an “identifiable direct valuable benefit” arises or may arise in respect of the payment, in the form of a supply of goods or services to the payer (or an associated person of the payer).
53. To disqualify a payment from being an unconditional gift the “identifiable direct valuable benefit” must arise in the form of a supply of goods or services. “Goods” and “services” are defined in s 2. A supply of money is not a supply of goods or services for GST purposes.

54. The phrase “identifiable direct valuable benefit” is a composite phrase and must be considered as a whole, and in light of the words following it. Even so, it is helpful to consider each of the words that make up the phrase in turn, as each word has its own meaning.

Identifiable

55. The Commissioner considers that, for the purposes of the definition of unconditional gift, an “identifiable” benefit is a benefit in the form of a supply of goods or services that is clearly able to be defined or identified. (See, for example in a different context, *Estate of Simpson v Accident Compensation Corporation* [2007] NZCA 247 where the Court considered that for compensation to be paid for loss or an expense for the provision of care by a person (the carer) to an injured person, that loss or expense had to be defined or identifiable. This required the carer to be able to prove the number of hours spent caring for the injured person and to provide evidence of how the loss of time caused financial detriment.)

Direct

56. While the meaning of “direct” has not been discussed in any detail by the New Zealand courts in a GST context, the phrase “directly in connection with” as used in the zero-rating provisions of the Act has been considered. In *Malololailai Interval Holidays New Zealand Ltd v CIR* (1997) 18 NZTC 13,137 (HC) and other New Zealand cases considering the words “directly in connection with”, the word “directly” is seen as specifying the strength or degree of connection required.
57. Judge Barber considered the meaning of the word “direct” in *Case H48* (1986) 8 NZTC 384 (TRA), in the context of the deductibility of expenditure incurred in obtaining an academic qualification. His Honour accepted that a nexus or link existed between the education expenditure and an increase in income; but did not find that link to be sufficiently close that it could be regarded “as a direct result of the obtaining of that degree”. Again, although in an income tax context, this is an example of the word “direct” being used to specify the degree of nexus required between two things.
58. In the Commissioner’s view, for a payment to be disqualified from being an unconditional gift a close connection is required between the benefit in the form of a supply of goods or services and the payment. The use of the word “direct” shows that Parliament recognised that sometimes indirect benefits are obtained when a gift is made but those indirect benefits should not disqualify the payment from being a gift. An example of an indirect benefit might be when a parent donates \$50 to their children’s school for library books that their children may read.

59. A stronger connection exists where a payment gives rise to a benefit in the form of a supply of goods or services for the payer alone, as opposed to the payment being one that benefits a whole class of people, one of whom is the payer. Also, where the benefit obtained would be available irrespective of whether the payment is made, it will not be a direct benefit as an insufficient connection exists between the payment and the benefit for it to be described as “direct”. And the benefit will also not arise “in respect of” the payment. This aspect is discussed further below and is linked to the idea of reciprocity.
60. A payment that directly relates to a benefit in the form of a supply of goods or services but passes through an intermediary or is provided by another party could still be a direct benefit. The Commissioner considers that whether such a benefit is a direct benefit will depend on the facts. The important question to be answered is whether and to what extent the payer or an associate has benefitted from the payment, and whether they would have gained the benefit irrespective of whether the payment was made.

Valuable

61. The ordinary meaning of “valuable” is something worth a great deal of money or very useful or important. Sometimes it also means something that is of material or monetary value and able to be valued. For example, the *Shorter Oxford English Dictionary on Historical Principles* defines “valuable” as:
- 1 Of material or monetary value; capable of commanding a high price; precious
 - 2 Able to be valued
 - 3 Having considerable importance or worth; of great use or benefit; having qualities which confer value.
62. Therefore, the Commissioner considers that a reasonable interpretation of the word “valuable” in the context of a benefit and the definition of “unconditional gift”, is that the benefit must be something useful or important and of real value. The benefit must be capable of being valued and be of material value and, it follows, should not include benefits of only nominal worth.
63. Judicial support for this interpretation can be found in comments made by Gallen J (delivering the judgment of the Court of Appeal in *Welch v Official Assignee* [1998] 2 NZLR 8 at 12) on the meaning of “valuable consideration” in the context of gifting for insolvency law purposes:

The term “valuable consideration” has been the subject of some disagreement in the decisions but as the Judge noted, the consensus of authority is that the term means more

than a nominal consideration which would be sufficient to support a contract, but falls short of a consideration which equates with the value of the property under consideration. In *Meo v Official Assignee* [1987] 3 NZCLC 100,280 Greig J referred to it as being a “real value” and there are similar comments in *Re Abbott (A Bankrupt), ex parte Trustee of the Property of the Bankrupt v Abbott (P M)* [1983] Ch 45, see also *Re Windle (a bankrupt), ex parte the trustee of the bankrupt v Windle* [1975] 3 All ER 987.

64. While not a GST decision, Gallen J found “valuable” in the context of gifts and consideration to mean something that was more than nominal and had a “real value”. This decision supports the Commissioner’s view that when deciding if a benefit is “valuable” for the purposes of the “unconditional gift” definition, benefits which cannot be valued or supplies of goods or services with only nominal worth may be overlooked. In keeping with these de minimis principles, a benefit will be of nominal worth when the value of the supply of goods or services is minimal or trivial (see Example 4 – Donation to street appeal at [94]).
65. The question of whether a benefit is “valuable” does not arise where a non-profit body supplies goods or services as an unsolicited “thank you” for a donation and it can be determined the supply is not made in return for the donation.

Benefit

66. The ordinary meaning of “benefit” is an advantage or profit gained from something (see *Concise Oxford English Dictionary* (12th ed, 2011, Oxford University Press Inc, New York) and also *Shorter Oxford English Dictionary on Historical Principles*).
67. The meaning of “benefit” is coloured by the adjectives that precede it and by the words that follow it. As a result, any advantage or gain to the payer (or a person associated with the payer) must be identifiable, direct and valuable and must be in the form of a supply of goods or services.

Summary

68. Bringing together all the elements of the phrase “identifiable direct valuable benefit”, the Commissioner considers that the phrase means an advantage or gain to the payer (or a person associated with the payer) in the form of a supply of goods or services that is:
 - clearly able to be defined or identified;
 - sufficiently closely connected to the payment;
 - useful, important and of real value;
 - capable of being valued; and

- not of only nominal worth.
69. Three examples where New Zealand courts have found there to be identifiable direct valuable benefits in the form of a supply of goods and services are:
- the benefit to the payer of the recipient entering into a lease with them and improving the payer's property (*Case U37*);
 - the benefit to the payer of the recipient providing education/tuition services to the payer's children (*Case 8/2018*); and
 - the benefit to the payer of being entitled to use the recipient's sports courts and to receive coaching services (*Case 6/2019* (2019) 29 NZTC 5,005 (TRA)).

In these cases, the payments were found to be consideration for the supply of the goods or services, and not unconditional gifts.

What does it mean for a benefit to arise “in respect of” a payment?

70. To disqualify a payment from being an unconditional gift, the identifiable direct valuable benefit (in the form of a supply of goods or services) must arise “in respect of” the payment made. Receipt of a benefit by the payer (or an associated person) is not by itself enough to take the payment out of the definition of unconditional gift. For a payment to be disqualified from being an “unconditional gift”, a sufficient link must exist between the payment and the benefit arising in the form of a supply of goods or services.
71. The Commissioner considers that where the benefit would arise irrespective of the payment being made, then an insufficient link exists to negate the payment from being an unconditional gift. The courts have found that for a payment to be an “unconditional gift” any benefit arising must not be conditional or dependent on the payment being made.
72. This approach was applied by Judge Barber in *Case U37* and *Case 6/2019*, and further clarified in *Case 8/2018* by Judge Sinclair. Judge Barber set out the criteria for an unconditional gift in *Case U37* at [42]:

To qualify as an unconditional gift, several criteria must be met under the definition of “unconditional gift” in s 2 of the Act:

- (1) The payment must be voluntarily made to a non-profit body.

