

INTERPRETATION STATEMENT: IS 15/01

INCOME TAX – TAX EXEMPT SCHOLARSHIPS AND BURSARIES – S CW 36

All legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this Interpretation Statement.

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Summary

1. Certain scholarships and bursaries are exempt income under s CW 36. This **Interpretation Statement sets out the Commissioner's view of how s CW 36** should be interpreted and applied.
2. A scholarship is a sum of money, or its equivalent, granted to a person for the primary purpose of assisting them with their education where the recipient is selected on merit or some other criteria.
3. A bursary is a sum of money, or its equivalent, granted to a person meeting certain criteria (often needs-based) for the primary purpose of assisting the recipient with funding their education.
4. If a scholarship or bursary is an amount of income under a provision of Part C or under ordinary principles, then s CW 36 may exempt that scholarship or bursary from income tax. Not all scholarships or bursaries received by a person will be amounts of income.
5. If a student receives a basic grant or independent circumstances grant from StudyLink (Ministry of Social Development), then the exemption in s CW 36 does not apply to that grant, and the grant will be taxable under s CF 1.
6. When applying the exemption in s CW 36, the New Zealand courts' approach is to determine the true character of the scholarship or bursary by considering the agreement that gives rise to the payment and the surrounding circumstances. There is no single rigid test. In particular, the courts consider:
 - the relationship between the payer and the payee;
 - the contractual basis for the payment;
 - the conditions of the agreement; and
 - anything the payee is required to provide in return for the payment.
7. For the exemption to apply, the scholarship or bursary must be made for the **dominant purpose of assisting with the recipient's education**.
8. A bursary or scholarship is usually granted by a public body or an independent private body to enable the recipient to pursue their education. However, sometimes there may be a special relationship between the payer and the recipient. A special relationship may be where the parties are not independent of each other, so that the payer may have competing reasons for the payment being made (eg, an employment relationship).
9. A special relationship between the payer and the recipient may make it harder to demonstrate that the primary purpose of a payment is to assist with the **recipient's education** because there can be competing reasons for making the payment. Where no special relationship exists between the payer and the recipient, education assistance is more likely to be regarded as the primary purpose of the payment. This may be the case even where the recipient subsequently takes up employment with the payer.
10. Sometimes a scholarship or bursary may be granted on the condition the recipient provides services for, or on behalf of, the payer. This may not prevent a payment from being a scholarship or bursary so long as the true character of the payment is **to assist the recipient's education and** the payment is not made primarily for the payer's benefit.

11. If a payment is equivalent to an amount previously paid as salary or wages, this suggests the payment is simply a re-characterisation of salary or wages and not a scholarship or bursary.
12. The existence of a bonding arrangement between the payer and the recipient may not prevent the payment being a scholarship or bursary. The amount to be repaid as a bond compared with the amount paid to the recipient can be a relevant factor. If all of the payment is to be repaid if the contract is cancelled, this may indicate it is not a scholarship or bursary.
13. For the purposes of s CW 36, an **“educational institution”** is a society or organisation founded for the sole or main purpose of promoting education and that actively provides that education. Education involves the imparting of knowledge through a systematic formal course of learning. The institution may be located in New Zealand or overseas. In New Zealand, educational institutions include, but are not limited to, schools, universities, wānanga, polytechnics and industry training organisations.
14. **“Attendance at”**, in the context of an educational institution, can be:
 - the student’s physical presence at the location where the course is being held;
 - the student being enrolled and pursuing an educational course offered by the educational institution if it involves requirements other than physical presence; or
 - a combination of both the above.
15. A scholarship or bursary is derived by the student (ie, the person who is attending at the educational institution). Where the student is a school child the scholarship or bursary is not derived by the **child’s** parents, even though the payment **may be used by the parents to meet their child’s education costs**. This is because it is the student who has qualified for and been granted the scholarship or bursary, and the amount is paid to assist that student with their attendance at an educational institution.
16. This Interpretation Statement updates and replaces **“Exempting a scholarship from income tax”**, *Tax Information Bulletin* Vol 5, No 6 (November 1993): 7. That item explains what criteria have to be met before a scholarship by an organisation to sponsor a student would be considered exempt from income tax under s 61(37) of the Income Tax Act 1976 (the predecessor to s CW 36).
17. The Interpretation Statement also refers to **“Retraining payments made on employment termination – assessability”**, *Tax Information Bulletin* Vol 7, No 3 (September 1995): 6. That item deals with the income tax treatment of retraining payments made by an employer to an employee on the termination of employment. Generally, a retraining payment paid to a former employee will be salary and wages and not a scholarship or bursary that meets the requirements of s CW 36.

Introduction

18. If a person receives a scholarship or bursary that is an amount of income, the amount received may be exempt income under s CW 36.
19. The approach taken in this Interpretation Statement to understanding when a scholarship or bursary is exempt income under s CW 36 is to:
 - consider briefly the relevant legislation;

- discuss the approach New Zealand courts have taken to determining whether payments are scholarships or bursaries and, therefore, exempt income under s CW 36; and
- consider the individual requirements for a scholarship or bursary to be exempt income under s CW 36, in particular:
 - when a payment is income;
 - whether a payment is a student allowance;
 - what is a "scholarship or bursary";
 - what is an "educational institution"; and
 - what is "attendance at" an educational institution.

Background

20. The Commissioner has previously been asked whether particular scholarships or bursaries are exempt income under s CW 36. The Commissioner has issued several product rulings confirming that s CW 36 applies to particular scholarships and bursaries (see the Inland Revenue website, www.ird.govt.nz/technical-tax/product-rulings). This Interpretation Statement outlines how s CW 36 applies in a general context.

Analysis

Relevant legislation

21. Part C sets out what is income and subpart CW sets out what is exempt income. For an amount to be exempt income, there first needs to be an amount of income. Section BD 1(2) provides that:
- An amount of income of a person is **exempt income** if it is their exempt income under a provision in subpart CW (Exempt income) or CZ (Terminating provisions)
22. Not all scholarships or bursaries received by a person will be an amount of income (and not taxable on that basis). However, if a scholarship or bursary is an amount of income under a provision of Part C or under ordinary principles, then s CW 36 may exempt that scholarship or bursary from income tax.
23. If s CW 36 applies to a scholarship or bursary, then, from a practical point of view, whether that scholarship or bursary is income does not need to be decided. For this reason, this Interpretation Statement only briefly outlines the general principles the courts have developed to determine whether a scholarship or bursary is an income receipt. Instead, the focus of this Interpretation Statement is on determining when a scholarship or bursary will meet the requirements s CW 36 and be exempt income.
24. Section CW 36 provides:
- CW 36 Scholarships and bursaries**
- A basic grant or an independent circumstances grant under regulations made under section 303 of the Education Act 1989 is not exempt income, but any other scholarship or bursary for attendance at an educational institution is exempt income.
25. Section CW 36 is a long-standing provision originally enacted in 1940 as part of a set of exemptions introduced to ensure symmetry of treatment between the tax legislation and the social security legislation that existed at the time. Scholarship and bursary payments were exempted from social security contribution requirements, so it was considered appropriate to also exempt these payments from income tax.
26. One minor change was made to the provision in 1988 when basic grants and independent circumstances grants (commonly referred to as "student

allowances”) were introduced as part of the government's Youth Support package. At that time, the predecessor to s CW 36 (s 61(37) of the Income Tax Act 1976) was amended to clarify that these grants were not included in the exemption.

27. The provision was reworded as part of the Income Tax Act rewrite process, becoming s CW 29 of the Income Tax Act 2004, then re-enacted as s CW 36 of the Income Tax Act 2007. Originally, when the provision was introduced it required the amount to be **derived “from any maintenance or allowance provided for or paid to that person in respect of his or her attendance at an educational institution in terms of a scholarship or bursary”**. Some of these words were removed by the rewrite and the exemption was restructured. However, the rewrite changes were not listed as an intended policy change in schedule 22A of the Income Tax Act 2004.
28. The Commissioner considers the rewrite process has not changed the meaning of what is now s CW 36. The provision still aims to exempt from tax a scholarship or bursary received by the recipient for their attendance at an educational institution.

