Inland Revenue
Te Tari Taake

PUBLIC RULING

Fringe Benefit Tax – Charitable and Other Donee Organisations and Fringe Benefit Tax

Issued: 31 May 2022

BR Pub 22/06

This Public Ruling considers when benefits provided by charitable organisations to their employees may be excluded from being treated as fringe benefits.

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

PERIOD OF THE RULING

This Ruling applies for an indefinite period from 1 July 2022.

REPLACES

This is an update and reissue of BR Pub 17/06. For more information about earlier publications of this Public Ruling see the Commentary to this Ruling.

Public Ruling BR Pub 22/06: Fringe Benefit Tax - Charitable and Other Donee Organisations and Fringe Benefit Tax

This is a public ruling made under s 91D of the Tax Administration Act 1994.

Taxation laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of section CX 25.

The Arrangement to which this Ruling applies

The Arrangement is the provision of a non-monetary benefit by a charitable or other donee organisation, not being a local authority, public authority or university, (the qualifying organisation) to an employee of that organisation.

How the Taxation Law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- Where a short-term charge card facility (as defined in s CX 25(3)) is provided to an employee of a qualifying organisation and the value of that benefit for the employee in a tax year is more than the lesser of 5% of the employee's salary or wages or $1,200, that benefit is a fringe benefit and the exclusion in s CX 25(1) does not apply.
- Where any other non-monetary benefit is provided to an employee of a qualifying organisation:
    - A fringe benefit **is not** provided where the benefit is not received mainly in connection with their employment.
    - A fringe benefit **is not** provided where the benefit is received mainly in connection with their employment to the extent that:
        - the employee is employed in carrying out the qualifying organisation's benevolent, charitable, cultural or philanthropic purposes; or
        - the employee is employed in a business carried on by the qualifying organisation, where the business activity is within (ie, carries out) the organisation's benevolent, charitable, cultural or philanthropic purposes.

- A fringe benefit **is** provided where the benefit is received mainly in connection with the employee's employment, to the extent that the employee is employed in a business carried on by the qualifying organisation, where the business activity is outside (ie, does not carry out) the organisation's benevolent, charitable, cultural, or philanthropic purposes, regardless of whether business profits are applied to the organisation's benevolent, charitable, cultural or philanthropic purposes.

The period or tax year for which this Ruling applies

This Ruling will apply for an indefinite period beginning on 1 July 2022.

This Ruling is signed by me on 31 May 2022.

Grant Haley
Tax Counsel Lead, Public Advice and Guidance

Commentary on Public Ruling BR Pub 22/06

This commentary is not a legally binding statement. The commentary is intended to help readers understand and apply the conclusions reached in Public Ruling BR Pub 22/06 ("the Ruling").

Contents

Summary

1. Section CX 25 excludes some benefits provided to employees by qualifying non-profit organisations from being fringe benefits for fringe benefit tax (FBT) purposes. This Ruling and commentary explains which organisations the FBT exclusion applies to and how it applies.

2. The exclusion in s CX 25 applies to "charitable organisations". This term is defined in s YA 1. It includes most organisations usually referred to as "donee organisations"; that is, any associations, funds, institutions, organisations, societies or trusts that are not carried on for the private pecuniary profit of an individual and whose funds are applied wholly or mainly to benevolent, charitable, philanthropic or cultural purposes ("specified purposes"). However, local authorities, public authorities and universities are specifically excluded from being "charitable organisations" for FBT purposes (and therefore the ordinary FBT rules apply to them). Most organisations which are donee organisations will be recorded on Inland Revenue's approved donee list. For ease of reference, in this commentary the organisations that can rely on the FBT exclusion in s CX 25 are referred to as "qualifying organisations".

3. Qualifying organisations carry on a variety of activities. Those activities may include business activities. Those business activities may be within the organisation's specified purposes or outside those purposes – even if undertaken to help fund the organisation's specified purposes.

4. Essentially, the FBT exclusion in s CX 25 applies where a qualifying organisation provides a benefit to an employee mainly in connection with their employment, in an activity carried on within the organisation's specified purposes.

5. The exclusion does **not** apply where a qualifying organisation provides a benefit to an employee mainly in connection with their employment, to the extent the benefit is provided in a business activity carried on outside the qualifying organisation's specified purposes.

6. The distinction between business activities that are within, or outside of, the qualifying organisation's specified purposes is specific to the FBT exclusion. It is not relevant for other purposes. Whether the FBT exclusion applies is a different question to whether s CW 42 applies to exempt a qualifying organisation's business income. A qualifying organisation's income may be entirely exempt under s CW 42 while the FBT exclusion may not apply to all fringe benefits provided.

7. The exclusion also does **not** apply to benefits provided by a qualifying organisation to an employee by way of short-term charge facilities (ie, credit or charge cards), if the

value of those benefits in a tax year exceeds the lesser of 5% of the employee's salary or wages for the tax year or $1,200.

8. **Figure 3: Exclusion from FBT for qualifying organisations** on page 19 summarises the approach to take to decide whether the exclusion in s CX 25 applies.

Background

9. This Ruling is a reissue of BR Pub 17/06: Fringe Benefit Tax – Charitable and Other Donee Organisations and Fringe Benefit Tax which expires on 30 June 2022. This Ruling will apply for an indefinite period from 1 July 2022.

10. BR Pub 17/06 replaced "Public Ruling BR Pub 09/03: Charitable Organisations and Fringe Benefit Tax", *Tax Information Bulletin* Vol 21, No 6 (August 2009): 12. BR Pub 09/03 was withdrawn from 30 June 2017. It was a reissue of "Charitable Organisations and Fringe Benefit Tax (FBT): Public Ruling BR Pub 00/08", *Tax Information Bulletin* Vol 12, No 9 (September 2000): 3.