(2) No direct valuable benefit may arise in the form of goods or services to the person making that payment, or if such a benefit does arise, **that benefit must not be conditional or dependant [sic] upon the payment.** [Emphasis added]

73. *Case U37* concerned a non-profit body that had agreed to take a lease of premises on the basis that it would receive a payment of \$20,000 from the landlord. Receipts and correspondence between the parties indicated that the money was to be used for refurbishing the premises. Judge Barber concluded that the payment was not an unconditional gift because it was sufficiently connected to the benefit (ie, the lease and the property improvements):
- the payment was conditional on the non-profit body entering into a lease and the payment being used for renovations and repairs of the leased premises; and
 - the landlord had received two direct valuable benefits from the payment (the entering into the lease and, if the payment was used for its intended purpose, the renovation and repair of the premises).
74. In *Case 6/2019* Judge Barber similarly concluded that a relevant benefit (namely the payer's entitlement to use the recipient's sport courts and receive coaching services) was conditional upon payment being made.
75. In *Case 8/2018* counsel for the taxpayer argued that "conditional" and "dependent" were essentially two ways of saying the same thing. Judge Sinclair disagreed, stating at [51]:
- In my view, on a careful reading of the decision, it is clear that **His Honour contemplated two different situations when he set out the criteria, namely that the benefit must not be conditional (contingent) or dependent (reliant) on the payment.** Furthermore, by way of observation, if Judge Barber had intended to use these words interchangeably, it would be reasonable to expect that his Honour would have done so in his decision or, at least, have continued to use the words together. Instead, in his analysis of the facts he only used the word "conditional". [Emphasis added]
76. Judge Sinclair found on the facts that children were not excluded from attending the private school if their parents were unable to pay, so their attendance at the school was not "conditional" on parents making the requested financial contributions. However, the supply of education services by the disputant was "dependent" on parents' contributions. This was because it was evident from the background facts preceding the payments, including the related documentation and correspondence between the school and the parents, that if the contributions had not been made the school would not be able to operate. Therefore, Judge Sinclair found that in the circumstances a sufficient nexus could be established between the contributions made by parents and the supply of education services, so that the contributions were not unconditional gifts, but consideration for the supply of education services.

77. In other circumstances, the fact that a benefit is arguably “dependent”, in the sense of reliant on a payment to a non-profit body (for example, because the non-profit body wholly or partly relies on such payments to carry on or carry out its purposes), may not prevent the payment from being an unconditional gift. Establishing if a benefit is “dependent” is a question of fact, and every case falls to be determined by considering all the relevant circumstances.

Summary

78. An identifiable direct valuable benefit arises “in respect of” a payment where a sufficient link exists between the payment and the benefit. Where the benefit will arise regardless of whether or not the payment is made, there will not be a sufficient link between the benefit and the payment to prevent the payment from being an unconditional gift. The strength of the link can be affected by situations like that in:
- *Case U37* where the improvement payment was conditional on the non-profit body entering into the lease; or
 - *Case 8/2018* where the background facts preceding the payments being made, including the related documentation and correspondence between the parents and the private school, meant the court could establish that the private school was dependent on the payments to be able to make the supply of education services and that those services were a relevant benefit arising “in respect of” the parents’ payments.

What does “arises or may arise” mean?

79. An “unconditional gift” exists only where no identifiable direct valuable benefit “arises or may arise” in the form of a supply of goods and services in respect of the payment. The words “arises or may arise” refer to an actual, future or contingent benefit in the form of a supply of goods or services made in respect of the payment.
80. Sometimes a benefit in the form of a supply of goods or services will be made in the future after the payment is made or might be contingent on some other event occurring. Where that benefit is still supplied “in respect of” the payment made then the payment is not an “unconditional gift”. For example, a future benefit might arise where a private school offers a 15% discount off next year’s tuition fees for all donations to the school’s building fund in excess of \$5,000. Alternatively, a contingent benefit may arise where a non-profit body promises all its donors that they will be supplied with free rugby tickets if it reaches a certain fundraising milestone.
81. Just like a benefit in the form of a supply of goods or services that occurs when a payment is made, a future or contingent identifiable direct valuable benefit will also not

be an unconditional gift if it is “in respect of” the payment. That is, where there is a sufficient nexus between the future or contingent benefit and the payment made, the payment is not an “unconditional gift”. In determining whether a sufficient nexus exists the courts will take into account all the circumstances surrounding the payment.