New Zealand cases considering s CW 36

29. Before considering the individual requirements of s CW 36, this Interpretation Statement outlines how the New Zealand courts have approached the question of whether payments are scholarships or bursaries and, therefore, exempt income under s CW 36.
30. Several cases have considered s CW 36 and its predecessors. Two main principles can be drawn from these cases. Firstly, to determine whether there is a bursary or scholarship within s CW 36, the true character of the payment must be determined. This requires looking at the characteristics of the payment and its primary purpose.
31. Secondly, the courts have drawn a distinction between scholarships and bursaries that are exempt income under s CW 36 and payments made for other purposes, such as services provided by an employee. Many of the cases considering s CW 36 involve payments made by current or prospective employers to employees while the employees are studying. In this context, where an employment relationship exists between the payer and the recipient, the courts have highlighted that, if the true character of the payment is not for the purpose of education but is a payment of salary and wages, then the payment is not a scholarship or bursary within s CW 36.
32. The leading New Zealand case on the exemption from tax for scholarships and bursaries is the Court of Appeal decision in *Reid v CIR* (1985) 7 NZTC 5,176. The case did not concern an employee situation, but rather a trainee teacher enrolled **at a teachers’ training college**. While studying at the college, the trainee teacher received a student teacher allowance paid fortnightly by the Wellington Education Board. As a condition of receiving the student teacher allowance, the taxpayer was required to enter into a bond agreement undertaking to repay all or part of the bond if he failed to complete the prescribed course and **three years’ service as a teacher** following graduation.
33. The Court of Appeal held the student teacher allowance was income according to ordinary concepts but the exemption for scholarships and bursaries applied to exempt the payments from tax.
34. On the question of whether the student teacher allowance payments were income, Richardson J confirmed the view of Quilliam J in the High Court (*Reid v*

CIR (1983) 6 NZTC 61,624) that the payments were income according to ordinary concepts, stating, at 5,183:

The sums in question were **regular periodical payments made to the appellant to defray his expenses** while attending teachers' college full-time as a teacher trainee. They were paid to him for that purpose and were the whole or part of the receipts upon which he depended for that purpose. **They were not gifts. They were contractual payments to which the appellant was entitled so long as he performed his part of the bargain.** They were emoluments received in respect of and in return for his performance of the obligations of the studentship he had undertaken. It is implicit in sec 61(37) that at least some scholarship and bursary payments constitute income according to ordinary concepts, otherwise it would be unnecessary to exempt such income. [Emphasis added]

35. On the question of whether the payments were exempt income, the Court of Appeal overturned the High Court's decision and found that the student teacher allowance was exempt from tax. Richardson J found the student teacher allowance was a bursary. He reached this conclusion by determining the true character of the payment received, stating, at 5,184:

The essential question is as to the **true character of the sums received by the appellant.** The answer is not to be found through the application of any single rigid test. It must be **derived from a consideration of all the circumstances**, some of which may point in one direction, some in another. [Emphasis added]

36. Richardson J considered the student teacher allowance was an exempt bursary despite being a contractual payment requiring the student to fulfil his course requirements and be available to serve as a teacher for three years after graduation. He went on to note that these types of conditions were not unusual for scholarships and bursaries, whether expressed in terms of expectation or binding obligation.
37. Somers J took much the same view as Richardson J and considered the payments were a bursary because they were paid to, and received by, a student to assist in their education and for the purpose of sustaining the student while furthering their education. The fact conditions as to service for a period after graduation were attached to the arrangement did not make the payments any less a scholarship.
38. Thorp J thought the student teacher allowance was a bursary based on an objective assessment of the true character of the payment received by the student, taking into account all circumstances relevant to determining the true character. He stated, at 5,191:

To my mind, subsec (37) [s 61(37) of the Income Tax Act 1976, the predecessor to s CW 36], which provides the exemption with which we are now concerned, the exemption of income "derived by any person ... in terms of a scholarship or bursary", is of the second type, and the question whether particular payments or income are of **that nature should be determined in an objective fashion, taking into account all circumstances relevant to determining their true character.**

...

Within the Commonwealth, the only decision located on the existence of exemption provisions is that in *FC of T v Hall*. There the test finally selected by *Rath J* to determine the classification of the payments to the physician was **whether they had as their real character payment for education as distinct from payment for specific work. It is my view that a similar pragmatic balancing operation is the proper approach in determining the character and purpose of the payments to the appellant.**

There is no gainsaying that in some respects they had the character of payments by way of retainer, payments to secure rights for the payer rather than benefits for the payee. However, **in determining which purpose was dominant**, the matter which seems to me greatly in favour of the appellant is the minimal sum required to be repaid if the appellant failed to make himself available to the department after his graduation. His maximum obligation in that event was \$600. By contrast, failure by him to complete the course could, in terms of reg 39(3) of the 1959 Regulations, render him liable to refund of all sums paid to him by way of allowances to the date of termination of his studies. **Had the department's principal purpose been to secure the appellant's future services rather than finance**

his education the penalty provided for breach of the covenant to accept employment after graduation would surely not have been less than that resulting from failure to complete the course. [Emphasis added]

39. Thorp J considered that the principal purpose of the payment was to assist the recipient with obtaining educational qualifications. This was despite the conditions restricting the subsequent employment and activities of the recipient.
40. Several other decisions followed *Reid* (CA). The High Court considered the exemption did not apply in *CIR v Drew* (1988) 10 NZTC 5,060. The taxpayer, a recent school leaver, applied for a bursar position with the Post Office. He was awarded the bursary and entered into an agreement with the Post Office. The agreement provided he was to be employed as an accounting bursar and the Post Office would grant him assistance to undertake a course of study. The assistance involved a leave of absence from his bursar position to enable him to study for an accountancy degree. During this time he would receive financial assistance determined by the Postmaster-General. The taxpayer was also bonded to work at the Post Office for five years after completing his degree or otherwise repay the sums paid to him reduced by the value of the actual services rendered by him.
41. During the early years of the agreement, the taxpayer was paid his ordinary salary when he worked and an annual bursary of \$700 during each academic year. In 1982 the arrangement changed and the taxpayer was paid his full salary while he was studying and no bursary was paid. Despite this change in arrangement, the Taxation Review Authority, in *Case G56* (1985) 7 NZTC 1,247, found **that the payments from 1982 were an exempt "bursary or scholarship"**. This was on the basis the taxpayer had been awarded the bursary for his university studies based on merit. The taxpayer had submitted his secondary school academic record when he applied for the position and was awarded the bursary after a successful interview process. The Commissioner appealed this decision.
42. Ellis J, on appeal in the High Court, followed the approach in *Reid* (CA) and concluded the principal purpose of the payments was to secure the services of the taxpayer and therefore the payments were not exempt, stating at 5,062:
- In my view the principal purpose of the payments was to secure for the Postmaster-General the services of Mr Drew and in particular, his services when he had qualified. The secondary purpose of the payment was to assist Mr Drew in his education** and accordingly I am of the view that the receipt by him of \$9,721.00 was taxable in his hands ...
- ...
- In my view the Court has to **consider the character of the payments against the total background of the situation.** [Emphasis added]
43. Ellis J considered it relevant that the agreement described the taxpayer as an **"employee"** and that the taxpayer was working for the Post Office during the whole period of the contract and was paid his normal salary during this time. Ellis J found it difficult to accept the taxpayer would receive more while he was studying by virtue of receiving his salary tax-free. He also considered it relevant that the operation of the bond required the taxpayer to repay all of the money advanced, subject to a reduction for time actually served. These factors distinguished *Drew* from *Reid* (CA), where it was less evident that an employee-employer relationship existed.
44. *Case L30* (1989) 11 NZTC 1,181 had similar facts to *Drew*. The taxpayer was an employee of the Post Office when he was granted a scholarship. This scholarship entitled him to complete a university degree for two years on full pay on the same bonding terms as in *Drew*. The taxpayer tried to distinguish his situation from the facts in *Drew* on the basis that he was an existing employee (unlike the

taxpayer in *Drew* who was recruited from secondary school) who was given an educational opportunity more as a reward for effort than was the case in *Drew*. This opportunity came at a greater financial cost to his employer. Keane DJ was not persuaded by these arguments.

45. Keane DJ considered the payments were income according to ordinary principles. He then went on to acknowledge that the assistance provided could aptly be called a scholarship because it was an award for effort and merit. However, he concluded that the payments needed to be for the purpose of education to be exempt, although he acknowledged this purpose may not be the exclusive purpose of the payment. On this basis, Keane DJ concluded that the **employer's** primary purpose was to assist the taxpayer to become a better equipped employee, where both the employee and employer reaped the benefits from the arrangement. Keane DJ considered the arrangement to be more like an **employer's incentive scheme**, rather than a scholarship or bursary paid for attendance at an education institution. For these reasons, Keane DJ did not consider the exemption in what is now s CW 36 applied.
46. Other cases that are similar to the facts of *Case L30* and where the courts have also considered the true nature of the payments were salary payments rather than a scholarship or bursary payment are *Case L35* (1989) 11 NZTC 1,218 and *Case M24* (1990) 12 NZTC 2,146.
47. *Case M66* (1990) 12 NZTC 2,371 concerned an engineering cadet who was employed by a construction company. While employed, he attended a technical institute full time for a period of 19 weeks as part of gaining his trade certificate in engineering. During this time he received his salary. These payments were considered to be salary paid under a contract of employment that included a requirement to complete the study and not a scholarship or bursary for attendance at an educational institution. Bathgate DJ again saw the conditions set out in the contract of employment as very important in determining the character of the payments received by the taxpayer and the character of the payments made by the employer. The same decision was reached in *Case P2* (1992) 14 NZTC 4,010 based on similar facts.
48. In *Case P17* (1992) 14 NZTC 4,115 the terms of the agreement were similar to those in *Case L30* except that the taxpayer completed his study overseas. This did not alter the **Authority's** finding that the nature of the payments was contractual payments.
49. *Case P23* (1992) 14 NZTC 4,166 involved the situation of a prospective employee receiving financial assistance while studying. A grant was made to the taxpayer while he was studying. One of the terms of the grant was that the taxpayer work for the organisation that made the grant for nine months and one week on **completion of the taxpayer's studies**. **During the study period**, the taxpayer was offered and took up employment with the organisation that made the grant under a separate agreement. The Taxation Review Authority found that the financial assistance payments were not made for the purpose of securing the future services of the taxpayer because the subsequent offer of employment was in an **area unrelated to the taxpayer's study**. The true flavour of the agreement was the provision of financial assistance to enable the taxpayer to complete his studies. At the time the agreement was entered into the taxpayer did not have an employment relationship with the provider of the assistance. For these reasons, Willy DJ found on the facts that the payments of financial assistance received by the taxpayer while studying were exempt.
50. In *Case T46* (1998) 18 NZTC 8,311 the taxpayer was granted special leave on full pay by his employer to study at an American university for three years. The taxpayer had to sign a bond guaranteeing that he would return to New Zealand

after completion of his study and work for the employer for 3.4 years or repay the amount (which could be reduced in proportion to service rendered). Barber DJ accepted that the principal purpose of the overseas study arrangement was education-related. However, he did not think this overcame the fact the **arrangement was an extension of the taxpayer's employment. The employment relationship did not significantly change during the special leave period, even though the taxpayer did not receive some entitlements during that period. The purpose of the arrangement was primarily to retain a highly qualified staff member.**