11. BR Pub 09/03 was withdrawn because the Commissioner's view on aspects of that ruling has changed. BR Pub 09/03 was published for an indefinite period. Therefore, on withdrawal, the Commissioner continued to be bound by it for arrangements entered into before the withdrawal date for a further three years (see s 91DE(4A) of the Tax Administration Act 1994).

Approach taken to analysis

12. The approach taken in this commentary is to:

- briefly consider the legislative context of the FBT exclusion in s CX 25;
- identify types of organisations that may qualify for the FBT exclusion (qualifying organisations);
- address the following issues arising from the exception to the FBT exclusion (as set out in s CX 25(1)(a) and (b)):
  - when a benefit received by an employee is mainly in connection with their employment;
  - when a qualifying organisation's activity is a business;
  - when a qualifying organisation's business activity is within its specified purposes;
- discuss whether s CX 25(1) contemplates apportionment; and

- consider briefly the rules regarding credit cards, charge cards and some vouchers provided to employees of a qualifying organisation.

Legislative context of the FBT exclusion

13. Under the Act, an employer may be liable to pay FBT on fringe benefits that it provides to an employee. "Fringe benefit" is defined in s CX 2(1) as follows:

> *Meaning*
>
> (1) A **fringe benefit** is a benefit that —
>
> (a) is provided by an employer to an employee in connection with their employment; and
>
> (b) either—
>
> (i) arises in a way described in any of sections CX 6, CX 9, CX 10, or CX 12 to CX 16; or
>
> (ii) is an unclassified benefit; and
>
> (c) is not a benefit excluded from being a fringe benefit by any provision of this subpart.

14. This definition is broad and intended to include all non-cash payments an employer makes to an employee in connection with their employment.

15. Section CX 25(1) excludes benefits provided by certain qualifying organisations to their employees from being fringe benefits, except in certain circumstances (see s CX 25(1)(a) and (b)):

> **CX 25 Benefits provided by charitable organisations**
>
> *When not fringe benefit*
>
> (1) A charitable organisation that provides a benefit to an employee does not provide a fringe benefit except to the extent to which—
>
> (a) the employee receives the benefit mainly in connection with their employment; and
>
> (b) the employment consists of the carrying on by the organisation of a business whose activity is outside its benevolent, charitable, cultural, or philanthropic purposes.

16. Section CX 25(2) and (3) also limits the exclusion in s CX 25(1) by providing that the exclusion does not apply to benefits provided to an employee by way of short-term charge facilities if the value of those benefits in a tax year is more than the lesser of 5% of the employee's salary or wages for the tax year or $1,200.

Applying the legislation

17. For a benefit to be a fringe benefit, it must be provided by an employer to an employee in connection with their employment and must not be excluded from being a fringe benefit by one of the exclusions in subpart CX (see s CX 2 Meaning of fringe benefit). Where the employer is a "charitable organisation" (as defined in s YA 1), a benefit provided to an employee is excluded from being a fringe benefit by s CX 25(1), except in certain circumstances. This means that, to the extent the exclusion in s CX 25 applies, no FBT is payable on the benefit provided to the employee by the charitable organisation.

What types of organisations qualify for the FBT exclusion in s CX 25?

18. The FBT exclusion in s CX 25 applies to charitable organisations which are defined in s YA 1 for the purposes of the FBT exclusion:

> **charitable organisation —**
>
> (a) means, for a quarter or an income year, **an association, fund, institution, organisation, society, or trust to which section LD 3(2) (Meaning of charitable or other public benefit gift) or schedule 32 (Recipients of charitable or other public benefit gifts)** applies— the employee receives the benefit mainly in connection with their employment; and
>
> (i) in the quarter; or
>
> (ii) in the income year, if fringe benefit tax is payable on an income year basis under section RD 60 (Close company option); and
>
> (ab) includes a person who has been removed from the register of charitable entities (the register) under the Charities Act 2005, but only for the period starting on the day the person is registered on the register and ending on the earlier of the last day of the following periods:
>
> (i) the quarter, or income year if section RD 60 (Close company option) applies, in which the person does not comply with their rules contained in the register:
>
> (ii) the quarter, or income year if section RD 60 applies, in which the day of final decision falls; and
>
> (c) **does not include a local authority, a public authority, or a university**.
>
> [Emphasis added.]

19. The definition of "charitable organisation" essentially relies on the description of a "donee organisation" set out in the tax credit rules for charitable or other public benefit gifts. However, it specifically **excludes** local authorities, public authorities or universities.

20. The tax credit rules for charitable or other public benefit gifts provide a description of the types of organisation to be treated as a "donee organisation" for gifting purposes in s LD 3(2):

> *Description of organisations*
>
> (2) The following are the entities referred to in subsection (1)(a) and (b):
>
> (a) a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual, and whose funds are applied wholly or mainly to charitable, benevolent, philanthropic, or cultural purposes within New Zealand: in the income year, if fringe benefit tax is payable on an income year basis under section RD 60 (Close company option); and
>
> (ab) an entity that, but for this paragraph, no longer meets the requirements of this subsection, but only for the period starting on the day it fails to meet those requirements and ending on the later of—
>
> (i) the day the entity is removed from the register of charitable entities under the Charities Act 2005:
>
> (ii) the day on which all reasonably contemplated administrative appeals and Court proceedings, including appeal rights, are finalised or exhausted in relation to the person's charitable status.
>
> (ac) community housing entity, if the gift is made at a time the entity is eligible to derive exempt income under section CW 42B (Community housing trusts and companies):
>
> (b) a public institution maintained exclusively for any 1 or more of the purposes within New Zealand set out in paragraph (a):
>
> (bb) a board that is constituted under subpart 5 of Part 3 of the Education and Training Act 2020 and is not carried on for the private pecuniary profit of any individual:
>
> (bc) a tertiary education institution:
>
> (c) a fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a), by a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual:
>
> (d) a public fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a).