82. In circumstances where a non-profit body chooses to make a supply of goods or services to a donor as a “thank you” to acknowledge a donor’s generosity, there will not usually be a sufficient nexus between the donor’s payment and the supply of goods or services for the supply to be “in respect of” the donor’s payment (see Example 8 - Donation to charity concert in return for free tickets at [101]). In that situation the payment is not subject to GST.

Can a single transaction be split into an unconditional gift and consideration for a supply?

83. Another question often asked about GST and “unconditional gifts” is whether a single transaction can be split into two parts – with one part being an unconditional gift (and not subject to GST) and the other part being consideration for a supply of goods and services (and subject to GST). This situation may arise where goods or services are purchased from a non-profit body for an amount in excess of their usual market value, so that the non-profit body is advantaged by the excess.
84. In the Commissioner’s view the GST rules do not allow a single supply (eg, a purchase of goods at a charity auction) to be notionally split into two parts (see Example 11 - Charity auction at [109]). Where a single supply of goods or services is made for an agreed consideration there can be no apportionment. The value of the supply is determined by the consideration paid, and there is no ability under the Act for a portion of the agreed consideration to be treated as an unconditional gift. There is no apportionment language in the definitions of “consideration” or “unconditional gift”, and the Commissioner cannot interfere in the commercial pricing of a transaction.
85. However, if on the facts it can be shown that a single payment made to a non-profit body actually relates to two separate transactions – a supply of goods or services for an agreed consideration and a separate donation, then that single payment can be split between the two separate transactions with one transaction being taxable and one not being subject to GST (see Example 10 - Purchase of tickets to charity dinner at [108]).

Examples

86. The following examples are included to assist in the application of the “unconditional gift” definition.

Example 1 – Non-profit body not GST registered

87. A design company makes a donation of \$1,000 to a local dance group that performs at a corporate function. The dance group is a non-profit body but it is not registered for GST, and the dance group's turnover level is below the threshold to register even if the payment was consideration for a supply.
88. The payment is not subject to GST, whether or not the payment is consideration for a supply or an unconditional gift, because the dance group is not GST-registered and not liable to be GST-registered.

Example 2 – Round of golf conditional on donation

89. South Beach Golf Club is a GST-registered non-profit body. The club decides it will no longer advertise casual green fee charges for non-members to play a round of golf. Instead non-members are asked for a \$30 donation to the club before entering the course.
90. Kate is a non-member and is asked to make a \$30 donation before she is permitted to play a round of golf. The round of golf is conditional on the donation being made.
91. Kate's \$30 payment is not an unconditional gift, it is consideration for a supply of services. Kate receives an identifiable direct valuable benefit (the supply of a round of golf) that is conditional on the payment. A sufficient connection exists between the payment and the round of golf. Also, the fact the golf club now refers to the casual green fee charges as "donations" does not change their character for GST purposes.

Example 3 – Recommended donation requested by museum

92. The Museum of Art is a GST-registered non-profit body. The museum charges \$20 admission for visitors from outside the area and recommends local visitors pay a donation of \$10.
93. The recommended donations paid by local visitors are unconditional gifts and are not subject to GST. These donations are voluntarily made, and while an identifiable direct valuable benefit arises in respect of the payment (ie, the enjoyment of visiting the gallery) there is not a sufficient link between that benefit and any payment made. This is because the local visitor is free to enter the museum whether or not they pay the recommended donation. Entry to the

museum is not conditional on payment. The \$20 admission fee paid by visitors from outside the area is subject to GST.

Example 4 – Donation to street appeal

94. Joseph makes a small donation to a street appeal being run by a national charity. After making the donation the volunteer thanks Joseph for his generosity and offers him a flower to wear to show his support for the charity. The donation is not subject to GST. This is because there is an insufficient nexus between Joseph's donation and the flower offered by the volunteer so Joseph's payment is not made "in respect of" the flower. In addition, if there was a sufficient nexus the donation would be an unconditional gift as the payment is made voluntarily and the flower is only a token of nominal worth and so in the circumstances it is not a valuable benefit.