51. These cases show that New Zealand courts have consistently looked to assess the true character of these types of payments by looking at the agreement that gives rise to the payment and the surrounding circumstances. The courts have considered, in particular, the relationship between the payer and the payee, the contractual basis for the payments, the conditions of the agreement(s) and anything the payee is required to provide in return for the payments. The cases show that where an employer pays for an employee to undertake study while employed and the employee receives study assistance equivalent to the **employee's salary**, then it is unlikely the payment will be exempt under s CW 36. This is because payments that have the character of salary or wages are not a bursary or scholarship to attend an educational institution. For a payment to be a scholarship or bursary it must be made for the dominant purpose of assisting with **the recipient's education.**
52. The Commissioner notes the above cases considered the exemption provision at a **time when it still referred to "any maintenance or allowance ... in terms of a scholarship or bursary"**. While s CW 36 no longer contains this reference, the Commissioner considers the above cases to be useful guidance on how s CW 36 is applied.

Principles drawn from the New Zealand cases

53. The courts have established that to determine whether a payment is a scholarship or bursary within s CW 36, the true character of the payment must be determined. In particular, for a payment to fall under s CW 36, the primary purpose of the payment must be to assist the **recipient's** education. This is determined by considering all the circumstances of the particular case. Usually no one single factor is dominant or conclusive. In reaching their decision, the courts consider such factors as any special relationship between the payer and the payee, the contractual basis for the payment, the conditions of the agreement(s) and anything the payee is required to provide in return for the payment. A special relationship may be where the parties are not independent of each other, so that the payer may have competing reasons for the payment being made (eg, an employment relationship). Further, the fact a payment is called a scholarship or bursary is not determinative of its nature. Similarly a payment referred to as an award or fellowship, may in fact be a scholarship or bursary.
54. The courts have most frequently considered the true character of scholarship or bursary-type payments where employment has been the special relationship between the payer and the recipient. In the employment context, the question is whether the true character of the payments is that of a scholarship or bursary within s CW 36 or whether they are salary and wages in the context of an employment relationship. **In the Commissioner's** view, the courts would take the same balanced approach to considering the true character of scholarship or bursary-type payments if there were a different type of special relationship between the parties. The primary purpose of the payment must always be to assist the **recipient's** education.

55. The following factors have been extracted from the cases as being relevant when determining whether the true character of a payment is a scholarship or bursary for the purposes of s CW 36:
- There is no single rigid test. All circumstances relevant to determining the true character of the payment are to be taken into account. This may include considering any special relationship between the payer and the recipient, the contractual basis for the payment, the conditions of the agreement(s) and anything the payee is required to provide in return for the payment.
 - The fact of an existing or a continuing employment contract between the payer and the recipient is a significant and important factor in determining the character of the payment received.
 - Determining whether the primary purpose of the payment is to secure rights for the payer (eg, future services of the payee) rather than benefits for the payee is a relevant factor.
 - If the amount paid for the study period equals the amount that was previously paid as salary, this suggests the salary and wages have simply been re-characterised as a scholarship or bursary, so will not be exempt income.
 - The existence of a bonding arrangement in itself does not mean the payment is not a scholarship or bursary.
 - The amount to be repaid as a bond compared with the amount paid to the recipient can be a relevant factor. If all of the money advanced is to be repaid if the employee cancels the contract, this may indicate payment for employment.
 - Where no special relationship exists between the payer and the recipient at the time the agreement to provide financial assistance is entered into, the education of the recipient is more likely to be regarded as the primary purpose of the payment. This may be the case even where the recipient subsequently takes up employment with the payer.

Requirements of s CW 36

56. Having considered the **courts' approach to** deciding whether a payment is a scholarship or bursary for the purposes of s CW 36 and the words of the provision, the following questions establish whether a payment meets the particular requirements of s CW 36:
- Is the payment income?
 - Is the payment a student allowance?
 - Is the payment a "scholarship or bursary"?
 - Is the recipient attending an "educational institution"?
 - Is the payment for **the recipient's "attendance at" an educational institution?**

Is the payment income?

57. As mentioned, this Interpretation Statement only briefly outlines the general principles the courts have developed for determining whether a scholarship or

bursary is an amount of income. This is because, from a practical perspective, whether the scholarship or bursary is income does not need to be considered in detail if the other requirements of s CW 36 are met. The main focus of this Interpretation Statement is on whether the payment is a bursary or scholarship that is exempt income under s CW 36 and not whether the payment is income in the first instance.

58. However, for the sake of completeness it is noted that not all scholarships and bursaries will be income in the hands of the recipient. For example, a scholarship awarded to a school child to attend a particular school might be a capital receipt (and not income under ordinary concepts) to the child and therefore not taxable income on that basis.
59. Part C sets out what amounts will be amounts of income. Section CA 1 provides the following general rule for establishing whether an amount is income:

CA 1 Amounts that are income

Amounts specifically identified

(1) An amount is income of a person if it is their income under a provision in this Part.

Ordinary meaning

(2) An amount is also income of a person if it is their **income under ordinary concepts**.

[Emphasis added]

60. Therefore, an amount will be income if it is income under one of the provisions of Part C. Part C is effectively a list of amounts that are treated as being amounts of income. Alternatively, **an amount will be income if it is "income under ordinary concepts"**.

61. The phrase "under ordinary concepts" is not defined in the Act. However, the courts have considered the meaning of what is income "under ordinary concepts" in several cases.

62. It is generally accepted that income is something that "comes in" (ie, it is income in the hands of the taxpayer). In *Tennant v Smith* [1892] AC 150, the taxpayer's accommodation in **his employer's** premises where he was required to live was held to not be income, as the taxpayer received no amount. This was because the benefit could not be converted to cash; it merely saved the taxpayer from having to pay for accommodation. This decision was cited with approval in the High Court judgment in *Reid*.

63. In *Scott v C of T* (1935) 35 SR (NSW) 215 (NSWSC), at 219 Jordan CJ observed, at 219 that:

[T]he word "income" is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind except insofar as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income, or that special rules are to be applied for arriving at the taxable amount of such receipts.

64. Justice Richardson cited this excerpt with approval in the Court of Appeal in *Reid*. After citing Jordan CJ, Richardson J said, at 5,183:

There may be difficulty in marginal cases in determining what are the ordinary concepts and usages of mankind in this regard and to assist in that determination there has been much discussion in the cases of criteria which bear on the characterisation of receipts as income in particular classes of case. **The major determinant in many cases is the periodic nature of a payment** (*FC of T v Dixon* (1952) 86 CLR 540; and *Asher v London Film Productions* [1944] 1 All ER 77). **If it has that quality of regularity or recurrence then the payments become part of the receipts upon which the recipient may depend for his living expenses**, just as in the case of a salary or wage earner, annuitant or welfare

beneficiary. But that in itself is not enough and **consideration must be given to the relationship between payer and payee and to the purpose of the payment, in order to determine the quality of the payment in the hands of the payee.** [Emphasis added]

65. According to Richardson J, the major determinant in many cases is the periodic nature of a payment. If payments have that quality of regularity or recurrence then they become part of the receipts on which the recipient may depend for their living expenses. However, that factor would not be enough on its own. Consideration must also be given to the relationship between the payer and the payee, and to the purpose of the payment. It is the quality of the payment in the hands of the recipient that is important.