21. Organisations of the types described in s LD 3(2) essentially include associations, funds, institutions, organisations, societies or trusts that:

    - are not carried on for the personal gain of an individual; and
    - apply their funds wholly or mainly to charitable, benevolent, philanthropic or cultural purposes within New Zealand.

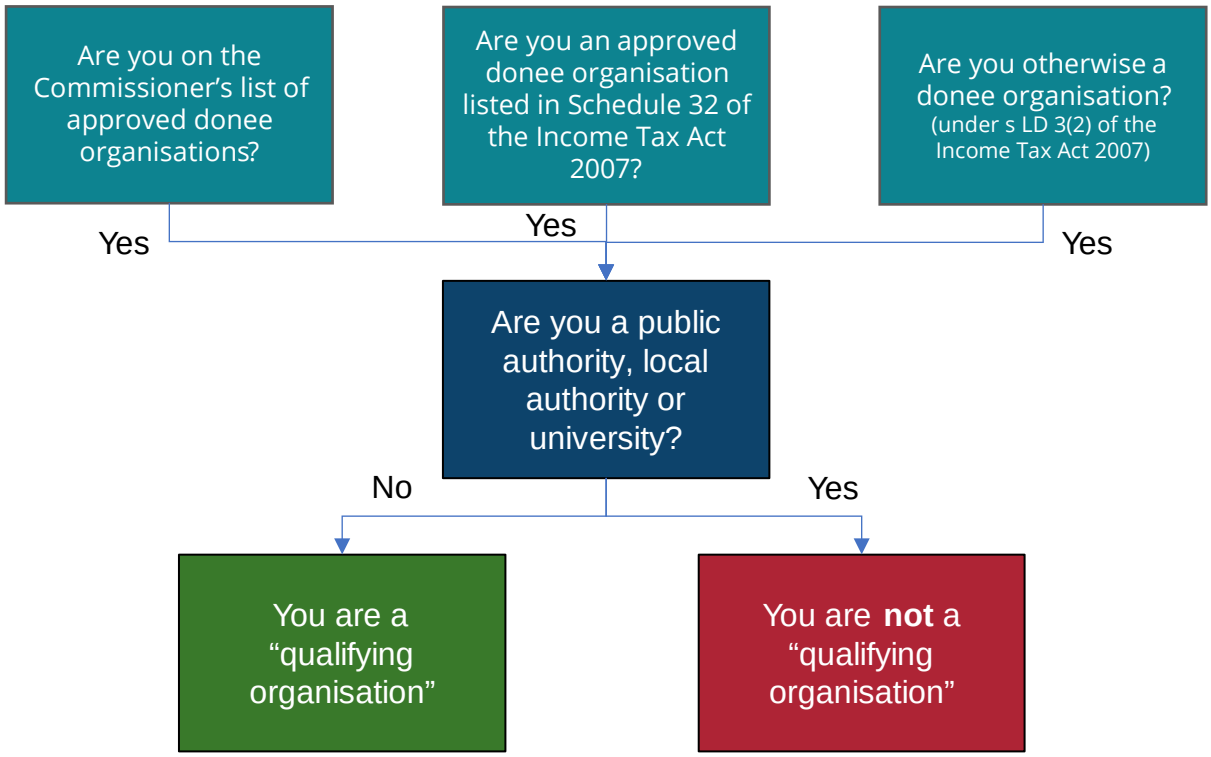
22. The definition of "charitable organisation" also includes organisations listed in schedule 32. Schedule 32 lists certain named organisations that Parliament has approved as being "recipients of charitable or other public benefit gifts". These are often international charities with a New Zealand presence, which would not otherwise qualify as "donee organisations" as they do not apply their funds wholly or mainly **within** New Zealand.[1]

23. There is significant overlap in s YA 1 between "charitable organisations" (used for the FBT exclusion) and "donee organisations". Both definitions include organisations described in s LD 3(2) and those listed in sch 32. However, the definition of "charitable organisations" excludes local authorities, public authorities and universities. Due to this overlap the term "qualifying organisation" is used to describe the charitable and donee organisations that the FBT exclusion in s CX 25 applies to (i.e. donee organisations, excluding those that are local authorities, public authorities or universities).

24. Most qualifying organisations will either be on the Commissioner's list of approved donee organisations or listed in schedule 32. **Figure 1: Are you a qualifying organisation?** illustrates this:

[1] The meaning of the phrase "wholly or mainly" in s LD 3(2) is discussed in IS 18/05: Income tax – donee organisations – meaning of wholly or mainly applying funds to specified purposes within New Zealand.

Figure 1: Are you a qualifying organisation?



Exceptions to the FBT exclusion

25. Generally, qualifying organisations are not subject to FBT. However, there are two exceptions to the FBT exclusion:

- The first exception is where benefits are provided mainly in connection with employment to employees who work for businesses outside the organisation's specified purposes.
- The second exception is where the benefits are provided by way of short-term charge facilities (discussed at [67]).