Example 5 – Donation to school with conditions

95. Jack is a businessperson, who has two children at the local primary school. Jack's company donates \$4,000 to the school for the installation of sunshades over the school playground.
96. The company's \$4,000 donation is an unconditional gift. The donation is made for the carrying on or carrying out of the purposes of the school (a non-profit body) even though the funds are for a specified purpose. Jack's company (or Jack and his children) do not receive an identifiable direct valuable benefit as a result of the company's payment. Any benefit arising from Jack's children using the sunshades is not an identifiable, direct valuable benefit in the form of a supply of goods or services to an associate of the company. The sunshades are for the benefit of the school community as a whole.

Example 6 – Donation to concert for charity with public acknowledgement

97. Jack's company donates \$2,000 to a GST-registered non-profit charity organising a concert to raise money for the local children's hospital. The event programme lists Jack's business and the names of 20 other local businesses, acknowledging their support. The company's donation was not conditional on the public acknowledgement.
98. The company's \$2,000 donation is an unconditional gift. The company has not received an identifiable direct valuable benefit in the form of a supply of goods or services in respect of the payment. While Jack's company is acknowledged in

the event programme, a mere acknowledgement is not a “valuable” benefit, as it has no real value and is not capable of being valued.

Example 7 – Use of charity’s logo in return for donation

99. The facts are the same as in Example 6, except in return for the donation Jack’s company is granted the right to use the charity’s logo on the company’s website and letterhead to “promote” Jack’s company as a supporter of the charity. This is a valuable benefit to Jack’s company.
100. The company’s \$2,000 donation is not an unconditional gift. In these circumstances the right to use the charity’s logo is a direct identifiable benefit of more than a nominal worth. The right to use the logo has a direct nexus with the donation, is of real value, and is capable of being valued. The payment is consideration for a supply and is subject to GST. The fact that the payment is referred to as a “donation” does not determine its character for GST purposes.

Example 8 – Donation to charity concert in return for free tickets

101. The facts are the same as in Example 6, except Jack receives four \$60 tickets to the concert for himself and his family in return for his donation. The charity promised free tickets in return for all donations of \$2,000 or more.
102. Jack (an associated person of his company) has received an identifiable direct valuable benefit in the form of the supply of concert tickets in respect of the company’s payment. The tickets have a direct nexus with the donation, are of real value, and are capable of being valued. The company’s \$2,000 donation is consideration for the supply of the tickets and is not an unconditional gift.
103. The value of a ticket (\$60) is not trifling or minimal and so it is a valuable benefit. Further, the fact the charity refers to the payment as a “donation” does not determine the payment’s character for GST purposes.
104. If instead of promising free tickets in return for all donations of \$2,000 or more, the charity had simply chosen to later give away free tickets to some donors as a way of thanking them for their generosity, the company’s payment of \$2,000 would not have been subject to GST. In that case, there would not be a sufficient link between the company’s donation and the benefit of the free tickets, so the payment would not be consideration for a supply.

Example 9 – Donation to charity concert with donor as major sponsor

105. The facts are the same as in Example 6, except Jack's company donates \$10,000 to the organisers of the concert on the condition that the concert is promoted with Jack's business as the major sponsor. Jack's business is named as the major sponsor in the marketing of the concert, on the front page of the programme, and at the concert.
106. The company's \$10,000 payment is consideration for the supply of advertising and not an unconditional gift. Jack has received an identifiable direct valuable benefit in return for the payment in the form of advertising. Advertising is a supply of a service that is of real value and is capable of being valued. Further, the fact the charity refers to the payment as a "donation" does not determine the payment's character for GST purposes.