66. The importance of considering the quality of the payment in the hands of the recipient was also emphasised in *FCT v Harris* 80 ATC 4238 (FCA), where the Australian Federal Court said at 4,240 to 4,241:

Whether or not a particular receipt is income depends upon its quality in the hands of the recipient (*Scott v. F.C. of T.* (1966) 117 C.L.R. 514 at p. 526). The motives of the donor may be relevant but are seldom, if ever, decisive (*Scott v. F.C. of T.*, supra, at p. 526; *Hayes v. F.C. of T.* (1956) 96 C.L.R. 47 at p. 55). The regularity and periodicity of the payment will be a relevant though generally not decisive consideration (*F.C. of T. v. Dixon* (1952) 86 C.L.R. 540 at p. 568). **A generally decisive consideration is whether the receipt is the product in a real sense of any employment of, or services rendered by the recipient, or of any business, or, indeed, any revenue producing activity carried on by him** (*Squatting Investment Company Ltd. v. F.C. of T.*, supra, at p. 633; *Hayes v. F.C. of T.*, supra, at pp. 56-57; *Scott v. F.C. of T.*, supra, at pp. 527-528; cf. *C. of T. (Vic.) v. Phillips* (1936) 55 C.L.R. 144; A.L. *Hamblin Equipment Pty. Limited v. F.C. of T.* 74 ATC 4001 at p. 4010). [Emphasis added]

67. Hill J in *FCT v Hyteco Hiring Pty Limited* 92 ATC 4,694 (FFCA), at 4,700, also considered that while regularity of receipt may often indicate that particular amounts are income, regularity alone will seldom be determinative. He **considered that something more is required, "such as that the receipts be intended by the payer to be used by the recipient for regular expenditure and be relied upon by the recipient"**. He also noted that a single payment may also be income, despite it not being repeated.

68. In addition, a payment that is a gift in the ordinary sense will be income if it is so related to an income-earning activity as to be a product of the income-earning activity. In *Hayes v FCT* (1956) 11 ATD 68 (HCA), Fullager J, at 72:

A voluntary payment of money or transfer of property by A to B is prima facie not income in B's hands. If nothing more appears than that A gave to B some money or a motor car or some shares, what B receives is capital and not income. **But further facts may appear which show that, although the payment or transfer was a "gift" in the sense that it was made without legal obligation, it was nevertheless so related to an employment of B by A, or to services rendered by B to A, or to a business carried on by B, that it is, in substance and in reality, not a mere gift but the product of an income-earning activity on the part of B, and therefore to be regarded as income from B's personal exertion.** [Emphasis added]

Summary of income concepts

69. Some key principles from the above cases concerning income under ordinary concepts are:

- Income is something that "comes in" (*Tenant v Smith, Reid* (HC)).
- Whether or not a particular receipt is income depends on its quality in the hands of the recipient (*Reid* (CA)).
- The periodic nature of payments made is the major determinant in many cases. Regularity or recurrence indicates that payments may become part

of the receipts the recipient depends on for living expenses (*Reid (CA)*, *Hyteco*).

- Consideration must be given to the relationship between payer and payee (*Reid (CA)*).
- A receipt that is the product in a real sense of any employment of or services rendered by the recipient or of any business or, indeed, any revenue-producing activity carried on by the recipient will be income (*Harris*).
- An amount that would ordinarily be considered a gift may be income if it is so related to an income-earning activity as to be a product of the income earning activity (*Hayes*).

70. It therefore follows that an amount of a scholarship or bursary paid to a person will be an amount of income under ordinary concepts if it has these types of qualities in the hands of the recipient. Payments without the requisite qualities and that are not income under a provision of Part C will not be taxable to the recipient. If a payment is an amount of income, then it falls to be decided whether it is exempt income under s CW 36.

Is the payment a student allowance?

71. To determine whether a payment is exempt from income under s CW 36, the payment must not be a **"basic grant" or an "independent circumstances grant"**. This is because these payments have been expressly excluded from s CW 36 since 1988 when this exclusion was introduced. Under s CF 1(1), an education grant is income. An **"education grant" is defined in s CF 1(2)** in the same manner as the grants excluded under s CW 36. Consequently, s CF 1 treats these grants as taxable and s CW 36 confirms this treatment by specifically excluding these grants from the exemption provision.

72. The **terms "basic grant" and "independent circumstances grant"** are not defined but collectively they are a category of grants paid under the Student Allowances Regulations 1998. These regulations are made under s 303 of the Education Act 1989. These grants are commonly referred to as **"student allowances"**. They are paid weekly by StudyLink to help with **a student's** living costs while the student studies full time at a secondary school or on a tertiary course approved by the Tertiary Education Commission. These tertiary courses include bachelor's degrees with honours, but exclude all New Zealand Qualifications Framework level 8 and above, postgraduate certificates, diplomas, master's degrees and doctorates.

73. In general, the eligibility criteria for receiving a basic grant are that the person is:

- aged at least 18 years old (in certain circumstances 16-17-year-olds are also eligible);
- aged under 65 on the start date of the course;
- studying full time (or limited full time with approval) in an approved course; and
- a New Zealand citizen or meets New Zealand immigration residency requirements.

74. To receive an independent circumstances grant, in addition to meeting the above criteria for a basic grant, the person must satisfy the following:

- the student is a single student without a supported child or children;

- the student is aged under 24;
 - the student is not living in a parental home or receiving financial assistance from a parent;
 - it would be unreasonable for the student to live with a parent and expect financial support from their parents (ie the student can demonstrate their circumstances show they are living independently); and
 - the student does not receive a basic grant.
75. If a student receives a basic grant or independent circumstances grant from StudyLink, StudyLink will deduct PAYE from the payment. StudyLink is required to deduct PAYE as these grants are treated as a "PAYE income payment" under subpart RD (see ss RD 3(1)(a) and RD 5(1)(b)(ii) and (6)(c)).
76. If a student is receiving one of these grants, then the exemption in s CW 36 does not apply to that grant, and the grant will be taxable under s CF 1. Generally, it will be clear from the circumstances of the payment whether it is one of these grants.

Is the payment a "scholarship or bursary"?

77. Having established that the payment is not a "basic grant" or an "independent circumstances grant", s CW 36 then requires the payment to be a scholarship or bursary. Neither term is defined in the Act. As discussed above, the courts have established that to determine whether there is a scholarship or bursary within s CW 36, the true character of the payment must be determined (*Reid* (CA), *Drew*). This requires looking at the characteristics of the payment and the primary purpose of the payment. (This is a different inquiry to determining whether the payment is an amount of income, and for that reason is not restricted to considering the quality of the payment in the hands of the recipient.)
78. In summary, a scholarship or bursary is a sum of money granted to a person to assist the person with their education. In the case of a scholarship, the grant of money has an additional merit or some other rational criterion component (eg, academic performance criteria and applicants must be from a particular ethnic group).
79. To understand the meaning of the phrase "scholarship or bursary" as it is used in s CW 36, it is easier to consider the term "bursary" before the term "scholarship". This is because, while both terms have distinct meanings, the courts usually give "bursary" a wider definition than they do "scholarship".

Ordinary meaning of bursary

80. The *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011) relevantly defines "bursary" as "a grant, especially one awarded to a student". The *Concise Oxford English Dictionary* defines a "grant" as follows:
- 1 a sum of money given by a government or public body for a particular purpose.
 - 2 the action of granting something.
 - 3 a legal conveyance or formal conferment.
81. The *Concise Oxford English Dictionary* defines the verb to "grant" as:
- agree to give or allow (something requested); give (a right, property, etc.) formally or legally to.

82. The *Oxford English Dictionary* (online, 3rd edition, Oxford University Press, 2013, accessed 4 September 2014) defines "bursary" as:

an endowment given to a student in a university or school, an exhibition. Also in extended use, an endowment to a person other than a student.

83. The *Concise Oxford English Dictionary* relevantly defines "endowment" as "the action of endowing" and "endow" as "to give or bequeath an income or property". The relevant definition in the *Concise Oxford English Dictionary* for "exhibition" in this context is "a scholarship awarded to a student at a school or university".

84. Based on the above, the ordinary meaning of "bursary" suggests that a bursary is a sum of money granted by a government or public body to someone. The recipient would commonly be a student, but in an extended meaning can be a person other than a student. The fact a bursary is granted suggests the recipient does not automatically receive the bursary but has to request or apply for it. A scholarship can also be a type of bursary.

Case law on the meaning of "bursary"

85. The leading case on the meaning of "bursary" is *Reid*. The Court of Appeal considered the meaning of "bursary" in the predecessor to s CW 36. All three judgments gave "bursary" a wider meaning than "scholarship". Richardson J stated, at 5,184:

"Bursary" is defined in the same dictionary [the *Shorter Oxford English Dictionary*] as "an exhibition at a school or university" (Scotland); and "a scholarship enabling a pupil at an elementary school to proceed to a secondary school" (England).

...