The first exception to the FBT exclusion

26. This first exception is set out in s CX 25(1) and has two limbs, paras (a) and (b):

> **CX 25 Benefits provided by charitable organisations**
>
> *When not fringe benefit*
>
> (1) A charitable organisation that provides a benefit to an employee does not provide a fringe benefit except to the extent to which—

> (a) the employee receives the benefit mainly in connection with their employment; and
>
> (b) the employment consists of the carrying on by the organisation of a business whose activity is outside its benevolent, charitable, cultural, or philanthropic purposes.

27. The first limb of the exception in s CX 25(1) considers whether a benefit is received by the employee mainly in connection with their employment. The second limb looks at the activities being carried on by a qualifying organisation in which the employee is engaged.

When is a benefit received by an employee mainly in connection with their employment?

28. The first limb of the exception (s CX 25(1)(a)) requires the employee to receive the benefit mainly in connection with their employment.

29. In the Commissioner's view, this wording recognises that a qualifying organisation may provide benefits to people who are acting in different capacities for the organisation. It is not unusual for people to be employed by an organisation in a particular role and for those same people to also provide additional or different services to the organisation, for example, on a voluntary (unpaid) basis.

30. In the Commissioner's view, the purpose of the wording in s CX 25(1)(a) is to clarify that a potential liability for FBT will arise only where an employee receives a benefit from a qualifying organisation mainly in their employment capacity and not in some other capacity (eg, in their voluntary capacity).

31. The word "mainly" is used in s CX 25 as a result of the rewrite of the Income Tax Act. The intended meaning of "mainly" in the rewritten Act is discussed in *Tax Information Bulletin* Vol 16, No 5 (June 2004) (at p 71):

> Mainly
>
> The rewritten provisions use "mainly" in place of "primarily and principally" and similar expressions. The expression "primarily and principally" was considered by Eichelbaum J in *Newman[s] Tours Ltd v CIR* (1989) 11 NZTC 6,027 (High Court). The judge interpreted the expression as requiring that the purpose not only be the main one, in the sense of outweighing all the other purposes, singly or collectively, but also the primary one - that is, the first one. Sufficiently similar connotations can be conveyed in the single word "mainly".

32. Therefore, a benefit will be provided to an employee of a qualifying organisation **mainly** in connection with their employment if the benefit arises primarily in

connection with their employment. If an employee is only employed by a qualifying organisation, and does no voluntary work, then any benefits provided to that employee will be provided in connection with their employment. But, if, for example, an employee is both employed by and works as a volunteer for a qualifying organisation, it will be necessary to determine in which capacity the benefit primarily arises.

33. If a benefit arises equally in connection with both their capacities, the benefit will be provided mainly in connection with the capacity in which the employee is predominantly engaged.

When is a qualifying organisation's activity a business?

34. Under the second limb of the exception (s CX 25(1)(b)), the FBT exclusion in s CX 25(1) does not apply to the extent that a benefit is provided to an employee whose:

> employment consists of the carrying on by the organisation of a business whose activity is outside its benevolent, charitable, cultural, or philanthropic purposes.

35. Therefore, the next issue is whether the employee is employed in a business carried on by the qualifying organisation. "Business" is defined in s YA 1 as including:

> any profession, trade, or undertaking carried on for profit:

36. The leading case on what constitutes a business is *Grieve v CIR* (1984) 6 NZTC 61,682 (CA). The Court found that determining whether a taxpayer is in business involves a two-fold inquiry as to:

- the nature of the activities carried on; and
- the intention of the taxpayer in engaging in those activities.

37. In the leading judgment, Richardson J (at 61,691) identified several factors relevant to determining whether a taxpayer is carrying on a business. These factors are the:

- nature of the activity;
- period over which the taxpayer engages in that activity;
- scale of operations and the volume of transactions;
- commitment of time, money and effort;
- pattern of the activity; and
- financial results.

38. Richardson J also stated that it may also be helpful to consider whether the operations involved are characteristic of that kind of business. However, in the end, it is the **character** and **circumstances** of the **particular venture** that are crucial.

39. Many qualifying organisations engage in activities on a continuous and ongoing basis, commit time, money and effort to those activities, and conduct a large volume of transactions, with the intention of making a surplus. Such organisations that carry on this type of activity are carrying on a business, as that term is defined in s YA 1.

40. A qualifying organisation carrying on a business (eg, a private school operated by a charitable trust) may still qualify for the FBT exclusion even though it makes a profit. Just because an organisation carries on some activities for profit does not prevent the organisation from being a qualifying organisation for FBT purposes, so long as the activity is not being carried on for the personal gain of an individual. This view is consistent with one of the key descriptions of a "donee organisation" in s LD 3(2)(a):

> a society, institution, association, organisation, or trust that is **not carried on for the private pecuniary profit of an individual**, and whose **funds are applied wholly or mainly to charitable, benevolent, philanthropic, or cultural purposes** within New Zealand.
>
> [Emphasis added]

When is a qualifying organisation's business activity within its benevolent, charitable, cultural or philanthropic purposes?

41. After considering whether the qualifying organisation's activity is a business, the next issue under s CX 25(1)(b) is whether the:

> employment consists of the carrying on by the organisation of a business **whose activity is outside its benevolent, charitable, cultural, or philanthropic purposes**.
>
> [Emphasis added]

42. If a qualifying organisation provides benefits to an employee who is employed in a business they are carrying on, the FBT exclusion may apply. The extent to which the FBT exclusion applies depends on whether the business activity being carried on is within or outside the organisation's benevolent, charitable, cultural, or philanthropic purposes:

- for business activities **within** these purposes, the FBT exclusion applies; and
- for business activities **outside** these purposes, the FBT exclusion does not apply.