Example 10 – Purchase of tickets to charity dinner

107. Tasneem purchases a ticket to attend a dinner for a GST-registered charity. The ticket costs \$100. The value of the dinner is only \$45 and so the charity benefits from the additional \$55 included in each ticket's price. The charity must charge GST on the full ticket price of \$100 and cannot treat \$55 as an unconditional gift. This is because the ticket sale is a single supply made for an agreed consideration of \$100.
108. If the charity had sold its dinner tickets for \$45 and then asked ticket buyers if they would like to make a donation of \$55, GST would only be charged on the ticket sale and not on the donation. This is because there are 2 separate transactions – a single supply of the dinner ticket for an agreed consideration of \$45 and then a separate donation of \$55. The donation will not be subject to GST because it is not made in respect of the supply of the dinner. Attendance at the dinner is not conditional on the donation being made.

Example 11 – Charity auction

109. While attending the charity dinner in Example 10, Tasneem participates in a charity auction. The charity has purchased various sporting equipment that it has had signed by famous New Zealand sportspeople. She purchases a signed netball in the auction for \$500. This is more than the signed netball is worth but she is happy with her purchase as she feels it is for a good cause.

110. The charity must charge GST on the full amount Tasneem pays for the signed netball, even though a significant proportion of the purchase price was, in Tasneem's mind, a donation to the charity. This is because the purchase is a single supply made for an agreed consideration of \$500.

Example 12 – Donation to surf lifesaving club

111. Wiremu makes a \$5,000 donation to his local surf lifesaving club, which is a GST-registered non-profit body.
112. Although a benefit may possibly arise for Wiremu in the form of a future supply of life saving services should Wiremu (or a person associated with Wiremu) get into difficulty at the beach, no identifiable direct valuable benefit arises to Wiremu or a person associated with Wiremu in respect of his payment to the surf lifesaving club. This is because any possible future supply of services to Wiremu (or an associate) does not have a sufficient nexus to Wiremu's payment. Wiremu's donation is not subject to GST.

Example 13 – Plaque to recognise funding body's donation

113. ABC Trust, a private philanthropic trust, makes a substantial distribution to a GST-registered non-profit body for its project to build a new hall. The non-profit body builds a new hall with those funds and in gratitude affixes a plaque which states that the hall was funded by the generous donation of ABC Trust. ABC Trust has not received an "identifiable direct valuable benefit" in the form of a supply of goods or services in respect of the distribution. The distribution is an unconditional gift for GST purposes. While the plaque acknowledges ABC Trust, a mere acknowledgement is not a "valuable" benefit and so it would not prevent the payment from being an "unconditional gift".

Example 14 – Advertisement of donor's logo in return for donation

114. A company makes a significant contribution to a GST-registered non-profit body for that body to purchase a vehicle. The vehicle is sign-written with the company's name and logo on it. The company's contribution is consideration for the supply of advertising services by the non-profit body. The company receives an "identifiable direct valuable benefit" in the form of a supply of advertising services in respect of its contribution. That is, the company is receiving advertising in return for its payment. The payment is consideration for a supply and is subject to GST.

Example 15 – Gift subject to a condition

115. Arthur pledges to make a gift of \$100,000 to the Municipal Opera House on the condition that the money is used to improve disabled access to the theatre's auditorium. Arthur's wife uses a wheelchair and will benefit from the improved access. While the gift to the Municipal Opera House has a condition attached to it, that does not mean the gift is not an "unconditional gift". A person can make an unconditional gift with conditions attached.
116. The fact a benefit will arise to Arthur's wife in the form of improved access to the opera house will not prevent the gift being an "unconditional gift". This is because the benefit is not a "direct" benefit in the form of a supply of goods or services to Arthur's wife. The improved disabled access is for the benefit of the community as a whole.

Example 16 – Payments to a local football club

117. Jill's two children are junior members of the local football club. It is a GST-registered non-profit body. Jill pays membership fees to the club for her two children, with membership allowing her children to train and participate in their respective age-group football teams. The club has also recently been fundraising for five new sets of goals for the club's 30 junior teams, and Jill makes a \$100 payment to the club as part of this fundraising.
118. The membership fees paid by Jill are consideration for the right to participate in the club's activities and their payment is a condition of participation. The membership fees are subject to GST.
119. However, Jill's separate \$100 payment towards the club's fundraising for the new goals is an unconditional gift. The fact that Jill's children, as junior members of the club, may benefit from the new goals does not disqualify her payment from being an unconditional gift. This is because any benefit in this context is too remote and therefore the benefit obtained is not in respect of Jill's \$100 payment towards the club's fundraising.
120. Although Jill paid the subscriptions and the donation together in one online banking transaction, that payment relates to two separate transactions and can be split between the two transactions.