Of more significance in this case, "bursary" is a widely used term referring to **the grant of financial assistance for educational purposes where the students concerned, and there may be many thousands of them, meet the criteria laid down. Grants of financial assistance for certain classes of students undertaking education in institutions and designated as "bursaries" have been regularly provided from public funds under statutory authority.** [Emphasis added]

86. Somers J was of the opinion that the term "bursary" has a wide scope. He said, at 5,186:

The word "bursary" has reference to **moneys paid to and received by a scholar to assist in his education.** It has become extended by usage to embrace payments which sustain the recipient while furthering his education such as for food, board, and lodging. [Emphasis added]

87. Thorp J discussed **the difference between a "scholarship" and a "bursary"**. He suggested that, compared with a "scholarship", a "bursary" **did not require** a special merit criterion. He commented on the meaning of bursary as outlined in the High Court by Quilliam J, who suggested a bursary as well as a scholarship was an "emolument expressly payable by reason of the winning of an award based on merit". However, Thorp J suggested, at 5,190, that a bursary did not require a merit criterion **other than meeting certain "qualifying standards of attainment or ability"**. However, he did not consider the term so broad so as to cover all forms of financial assistance to tertiary education:

As at 1976 tertiary bursaries, the form of assistance the appellant elected not to receive, **would have been classified as a "bursary" for the purposes of sec 61(37).** That proposition, which was accepted by both counsel in this Court, does not involve any direct conflict with *Quilliam J's* view that "bursar" connotes some merit qualification, as it is plain that to obtain entry to training college a student was required to meet stated academic standards. At most it may involve a different emphasis from that placed by *Quilliam J* on the significance of merit. If so, it should in my view suffice to satisfy the merit criteria if the term "bursar" be restricted **to a person who meets qualifying standards of attainment or ability** without

the “bursar” being required to achieve the degree of competitive success or excellence or special merit expected of “scholars”. Nor does the proposition involve any conflict, direct or indirect, with *Quilliam J*’s view that **the exemption cannot have intended to cover all forms of financial assistance to tertiary education**. For example, an employee of a large company who was paid his normal salary while studying to gain the expertise necessary to introduce some new process to his employer’s business would not, in my view, receive such payments as bursary. [Emphasis added]

88. The term “bursary” has been given a wide meaning in *Reid* (CA) - the granting of financial assistance to a student meeting certain criteria to assist with their education. It includes payments that assist a recipient with their living costs. To receive a bursary, the person needs to meet the qualifying criteria or standards laid down for the specific bursary. In New Zealand, the term “bursary” most commonly refers to payments made from public funds to assist a tertiary student with their living costs. Importantly, payments made to a person while studying will not be a bursary, unless the primary purpose of the payments is to assist with the person’s education.
89. The other cases on the predecessor to s CW 36 did not consider the meaning of “bursary” in any detail. In *Drew*, the taxpayer had received a \$700 annual bursary before a change in the arrangement with his employer. However, the court did not consider the characteristics of this payment because the exempt treatment of the payment was not disputed. In *Case P23*, Willy DJ considered that a bursary was a grant of financial assistance for educational purposes. Barber DJ in *Case T46* remarked on “bursary”, after having considered the meaning of “scholarship” in terms of the predecessor to s CW 36, at 8,317:

The indicia of a “bursary” are that merit need not have so much significance; and financial need is often more important.

90. Overall the cases have adopted a similar meaning to “bursary” as was given in *Reid* (CA).

Ordinary meaning of “scholarship”

91. The *Concise Oxford English Dictionary* relevantly defines “scholarship” as follows:
- a grant made to support a student’s education, awarded on the basis of achievement.
92. Similar to the ordinary meaning of “bursary”, the above definition suggests a scholarship is a sum of money paid to a student. It is a payment granted to a person to assist their education, based usually on merit or achievement.

Case law on the meaning of scholarship

93. The leading New Zealand case on the meaning of “scholarship” is also *Reid* (CA). Richardson J considered the dictionary meaning of “scholarship”, at 5,184:
- “Scholarship” is defined in the *Shorter Oxford English Dictionary* as “the status of emoluments of a scholar at a school, college or university”, and “scholar” is defined for this purpose as “a student who receives emoluments, during a fixed period, from the funds of a school, college, or university, towards defraying the cost of his education or studies, and as a reward of merit”.
94. However, Richardson J did not find the dictionary definition of “scholarship” very satisfactory because, in his view, it did not take account of the common usage of the term in New Zealand. He continued, at 5,184:

I am satisfied that these dictionary definitions of those words do not fully capture the wide meaning which they have in New Zealand usage. Speaking of the meaning of scholarship in Victoria in 1965, *Adam J* in *Re Leitch* [1965] VR 204, at p 206 said:

“I am not prepared to hold that according to common usages of speech, or by reason of any authoritative definition, the word ‘scholarship’ in the absence of expressed purposes or conditions attached to it, connotes anything more than the grant of an emolument,

normally in a sum of money, to a scholar selected on merit or upon some other rational criterion.”

And *Webster’s Third New International Dictionary* defines “scholarship” as “a sum of money or its equivalent offered (as by an educational institution, a public agency, or a private organisation or foundation) to enable a student to pursue his studies at a school, college, or university”.

When one considers the number and range of awards designated as scholarships in New Zealand, those wider definitions seem equally reflective of common usage in this country.

95. The discussions in *Reid* (CA) suggest that “scholarship” has a wide meaning and is a sum of money or its equivalent granted to a student. It is granted, usually by a public or independent private body with the primary purpose of assisting the student to pursue their studies. The student is selected on merit or some other rational criterion. The above also suggests that the **student’s** study is at a school, college or university. This would appear consistent with the additional requirement of s CW 36 that the scholarship is “for attendance at an educational institution”. The meaning of this phrase is discussed later.
96. In *Re Leitch* [1965] VR 204 Adam J **considered the meaning of “scholarship” at 206**, as cited in *Reid* (CA) and followed in *Drew*. He considered it to be, at 206:

a grant of an emolument, normally in a sum of money, to a scholar selected on merit or upon some other rational criterion.
97. In *Case T46* Barber DJ looked at the discussion on the meaning of “scholarship” in *Reid* (CA) and concluded, at 8,317:

Our case **law establishes that the indicia of a “scholarship” are a grant of an emolument**, normally a sum of money; the need for financial assistance is not usually a consideration; it is usually awarded on merit in recognition of achievement; and there may be a condition requiring the person to return and provide services for the payer. **The indicia of a “bursary”** are that merit need not have so much significance; and financial need is often more important.
98. From the above it can be seen that both a bursary and a scholarship have the element of granting financial assistance for educational purposes. Case law also suggests receiving a bursary or scholarship may be subject to conditions on the recipient to provide services to or on behalf of the payer. The granting of a scholarship will involve some selection based on merit or other achievement criteria whereas a bursary may be granted based on the meeting of certain eligibility criteria, often financial needs-based. In either case, in the **Commissioner’s** view, the payer selects the recipient according to some pre-defined criteria. **In the Commissioner’s view**, the more rigorous the application process and the greater the independence between the payer and the recipient, the easier it is for a recipient to demonstrate that the payment is a scholarship or bursary.
99. For example, an issue that often arises in the context of s CW 36 is whether a payment is a scholarship or bursary within s CW 36 or salary and wages by reason of an employment relationship. This distinction is important because, as seen above, the courts have established that if the true character of the amounts received is not for the dominant purpose of education but is primarily a payment of salary and wages under an employment relationship, then it is not a scholarship or bursary within s CW 36. This Interpretation Statement has outlined the factors the courts have considered to be relevant in this context at [55] above.
100. The Commissioner has published specific guidance on whether a retraining payment paid to a former employee would meet the requirements of what is now s CW 36 (see **“Retraining payments made on employment termination –**

assessability", *Tax Information Bulletin* Vol 7, No 3 (September 1995): 6). Generally, a retraining payment paid to a former employee will be salary and wages and not a scholarship or bursary that meets the requirements of s CW 36.

Conclusion on the meaning of "scholarship or bursary"

101. Based on the above, the Commissioner concludes the following:

- A "bursary" or "scholarship" is usually granted by a public body or an independent private body to enable the recipient to pursue their education, but may also be granted in circumstances where a special relationship exists between the payer and the recipient.
- A bursary is a sum of money, or its equivalent, granted to a person meeting certain criteria (often needs-based) for the primary purpose of assisting the recipient with funding their education.
- A scholarship is a sum of money, or its equivalent, granted to a person for the primary purpose of assisting them to pursue their studies. The recipient is selected on merit or some other criteria.
- Where a special relationship exists between the payer and the recipient, it may be harder to show that the dominant purpose of a payment is to assist the recipient with their studies because there may be competing reasons for the payment.
- The granting of a scholarship or bursary may be on the condition that the recipient is required to provide services for, or on behalf of, the payer. However, the true character of the scholarship or bursary must be to assist **the recipient's education**, and the payment must not be primarily for the payer to receive some other benefit, such as services, from the recipient.

Is the scholarship or bursary for attendance at an "educational institution"?

102. Section CW 36 requires a scholarship or bursary to be primarily for **the recipient's attendance at an "educational institution"**. It is, therefore, necessary to **determine what "educational institution" means in s CW 36.**

103. The term **"educational institution" is not defined in the Act.** The cases that have considered the exemption do not discuss the meaning of the term. In those cases it was implicit that the various organisations running the courses that the taxpayers were attending or intending to attend were **"educational institutions"**. The educational institutions were all tertiary institutions: universities (*Drew, Case L30, Case L35, Case M24, Case P23* and *Case T46*), a technical institution (*Case M66*) and a teacher's training college (*Reid* (CA)).

104. These cases are consistent with the meaning of the term **"institution"**, as specifically defined in s 159(1) of the Education Act 1989:

- (a) a college of education; or
- (b) a polytechnic; or
- (ba) a specialist college; or
- (c) a university; or
- (d) a wananga:

105. **This definition of "institution" indicates that,** for the Education Act 1989, the term **"institution" means one of a prescribed list of tertiary education providers that have been established through a statutory process** (see s 162 of the Education Act 1989). Section 162 details how each body is established and its

characteristics. While this definition of "institution" is helpful in determining the meaning of "educational institution" in s CW 36, the Commissioner considers that the meaning in s CW 36 is not limited to "institution" as defined in the Education Act 1989.