43. The distinction between business activities that are within, or outside of, the qualifying organisation's specified purposes is specific to the FBT exclusion. This is not a distinction that is relevant for income taxation purposes, or when determining whether an organisation is a charitable entity for the purposes of the Charities Act 2005.

44. Applying the second limb of the exception requires an understanding of the types of activities the qualifying organisation is carrying on. Sometimes activities will be within a qualifying organisation's specified purposes and sometimes activities will be outside those purposes.

45. The distinction between activities carried on within a qualifying organisation's specified purposes and outside those purposes was discussed in *Trustees of the Dean Leigh Temperance Canteen v Commissioners of Inland Revenue* (1958) 38 TC 315. The High Court of Justice (Chancery Division) considered whether a charity could carry on a business activity that was within its charitable purposes. This was in the context of determining whether income derived by the trustees was exempt from tax. In the United Kingdom at that time, income from a business was exempt from tax if that business was carried on in the course of carrying out a primary purpose of the charity.

46. The trust was established for the purpose of promoting temperance. It operated a canteen selling non-alcoholic drinks and light refreshments at normal market prices in a marketplace. The canteen made considerable profits. The issue before the court was essentially whether the canteen activity was a business exercised in the course of carrying out the primary purpose of the charity. The court concluded that the object of the trust was to promote temperance and "the canteen was the engine in their hand for that purpose" (at 325). In other words, the canteen activity was a business activity within (and not outside) the trust's charitable purposes. Accordingly, the income derived from the canteen business was exempt from tax.

47. Another case that considers the distinction between activities carried on by a charity is *Oxfam v City of Birmingham District Council* [1975] 2 All ER 289 (HL). In *Oxfam,* the House of Lords found that where a charity carried out its charitable objects or directly facilitated the carrying out of the charitable objects (such as administrative or clerical activities), it was acting within its charitable purposes. However, where a charity carried on a trading activity that did not carry out its charitable objects, that activity would be outside the charity's charitable purposes. This is the case even if all funds raised from the activity are applied to the charity's charitable purposes.

48. The House of Lords was considering whether Oxfam's gift shops were on premises wholly or mainly used for charitable purposes. The court found that, although the gift shops were used for purposes indirectly related to the achievement of the objects of the charity (ie, selling donated goods to raise money for the charity), the premises were not wholly or mainly used for charitable purposes.

49. In reaching this conclusion, the House of Lords drew a line between the use of premises for purposes that are the charity's charitable purposes and the use of premises for purposes that, though purposes of the charity, are not charitable purposes. Lord Cross said at 293:

> The wording of s 40(1) of the [General Rate Act 1967] shows that the legislature did not consider that the mere fact that the hereditament in question is occupied by a charity justifies any relief from rates. That is only justified if the hereditament is being used for 'charitable purposes' of the charity. So the first question which arises is: what are 'charitable purposes' of a charity as distinct from its other purposes? The answer must be, I think, those purposes or objects the pursuit of which make it a charity — that is to say in this case the relief of poverty, suffering and distress.

50. As well as "those purposes or objects the pursuit of which make it a charity", Lord Cross recognised that activities that are "wholly ancillary to" or "directly facilitate" the carrying out of an organisation's charitable objects will be part of fulfilling the organisation's charitable objects. Fundraising through the gift shops did not meet those criteria.

51. In the Commissioner's view, these cases support the view that activities (including business activities) undertaken to carry out the benevolent, charitable, cultural or philanthropic objects of a qualifying organisation or directly facilitating the carrying out of those objects (including administrative or clerical activities) will be within the benevolent, charitable, cultural or philanthropic purposes of the organisation for the purposes of s CX 25. However, trading activities carried on to raise funds for the organisation that do not in themselves carry out the charitable purposes of the organisation will not be within the benevolent, charitable, cultural or philanthropic purposes of a qualifying organisation for the purposes of s CX 25. This is the case even if all the funds raised from the activity are applied to the qualifying organisation's purpose.

52. Therefore, the Commissioner considers activities will be carried on *within* a qualifying organisation's purposes when they:

- are the performance of a qualifying organisation's specified purposes; or
- directly facilitate the carrying out of a qualifying organisation's specified purposes.

53. Activities the Commissioner considers will usually be characterised as being carried on *within* a qualifying organisation's specified purposes include:

- the carrying out of the qualifying organisation's specified purposes;
- appeals for funds for the qualifying organisation's specified purpose;

- passive investment and management of the qualifying organisation's funds, so long as the organisation does not carry on a business of fund investment; and
- the administration of the above activities.

54. On the other hand, business activities that are carried on to raise funds for the qualifying organisation and that are not of themselves achieving a qualifying organisation's specified purposes, or which do not directly facilitate those purposes, will be treated as business activities outside the purposes of a qualifying organisation. This is the case even if the profits from such business activities are used to fund the qualifying organisation and thereby help it carry out its specified purposes. For example, a clothing thrift shop run by an animal welfare organisation is a business activity that is *outside* the organisation's object of caring for animals.

55. Applying this approach to s CX 25(1), where benefits are received mainly in connection with employment, to the extent an employee is engaged in activities carrying out a qualifying organisation's specified purposes (including the carrying on of a business activity), benefits provided to them will not attract FBT. However, to the extent a qualifying organisation's employee is engaged in business activities of the organisation that are not of themselves benevolent, charitable, cultural or philanthropic, any benefits provided to the employee will not fall within the exclusion provided by s CX 25, and so may attract FBT.