References

Related rulings/statements

BR Pub 18/06 Goods and Services Tax - Payments made by parents to state and state integrated schools, *Tax Information Bulletin* Vol 30, No 7 (August 2018): 3.

"GST and Unconditional Gifts", *Tax Information Bulletin* Vol 2, No 4 (November 1990): 3.

"GST and Unconditional Gifts", *Tax Information Bulletin* Vol 2, No 4 (November 1990): Appendix B.

"GST and Unconditional Gifts", *Tax Information Bulletin* Vol 3, No 1 (July 1991): 11.

Subject references

consideration

gift

GST

identifiable direct valuable benefit

unconditional gift

voluntary

Case References

Broadbent v Chief Executive of The Ministry of Social Development [2017] NZHC 1499

Case 6/2019 (2019) 29 NZTC 5,005 (TRA)

Case 8/2018 (2018) 28 NZTC 4,015 (TRA)

Case H48 (1986) 8 NZTC 384 (TRA)

Case U37 (2000) 19 NZTC 9,353 (TRA)

Case X19 (2006) 22 NZTC 12,255 (TRA)

Chatham Islands Enterprise Trust v CIR (1999) 19 NZTC 15,075 (CA)

Estate of Simpson v Accident Compensation Corporation [2007] NZCA 247

Malololailai Interval Holidays New Zealand Ltd v CIR (1997) 18 NZTC 13,137 (HC)

New Zealand Refining Co v CIR (1995) 17 NZTC 12,307 (HC)

Rumney Rugby Football Club v HM Commissioners for Revenue & Customs [2006] UKVAT V19480

Turakina Maori Girls College Board of Trustees v CIR (1993) 15 NZTC 10,032 (CA)

Welch v Official Assignee [1998] 2 NZLR 8

Legislative References

Goods and Tax Act 1985, ss 2 (“consideration”, “non-profit body”, “unconditional gift”)

Appendix - Legislation

Goods and Services Tax Act 1985

2 Interpretation

(1) In this Act, other than in section 12, unless the context otherwise requires,—

...

consideration, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body

...

non-profit body means any society, association, or organisation, whether incorporated or not,—

- (a) which is carried on other than for the purposes of profit or gain to any proprietor, member, or shareholder; and
- (b) which is, by the terms of its constitution, rules, or other document constituting or governing the activities of that society, association, or organisation, prohibited from making any distribution whether by way of money, property, or otherwise howsoever, to any such proprietor, member, or shareholder

...

public authority means all instruments of the Crown in respect of the Government of New Zealand, whether departments, Crown entities, State enterprises, or other instruments; and includes offices of Parliament, the Parliamentary Service, the Office of the Clerk of the House of Representatives, public purpose Crown-controlled companies,

and the New Zealand Lottery Grants Board; but does not include the Governor-General, members of the Executive Council, Ministers of the Crown, or members of Parliament

...

unconditional gift means a payment voluntarily made to any non-profit body for the carrying on or carrying out of the purposes of that non-profit body and in respect of which no identifiable direct valuable benefit arises or may arise in the form of a supply of goods and services to the person making that payment, or any other person where that person and that other person are associated persons; but does not include any payment made by the Crown or a public authority.

...

- (2) For the purposes of this Act, a reference to goods and services includes a reference to goods or services.