106. The meanings of "education" and "institution" are considered separately before considering the composite term.

Ordinary meaning of "education"

107. The Concise Oxford English Dictionary defines "education" as:

the process of educating or being educated; systematic instruction

and "educate" as:

give intellectual, moral, and social instruction to; train or give information on a particular subject.

Case law on the meaning of "education"

108. The Supreme Court of New South Wales discussed the meanings of "education" and the related term "educational purpose" in *FCT v Hall* (1975) 75 ATC 4,156. This case considers s 23(z) of the Income Tax Assessment Act 1936 (Aust). That section is similar in context to s CW 36 and exempts from income tax "income derived by way of a scholarship, bursary or other educational allowance or educational assistance ... by a student receiving full-time education at a school, college or university".
109. The case concerns the grant of a research fellowship by the Asthma Foundation to a researcher studying for a doctorate in medicine at a university. The main issue was whether the grant was a scholarship or bursary within s 23(z) of the Income Tax Assessment Act 1936 (Aust) or a payment for services rendered under an employment relationship.
110. Rath J discussed the meaning of "education", in the context of whether the purpose of the payment was for education, at 4,162 to 4,163:

In *Chesterman v F.C. of T. Starke* J. said ((1923) 32 C.L.R. 362 at 400) that **the essential idea of education is training or teaching**. *Isaacs* J. said (pp. 385-6) that for purposes to be educational they must provide for the giving or imparting of instruction. In his view education connotes **the sense of imparting knowledge or assisting and guiding the development of body and mind**. "Within that orbit", he said, "the field is wide, and extends from elementary instruction in primary schools to the highest technical scientific teaching in Universities". In *Lloyd v F.C. of T.* ((1955) 93 C.L.R. 645), *Kitto* J., after referring to these views, said (at p. 676): "The conception is unquestionably much wider than mere book learning, and wider than any category of subjects which might be thought to comprise general education as distinguished from education in specialised subjects concerned primarily with particular occupations". In the same case *Dixon* C.J. referred (at p. 661) to **"systematic methods or procedures for the inculcation of knowledge"**.

On these authorities education **involves the dual concepts of imparting of knowledge and system**. In educational institutions the imparting of knowledge is performed by various methods and combination of methods. The simplest, and this is the one that features prominently in primary education, is the direct inculcation of knowledge by the teacher in the pupil. A more sophisticated form of instruction is discussion, the exchange of ideas between teacher and student, a form which finds classical expression in the dialogues of Plato. In advanced education the element of direct inculcation may have little prominence. The professor's lectures may be better understood by reading his notes than by hearing him speak. It is not unknown for the lecturer to deliver his lecture at a speed which permits of every word being taken down in long hand. There can be little or no understanding of the subject matter in such a procedure, and understanding comes later from a study of the notes. In higher education much of the instruction comes, not from the teacher, but from the books the student reads. Indeed the element in education that has been referred to as imparting of knowledge (thus suggesting a necessary teacher-student relationship) might be better

described as learning; and the process of learning may be fostered in many ways, without stress on the teacher-student relationship.

More significant perhaps is the element of system. In all educational establishments there is a planned course of learning. It is primarily for the educator to plan the course of study, and the procedures of learning. Typically these procedures will involve reading, discussion and teaching, with the first two having the predominant role as the level of education advances. [Emphasis added]

111. The courts have considered the meaning of "education" in several cases when deciding whether an organisation had a charitable purpose, so was a charity. Charitable purposes include the "advancement of education" (see s YA 1). In this context, the courts have given "education" a wide meaning (see *Royal Choral Society v Commrs of IR* [1943] 2 All ER 101 (CA), *Re South Place Ethical Society, Barralet v Attorney-General* [1980] 3 All ER 918 (Ch); *Re Dupree's Trusts, Daley v Lloyds Bank* [1944] 2 All ER 443 (Ch), *Royal College of Surgeons of England v National Provincial Bank* [1952] AC 631 (HL), *Crystal Palace Trustees v Minister of Town & Country Planning* [1951] Ch 132 and *In re Delius (decd), Emanuel v Rosen* [1957] Ch 299).
112. While the meaning of "education" in the charitable purposes context has been given a wide meaning, this wide meaning is consistent with the view that education involves the imparting of knowledge or learning (by various methods) and requires an element of system (a planned course of learning). Education extends from elementary instruction in primary schools to the highest technical scientific teaching in universities. This is consistent with the ordinary meaning of "education".

Ordinary meaning of "institution"

113. The Concise Oxford English Dictionary defines "institution" as:

a society or organisation founded esp. for charitable, religious, educational, or social purposes.

114. The ordinary meanings suggest that an "educational institution" is an organisation founded to give training on a particular subject by way of systematic instruction.

Case law on the meaning of "institution"

115. Lord Macnaghten described an institution in the following terms in *Mayor, etc of Manchester v McAdam (Surveyor of Taxes)* [1896] AC 500 (HL) at 511:

It is a little difficult to define the meaning of the term 'institution' in the modern acceptation of the word. It means, I suppose, **an undertaking formed to promote some defined purpose**, having in view generally the instruction or education of the public. It is **the body (so to speak) called into existence to translate the purpose** as conceived in the minds of the founders **into a living and active principle**. [Emphasis added]

116. Both the ordinary meaning and common law meaning suggest an institution is a society or organisation founded for a particular purpose and to actively implement that purpose by instructing the public. Since s CW 36 is concerned with an "educational institution", an institution within the provision would have to be founded for educational purposes and to actively educate.

Meaning of "educational institution"

117. In South Africa, Grosskopf J in *ITC 1262* 39 SATC 114 looked at the meaning of "educational institution" in s 10(1)(f) of the Income Tax Act 58 of 1962 (SA). That section exempts from income "the receipts and accruals of all ecclesiastical, charitable and educational institutions of a public character". The issue in this case was whether a company that had as its main object the promotion of travel

by students as **an integral part of their education was an "educational institution"** within the meaning of the provision.

118. Grosskopf J considered whether "educational" should be given the wide meaning it had been given in charities cases or should be limited to formal education. He stated, at 120:

This, however, brings me back to the original question: where is the line to be drawn? No doubt foreign travel can be educational in the wide sense in which the acquisition of all knowledge or experience is considered educational. However, as I have already said, it is common cause that this is not the sense in which the word is used in the Act,...

119. Grosskopf J then concluded on the meaning of "educational institution", at 120:

To sum up: I consider that **the concept of education** which the legislature had in mind when exempting 'educational institutions' from tax **requires at least an element of systematic or formal instruction, schooling or training**. And **an institution is 'educational'**, in my view, **if its sole or at least main purpose or activity is to provide education in that sense**. [Emphasis added]

120. The above case confirms the meaning that "institution" was given in *Mayor, etc of Manchester*. Additionally, it suggests that **to be an "educational institution"**, an institution's sole, or at least main, purpose or activity needs to be to provide education that requires an element of systematic or formal instruction, schooling or training. This is consistent with the meaning of "education" in *FCT v Hall*.
121. In New Zealand, the New Zealand Qualifications Authority (NZQA) manages the New Zealand Qualifications Framework and provides independent quality assurance of education providers. Section CW 36 does not require an educational institution to be NZQA-approved. However, the fact an institution is NZQA-approved may be an indicator it is an educational institution offering formal and planned courses of learning.

Conclusion on the meaning of "educational institution"

122. From the above, it can be seen that courts have given "education" a wide meaning. It involves the imparting of knowledge and requires a planned, systematic course of learning. It can also be seen that an "institution" is a society or an organisation founded for a particular purpose that it actively pursues.
123. The Commissioner considers an "educational institution" in s CW 36 is a society or an organisation founded for the sole or main purpose of promoting education and that actively provides that education. Education involves the imparting of knowledge through a systematic formal course of learning. The institution could be in New Zealand or overseas. In New Zealand, educational institutions include, but are not limited to schools, universities, wānanga, polytechnics and industry training organisations.

Is the scholarship or bursary "for attendance at" an educational institution?

124. For s CW 36 to apply, the scholarship or bursary must be "for attendance at" an educational institution. Therefore, **what "for attendance at" means** must be determined. The phrase "for attendance at" is not defined in the Act.

Ordinary meaning "for attendance at"

125. The *Concise Oxford English Dictionary* relevantly defines "attendance" as:

the action or state of attending

126. **and "attend" as:**

be present at: go regularly to (a school, church, or clinic).

127. The *Concise Oxford Dictionary* relevantly defines "present" as:
Being or occurring in a particular place.
128. The *Oxford English Dictionary* (online, accessed 25 August 2015) relevantly defines "attendance" as:
The action or condition of applying one's mind or observant faculties to something;
The action of coming or fact of being present, in answer to a summons, or to take part in public business, entertainment, instruction, worship, etc.
129. The ordinary meaning suggests that attendance can mean the being at or going to a particular place (regularly or not). It can also mean the taking part in or **applying one's mind to something**.