56. It will be a question of fact in each case whether the business activities of a qualifying organisation are activities that are not of themselves achieving the organisation's specified purposes. It is, therefore, possible that two qualifying organisations may carry out similar business activities, with different FBT consequences for each organisation. An example of this is where a qualifying organisation operates retail stores selling goods with a view to making a profit. This type of activity would generally be considered to be outside an organisation's specified purposes, although for some organisations such an activity might fall within their purposes. For example, if the operation of a particular retail store served the purpose of creating job opportunities for a group that the organisation was established to assist, or if the goods were provided at low cost to a group the organisation was established to assist. This business activity may be considered to be achieving the organisation's specified purposes.

Whether s CX 25(1) contemplates apportionment

57. Just as a person may work for a qualifying organisation in different capacities (eg, as a volunteer or as an employee), an employee may also be employed by a qualifying organisation in different activities, some of which may be within the organisation's specified purposes and some of which may be outside those purposes.

58. Section CX 25(1) provides that:

> **CX 25 Benefits provided by charitable organisations**
>
> *When not fringe benefit*
>
> (2) A charitable organisation that provides a benefit to an employee does not provide a fringe benefit except **to the extent to which**—
>
> (a) the employee receives the benefit mainly in connection with their employment; **and**
>
> (b) the employment consists of the carrying on by the organisation of a business whose activity is outside its benevolent, charitable, cultural, or philanthropic purposes.
>
> [Emphasis added]

59. In the Commissioner's view, the phrase "to the extent to which" in s CX 25(1) applies to both paras (a) and (b), but in para (a) it is qualified by the word "mainly". The word "and" between the paragraphs indicates that both paragraphs (ie, both the first and second limbs of the exception) need to be satisfied for the exclusion not to apply.

60. The word "extent" is defined in the *Concise Oxford English Dictionary* (12th ed, Oxford University Press, 2011) as meaning:

> *n*. **1** the area covered by something. The size or scale of something. **2** the degree to which something is the case: *everyone has to compromise to some extent*

61. The Court of Appeal in *CIR v Banks* (1978) 3 NZTC 61,236 and *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 held that the phrase "to the extent to which" expressly contemplates apportionment. On this point, Richardson J stated in *Buckley & Young* at 61,274:

> The second feature of sec. 111 is that the **statutory language contained in the phrase "to the extent to which" expressly contemplates apportionment**. In *Banks* this Court said, in relation to this aspect of deductibility (p. 61,241):
>
> > "A deduction is allowed to the extent that the statutory standard of deductibility is met. Furthermore, this is not restricted to expenditure which can be dissected with distinct and severable parts being directly referable to the production of assessable income. It extends to outgoings not capable of such dissection but which serve both income earning and other purposes indifferently (*Ronpibon Tin N.L. & Tongkah Compound N.L. v F.C. of T.* (1949) 78 C.L.R. 47."
>
> While sec. 112(a) does not expressly provide in the same way for apportionment between capital and revenue, **at the same time it does not provide to the contrary, for example, by the use of the familiar qualification in taxation legislation "wholly and**

> **exclusively"**. Section 112(a) operates as a restriction on deductibility and, as a matter of construction, applies only in so far as the expenditure is of a capital character. In The Texas Company (Australasia) Limited v F.C. of T. (1940) 63 C.L.R. 382, 466 referring to the then counterpart of sec. 112(a) Dixon J. said:
>
> > "There is I think nothing which prevents the division or apportionment between capital and income of an outgoing which is in part of a capital nature and in part of a revenue nature."
>
> In our view the same approach is to be made whether the apportionment is under sec. 111 or between capital and revenue expenditure [Emphasis added]

62. In *Banks,* Richardson J also made the observation at 61,243– 61,244 that "[i]ndeed, the expressions 'to the extent' and 'so far as' demonstrate the absence of a statutory minimum applicable in all cases".

63. Richardson J makes it clear that the phrase "to the extent to which" expressly contemplates apportionment. Richardson J does, however, acknowledge that the phrase may not have this meaning if it is qualified with a term like "wholly and exclusively". Therefore, applying that reasoning to s CX 25(1), the word "mainly" in s CX 25(1)(a) could be read as qualifying the phrase "to the extent to which". However, in the Commissioner's view, in s CX 25(1)(a) the word "mainly" places the focus on establishing the principal reason for the employee receiving the benefit. For example, whether the employee received the benefit mainly in connection with their employment or mainly in connection with their role as a volunteer. If it is mainly received in connection with volunteer service, the benefit is not a fringe benefit. However, if the benefit is provided mainly in connection with employment (ie, s CX 25(1)(a) is satisfied) then any volunteer service is disregarded for the purposes of s CX 25(1)(b). This is because only employment is considered for the purposes of applying the second limb of the exclusion in s CX 25(1)(b).