2A Meaning of associated persons

- (1) In this Act, **associated persons** or persons associated with each other are—
- (a) two companies if a group of persons—
 - (i) has voting interests in each of those companies of 50% or more when added together; or
 - (ii) has market value interests in each of those companies of 50% or more when added together and a market value circumstance exists in respect of either company; or
 - (iii) has control of each of those companies by any other means whatsoever:
 - (b) a company and a person other than a company if the person has—
 - (i) a voting interest in the company of 25% or more; or
 - (ii) a market value interest in the company of 25% or more and a market value circumstance exists in respect of the company:
 - (bb) a person, or a branch or division of the person that is treated as a separate person under section 56B, and another branch or division of the person that is treated as a separate person under section 56B:
 - (c) two persons who are—
 - (i) connected by blood relationship:
 - (ii) connected by marriage, civil union or de facto relationship:
 - (iii) connected by adoption:
 - (iv) [Repealed]
 - (cb) a trustee of a trust and another person (person A), if—

- (i) person A is associated with another person (the relative) under paragraph (c); and
 - (ii) the relative is associated with the trustee under paragraph (f):
- (d) a partnership and a partner in the partnership:
- (e) [Repealed]
- (f) a trustee of a trust and a person who has benefited or is eligible to benefit under the trust, except if, in relation to a supply of goods and services,—
 - (i) the trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic, or cultural purposes and the supply is made in carrying out these purposes; or
 - (ii) the person is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic, or cultural purposes and the supply enables them to carry out these purposes:
- (g) a trustee of a trust and a settlor of the trust, except if the trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic or cultural purposes:
- (h) a trustee of a trust and a trustee of another trust if the same person is a settlor of both trusts, except if, in relation to a supply of goods and services,—
 - (i) either trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic, or cultural purposes; and
 - (ii) the supply is made in, or enables, the carrying out of the charitable, benevolent, philanthropic, or cultural purposes:
- (hb) A trustee of a trust and a person who has a power of appointment or of removal of the trustee, except if the person—
 - (i) holds the power as a provider of professional services; and
 - (ii) is subject to a professional code of conduct, and disciplinary process intended to enforce compliance with the code, of an approved organisation as that term is defined in section 3(1) of the Tax Administration Act 1994, for such providers of professional services; and
 - (iii) has not benefited from the trust; and
 - (iv) is not eligible to benefit from the trust:
- (i) a person (person A) and another person (person B) if—
 - (i) person B is associated with a third person (person C) under any one of paragraphs (a) to (hb); and
 - (ii) person C is associated with person A under any one of paragraphs (a) to (hb).

- (2) For the purpose of subsection (1)(a), group of persons has the meaning set out in section YA 1 of the Income Tax Act 2007.
- (3) For the purpose of subsection (1)(a) and (1)(b)—
 - (a) market value circumstance has the meaning set out in section YA 1 of the Income Tax Act 2007, as if the reference to “this Act” in paragraph (e) of the definition were to “the Goods and Services Tax Act 1985”:
 - (b) market value interest has the meaning set out in paragraph (a) of the definition of market value interest in section YA 1 of the Income Tax Act 2007:
 - (c) voting interest has the meaning set out in paragraph (a) of the definition of voting interest in section YA 1 of the Income Tax Act 2007.
- (4) For the purpose of subsection (1)(a) and (1)(b), if a person (person A) and another person (person B) are associated persons under any of subsection (1)(bb) to (1)(i), person A is treated as holding anything held by person B.
- (5) [Repealed]
- (6) For the purpose of subsection (1)(c)—
 - (a) persons are connected by blood relationship if they are within the second degree of relationship:
 - (b) persons are connected by marriage, civil union or de facto relationship if one is in a marriage, civil union or de facto relationship with the other or with a person who is connected by blood relationship to the other:
 - (c) persons are connected by adoption if one has been adopted as the child of the other or as a child of a person who is within the first degree of relationship to the other.
- (7) For the purpose of subsection (1)(g) and (1)(h), settlor has the meaning set out in section YA 1 of the Income Tax Act 2007.
- (8) Subsection (1)(i) does not apply if 2 persons (persons A and B) are both associated with a third person (person C) under subsection (1)(c).

10 Value of supply of goods and services

...

- (2) Subject to this section, the value of a supply of goods and services shall be such amount as, with the addition of the tax charged, is equal to the aggregate of,—
 - (a) to the extent that the consideration for the supply is consideration in money, the amount of the money:
 - (b) to the extent that the consideration for the supply is not consideration in money,—
 - (i) the open market value of that consideration, if subparagraph (ii) does not apply; or

- (ii) the value of the consideration agreed by the supplier and the recipient, if subsection (2B) applies.