Case law on the meaning of "attendance"

130. None of the cases discussed earlier on the predecessors to s CW 36 considered the meaning of "attendance at an educational institution".
131. However, the Court of Appeal implicitly accepted in *Reid* that the trainee teachers **were in attendance at the teachers' college**. The trainee teachers were required **under their course of study to physically attend the teachers' college, but also to physically attend schools outside the teachers' college**. This shows that the court accepted that "attendance at an educational institution" under the predecessor to s CW 36 was not restricted to physical attendance at the educational institution itself. It could also include going to a different location to fulfil the requirements or obligations of the particular formal course of education offered by the educational institution. This is consistent with the ordinary meaning of "attendance at".
132. Other jurisdictions have looked at what constitutes attendance at a school, university or similar.
133. The United Kingdom Court of Appeal decision in *Flemming v Secretary of State for Work and Pensions* [2002] EWCA Civ 641 was a social security case. It concerned whether a daughter was entitled to an invalid care allowance under s 70 of the Social Security Contributions and Benefits Act 1992 (UK) ("**1992 Act**") for caring for her disabled mother. The daughter had commenced a degree course at a university. Section 70 of the 1992 Act provides that a person is not entitled to an **allowance under the section if the person is "receiving full-time education"**. Regulation 5 of the Social Security (Invalid Care Allowance) Regulations 1976 sets out that for the purposes of s 70 of the 1992 Act:
...a person shall be treated as receiving full-time education for any period during which he **attends** a course of education at a university, college, school or other educational establishment for twenty-one hours or more a week. [Emphasis added]
134. One of the issues was whether the word "attends" was, as submitted for the claimant, only physical presence at the university. Pill LJ stated on this issue at [17]:
I would construe the expression "attends a course of education at a university" in the sense of being enrolled upon such a course at the university. In ordinary language, the student who says he attends a course of education at Glamorgan University is saying no more than that he is **enrolled upon and pursuing such a course offered by the University**. The expression does not have the locational connotation for which Mr Stagg argues. Some of the student's time will almost inevitably be spent in study upon the premises of a university but the hours during which he is attending the course of education are not confined to the hours on the premises. Hours of study away from the premises of the university are capable of coming within the period during which the student is attending the course of education. This construction is supported by the presence of the word "attending" in reg 5(3). **The word does not have a locational limitation in that context** and it would be surprising if the

word attendance has a different meaning in two paragraphs of the same Regulation, as Mr Stagg contends it has. [Emphasis added]

135. Several Canadian cases have looked at what "attendance as a full-time student" means **within the definition of "dependent son" and "dependent daughter" in s 2(1)(b)(i) of the Immigration Regulations 1978, SOR/78-172**. Whether someone is a dependent son or daughter determines whether they can be **included in a parent's principal application for a permanent residence visa**. In the Federal Court decision in *Dhami v Canada (Minister of Citizenship and Immigration)* [2001] FCT 805, Dawson J stated at [43]:

I conclude that because the regulatory definition speaks of both enrollment and attendance, a visa officer is obliged to look beyond the mere fact of registration in a program of study. The reference in the definition to "attendance" is, in my view, for the purpose of testing the reality of a claim to full-time student status. The visa officer must inquire whether an applicant is simply enrolled on paper or whether an applicant is **actually engaged in a bona fide manner in a program of study**. [Emphasis added]

136. In the same context, the Canadian Court of Appeal in *Minister of Citizenship and Immigration v Jagwinder Singh Sandhu* 2002 FCA 79 stated in [20] and [21]:

[20] In my view, the words "enrolled and in attendance as a full-time student" require that the student, on a continuous basis, make a bona fide attempt to assimilate the material of the subjects in which the student is enrolled.

[21] This does not suggest that a student must be either successful in the examinations or that the student have acquired a mastery of the subject. What is required is **a genuine effort** on the part of the student **to acquire the knowledge that the course seeks to impart**. [Emphasis added]

137. While the above cases look at attendance in a different context and may not be **directly relevant to the meaning of "attendance at an educational institution" in s CW 36**, they are, however, consistent with the ordinary meaning of the term. They are also consistent with the decision in *Reid* (CA) that **"attendance" in the context of an educational course has an aspect of actively taking part in or genuinely pursuing the particular course of education**.
138. Attendance is not limited to a certain location, **so a student can still be "attending at an educational institution" when not on the premises of the educational institution**. **In the Commissioner's view**, it therefore follows, that a student will be attending at an educational institution even when they are attending remotely (eg, by being enrolled in and actively pursuing a distance learning programme of an educational institution) or when required to attend at premises other than those of the educational institution. This is consistent with the commonly accepted usage of the word **"attendance" today**. For example, under ordinary usage a person is regarded as attending a meeting when dialling into a meeting over the internet or phone without being at the physical place where the meeting is held. Further, it is acceptable to refer to people **as "attending at" court** when giving evidence remotely or in person.

Conclusion on the meaning of "attendance at"

139. From the above, it can be **seen "attendance"**, in the context of an educational course, can be **the student's physical presence at the location where the course is being held or the student being enrolled and pursuing the educational course if it involves requirements other than physical presence, or a combination of both**.
140. The Commissioner considers a scholarship or bursary will be for **"attendance at an educational institution" when the payment is for a person to enrol and take part in a formal course of education offered by an educational institution**.

Who derives a scholarship or bursary?

141. Another question that is sometimes important to resolve is who derives the scholarship or bursary. For example, sometimes, a bursary might take the form of a regular payment that is used to meet a **student's school fees that the student's parents** would otherwise pay.
142. **In the Commissioner's view a scholarship or bursary is derived by the scholar or bursar** (ie, the person who is attending at the educational institution), and not by the recipient's **parents**, even though the parents may use the payment to meet **their child's education costs**. This is because it is the student who has qualified for and been granted the scholarship or bursary, and the amount is paid to assist that student with their attendance at an educational institution.
143. Before s CW 36 was rewritten, the predecessor exemption in s CB 9(d) of the Income Tax Act 1994 provided that the exemption from income **was for "any amount derived by any person from any maintenance or allowance provided for or paid to that person in respect of his or her attendance at an educational institution in terms of a scholarship or bursary"**. This wording made it clear that the income exemption is for scholarship or bursary income derived by a person for **their** attendance at an educational institution. There was no intended policy change to this position when the Income Tax Act was rewritten.

Examples

144. The following examples are included to assist in explaining the application of s CW 36. They assume the payments are amounts of income.

Example 1 - Scholarship for course requiring practical work aspect

145. Ruby is enrolled in a relaxation massage course at the Holistic Centre of Massage Therapies Ltd. Graduates who successfully complete the full-time one year course gain the Certificate in Relaxation Massage. The course includes components such as anatomy and physiology and the theory and practice of massage. Half of the time spent on the course is practice-based massage at a clinic the centre works with to enable the application of the students' knowledge and skills in a supervised clinical environment. The centre was founded with the mission to produce multi-skilled graduates with a broad knowledge base in massage. The **centre's** purpose is to teach massage therapies. The centre and the course both have NZQA approval.
146. Ruby has been granted a **Women's** Restart Education Scholarship by a local community trust. The scholarship reimburses her for the first year course fee of \$5,000 and pays \$12,000 in monthly instalments of \$1,000 per month over 12 months while she is pursuing her studies. The payments are intended to financially assist female students who, through a change in circumstances, are studying full time towards a nationally recognised qualification. The payments will be stopped if Ruby pulls out of the course.
147. The payments are exempt income under s CW 36 because:
- **they are not a "basic grant" or an "independent circumstances grant" under s 303 of the Education Act 1989;**
 - they are a scholarship or bursary because they are granted to Ruby (who meets the criteria laid down for the payments) to assist her education financially.
148. The centre is an educational institution because it was founded for the sole purpose of teaching massage and related therapies and it actively runs systematic

formal courses for this purpose. Section CW 36 does not require an educational institution to be NZQA approved. However, the fact that the centre is NZQA approved may indicate that it is an educational institution that offers formal and planned courses of learning.

149. **Ruby receives the payments “for attendance at the educational institution”** because she is enrolled in the formal course, relaxation massage, and takes part in this course by fulfilling the obligations, (ie, attending theory classes at the centre and practice-based training at the clinic. Attending the practice-based half of the course at the clinic outside the **centre’s** premises is part of fulfilling the obligations of the course, so is part of attendance at the educational institution.

Example 2 - Literary residency not a scholarship or bursary

150. William, a young author, has applied for and is granted a literary residency by a New Zealand university. He is provided with an office in the English Department of the university for 12 months and receives the minimum salary of a full-time university lecturer over this period. The grant has been created to foster New Zealand writing by providing an opportunity to write full time within an academic environment for the period of tenure.
151. William would like to know whether the grant he receives is exempt income under s CW 36.
152. While the university is an educational institution as referred to in s CW 36 and the payments are to **assist William’s education in a broad sense, they are not “for attendance at an educational institution”** within the meaning of the term in s CW 36. This is because William is not enrolled in, and does not pursue, a planned, formal course of education at the university. The payments are to provide William with the opportunity to further his skills in his profession and to focus on his professional work and projects during the period. The payments are not exempt from tax under s CW 36.