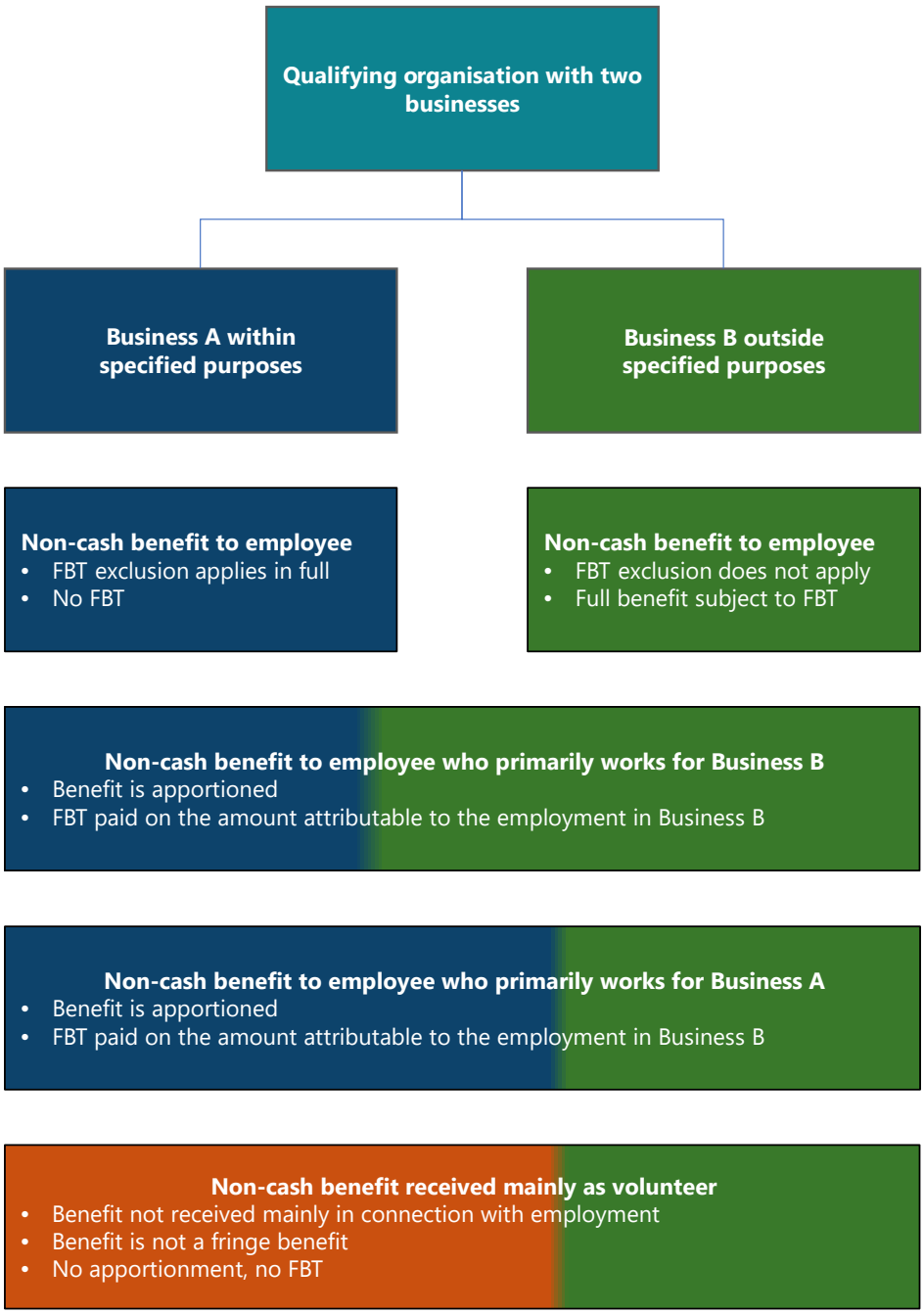
64. Unlike in s CX 25(1)(a), there are no words in s CX 25(1)(b) to qualify the phrase "to the extent to which". This means that, for the purposes of s CX 25(1)(b), the words "to the extent to which" should be given their ordinary meaning (ie, requiring apportionment). Therefore, under s CX 25(1)(b) a qualifying organisation will be subject to FBT only **to the extent to which** that benefit is provided to an employee in connection to their employment in a business activity that is outside the organisation's specified purposes.

65. In summary, the Commissioner considers FBT will apply only to benefits provided to an employee **mainly in connection with their employment**, and then only **to the extent to which** those benefits are received in connection with **employment in a business carried on outside** a qualifying organisation's purposes. Where an employee is employed in different activities across a qualifying organisation and one or more of those activities is a business activity outside the organisation's purposes, the benefits

provided need to be apportioned so only the benefits relating to the employment in the business activity carried on outside the organisation's specified purposes are treated as fringe benefits. In the Commissioner's view, any apportionment should be reasonable and reflect the reality of the situation. Example 4 provides an example of a reasonable apportionment basis, based on working hours.

66. **Figure 2: First exception to the FBT exclusion** on the next page shows the application of the FBT exclusion where a qualifying organisation provides non-cash benefits to employees across two business activities and only one business activity is within the qualifying organisation's specified purposes.

Figure 2: First exception to the FBT exclusion



The second exception to the FBT exclusion

67. The second exception to the FBT exclusion relates to short-term charge facilities (ie, credit and charge cards). Section CX 25(2) states that the exclusion in s CX 25(1) does not apply, and a fringe benefit **is** provided when a qualifying organisation provides a benefit to an employee by way of a short-term charge facility and the value of the benefit is more than the lesser of 5% of the employee's salary and wages for a tax year and $1,200.

68. Subsection (3) defines the term "short-term charge facility":

> *Meaning of short-term charge facilities*
>
> (3) For the purposes of the FBT rules, a **short-term charge facility** means an arrangement that—
>
> (a) enables an employee to obtain goods or services that have no connection with the employer or its operations by—
>
> (i) buying or hiring the goods or services:
>
> (ii) charging the cost of the goods or services to an account:
>
> (iii) providing consideration other than money for the goods or services; and
>
> (b) requires the employer to provide some or all of the payment or other consideration for the goods or services; and
>
> (c) is not a fringe benefit under section CX 10.