Example 3 - Employment income rather than a scholarship or bursary

153. Kiri is working full time in a garden centre. She would like to gain a Certificate in Floristry Practice at the North Island Institute of Technology. The course is a one-year full-time course requiring attendance at the institute as well as some online course participation.
154. The garden centre like having Kiri as an employee and does not want to lose her. To encourage her to stay working for it long term, the garden centre offers to financially assist Kiri with her studies. The garden centre and Kiri sign an agreement whereby the garden centre agrees to pay her a fortnightly bursary payment for the duration of her studies equivalent to the amount she earned before studying full time. In return, Kiri is required to work in the garden centre on weekends (without pay) while studying and guarantees that after completing her studies she will work full time for the garden centre for two years or repay 75% of the payments made to her during the study period.
155. Kiri would like to know whether the payments she will receive from the garden centre while she is studying floristry practice are exempt income under s CW 36.
156. The payments Kiri will receive from the garden centre while she is studying are not exempt income under s CW 36. This is because the true character of the payments is that of employment income rather than of a scholarship or bursary for attendance at an educational institution.
157. This is supported by the following:

- An existing employment relationship exists between Kiri and the garden centre at the time Kiri enrolls in the educational course and this relationship continues throughout the study period.
- **The garden centre's principal purpose in making the payments** is to ensure that it retains **Kiri's** services. The provision of financial assistance while Kiri is studying is only a secondary purpose of the garden centre.
- Kiri is required to work for the garden centre (on weekends) during the period of study.
- The amount of the fortnightly bursary the garden centre pays is equivalent to **Kiri's** previous salary.
- Kiri is required to repay a significant portion of the money the garden centre pays during her study period, if she does not work for the garden centre for two years after finishing her studies.

Example 4 – Distance learning course

158. Callum is enrolled in an online business studies distance learning course through an NZQA approved business school. Graduates who successfully complete the one-year full-time course gain a Certificate in Business Studies. Callum has been granted a scholarship by his local Chamber of Commerce to assist him with his course costs and living expenses while he studies.
159. The scholarship is exempt income under s CW 36 because:
- it is not a basic grant or an independent circumstances grant under s 303 of the Education Act 1989; and
 - it is granted to Callum (who meets the criteria laid down for the payments and who has no special relationship with the Chamber of Commerce) to assist with him pursuing his education.
160. Callum receives the scholarship for the primary purpose of assisting his attendance at an educational institution. He is enrolled in a formal course of education provided by an educational institution and the payment is for him to pursue that course.

References

Related rulings/statements

"Exempting a Scholarship from Income Tax" *Tax Information Bulletin* Vol 5, No 6 (November 1993): 7

"Retraining payments made on employment termination – assessability" *Tax Information Bulletin* Vol 7, No 3 (September 1995): 6

Subject references

Income tax, exempt income, bursary, scholarship

Legislative references

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 Income Tax Act 2007, ss BD 1, CF 1, CW 36
 Income Tax Act 1994, s CB 9(d)
 Income Tax Act 1976, s 61(37)

Case references

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Case L30 (1989) 11 NZTC 1,181
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Case M24 (1990) 12 NZTC 2,146
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Royal College of Surgeons of England v National Provincial Bank [1952] AC 631 (HL)
Scott v C of T (1935) 35 SR (NSW) 215 (NSWSC)
South Place Ethical Soc, Re, Barralet v A-G [1980] 3 All ER 918 (Ch)
Tennant v Smith [1892] AC 150

Appendix – Legislation

Income Tax Act 2007

1. Section BD 1 provides:

BD 1 Income, exempt income, excluded income, non-residents' foreign-sourced income, and assessable income

Amounts of income

(1) An amount is income of a person if it is their income under a provision in Part C (Income).

Exempt income

(2) An amount of income of a person is **exempt income** if it is their exempt income under a provision in subpart CW (Exempt income) or CZ (Terminating provisions).

Excluded income

(3) An amount of income of a person is **excluded income** if—

- (a) it is their excluded income under a provision in subpart CX (Excluded income) or CZ; and
- (b) it is not their non-residents' foreign-sourced income.

Non-residents' foreign-sourced income

(4) An amount of income of a person is **non-residents' foreign-sourced income** if—

- (a) the amount is a foreign-sourced amount; and
- (b) the person is a non-resident when it is derived; and
- (c) the amount is not income of a trustee to which section HC 25(2) (Foreign-sourced amounts: non-resident trustees) applies.

Assessable income

(5) An amount of income of a person is **assessable income** in the calculation of their annual gross income if it is not income of any of the following kinds:

- (a) their exempt income;
- (b) their excluded income;
- (c) their non-residents' foreign-sourced income.

2. Section CF 1 relevantly provides:

CF 1 Benefits, pensions, compensation, and government grants

Income

(1) The following amounts are income:

- (a) an accident compensation payment;
- (b) an education grant;
- (c) an income-tested benefit;
- (d) *[Repealed]*
- (e) a New Zealand superannuation payment;
- (f) a parental leave payment paid under Part 7A of the Parental Leave and Employment Protection Act 1987;
- (g) a pension;
- (h) a veteran's pension.

Some definitions

(2) In this section, —

...

education grant means a basic grant or an independent circumstances grant under regulations made under section 303 of the Education Act 1989

....

3. Section CW 36 provides:

CW 36 Scholarships and bursaries

A basic grant or an independent circumstances grant under regulations made under section 303 of the Education Act 1989 is not exempt income, but any other scholarship or bursary for attendance at an educational institution is exempt income.

Education Act 1989

4. Section 2 relevantly provides:

2 Interpretation

- (1) In this Part, and Parts 2, 3, and 11, unless the context otherwise requires,—

...

institution has the same meaning as it has in section 159

5. Section 159 relevantly provides:

159 Interpretation

- (1) In this Part and Part 13A to Part 24, and in Schedules 13 to 17, unless the context otherwise requires,—

...

institution means—

- (a) a college of education; or
- (b) a polytechnic; or
- (ba) a specialist college; or
- (c) a university; or
- (d) a wananga

6. Section 303 provides:

303 Student allowances

- (1) The Governor-General may, by Order in Council, make regulations establishing allowances to help people pursue courses of education or training (in the case of courses of secondary education, whether within or outside New Zealand).
- (2) Every allowance shall—
 - (a) be awarded in accordance with the regulations that established it; and
 - (b) have an annual or other value from time to time set out in those regulations.
- (3) Regulations under subsection (1) may, in relation to the payment of allowances in respect of courses of study at registered private schools or private training establishments, apply to—
 - (a) all such schools or establishments; or
 - (b) registered private schools or private training establishments of a specified class or description only; or
 - (c) particular schools or establishments.
- (3A) Regulations made under this section may be expressed to come into force, and may accordingly come into force, before the date on which they are made, but only if the regulations—
 - (a) increase the value or maximum value of any allowance, or the rate or maximum rate at which any allowance may be paid; or
 - (b) extend the class or classes of person entitled to receive an allowance, or entitled to be paid an allowance at any particular rate.
- (3B) The rates of student allowances set under this section (except the rates of allowances provided in respect of accommodation expenses) must be adjusted, by regulations made

under subsection (1), as at 1 April each year so that in each case the new rate (after the deduction of standard tax) is the rate at that date (after the deduction of standard tax and before the adjustment under this section is made) adjusted by an amount equal to the percentage movement upwards in the CPI between the CPI for the quarter ended with 31 December 1 year before the immediately preceding 31 December and the CPI for the quarter ended with the immediately preceding 31 December.

- (3C) The adjustments (by any percentage movement upwards in the CPI) required under subsection (3B) as at 1 April in any year from 2011 to 2017 (inclusive) must, despite subsections (3B) and (3F), be calculated,—
- (a) if, and insofar as, they relate to movements during quarters that end before 29 April 2010, using index numbers for those quarters of the consumers price index-all groups published by Statistics New Zealand; and
 - (b) if, and insofar as, they relate to movements during quarters that end after 28 April 2010, using index numbers for those quarters of the consumers price index-all groups excluding cigarettes and other tobacco products published by Statistics New Zealand.
- (3D) An adjustment under subsection (3B) must not reduce the weekly amounts of student allowances payable.
- (3E) Every adjustment made under subsection (3B) comes into force, or is considered to have come into force, on 1 April of the calendar year in which it is made, and applies to student allowances payable on and after that date.
- (3F) In this section,—
- CPI** means the consumers price index-all groups published by Statistics New Zealand
- standard tax** means the amount of tax reckoned on a weekly basis that would be withholdable in accordance with tax code "M" stated in section 24B of the Tax Administration Act 1994.
- (4) The power to make regulations under subsection (1) includes (and is deemed always to have included) power to make regulations—
- (a) authorising the Secretary, for the purposes of assessing the eligibility of any person for an allowance, to take into account **the income of that person's parents** or spouse or partner;
 - (b) defining the terms parent, spouse, partner, and any related terms, for the purposes of the regulations;
 - (c) stating when and to what extent that income is to be taken into account.
- (5) Until regulations under this section set out the value of allowances established by the regulations, the allowances have the annual or other value prescribed by the Minister by notice in the *Gazette*.