69. Employment-related loans (s CX 10) are explicitly excluded from the meaning of short-term charge facilities under s CX 25(3)(c). As a result, the second exception would not apply to an employment-related loan provided by a qualifying organisation with a value greater than the lesser of 5% of an employee's wages or $1,200 for a tax year. However, the first exception may still apply (i.e. if the loan was provided in relation to employment in business activities outside the qualifying organisation's specified purposes). Example 4 and Example 5 illustrate these points.

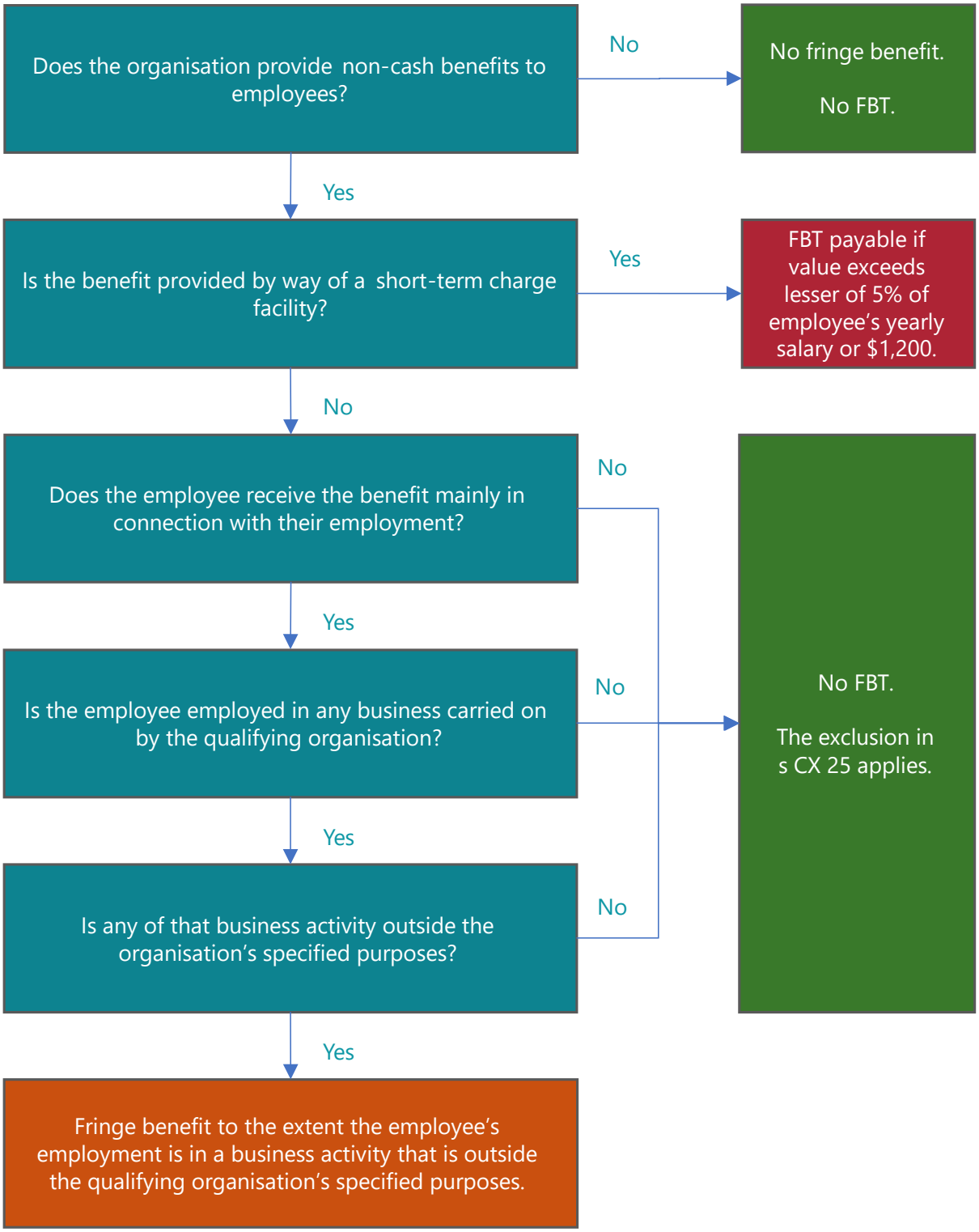
70. Short-term charge facilities include things like enabling employees to use business charge accounts or business credit cards for private use without paying associated costs. They also include the provision of some vouchers or store gift cards (for example: gas station or supermarket vouchers).

71. If you agree to provide vouchers to an employee and deduct their salary to the same amount, this may in fact represent employment income under s CE 1 rather than fringe benefits. Revenue Alert RA 13/01 discusses this topic in more detail.

72. If s CX 25(2) applies to a benefit provided by way of short-term charge facility to a qualifying organisation's employees, the benefits are subject to FBT. Example 6 illustrates this point.

Flowchart summarising the FBT exclusion

Figure 3: Exclusion from FBT for qualifying organisations



Examples

Example 1: Private school operated by a charitable organisation

A non-profit organisation has the principal purpose of providing education through a private school. The organisation is a charitable organisation for the purposes of the FBT rules because it is not carried on for the private gain of any individual and its funds are applied wholly or mainly for the advancement of education within New Zealand.

The organisation charges tuition fees for the education it provides and has had surpluses of income over expenditure for the last three income years. It provides a car to its school principal for work and private use.

The organisation is not liable for FBT on the benefit arising from the private use or availability for the private use of the car provided to the principal. This is because the benefit is provided by a charitable organisation to an employee who is employed in an activity that is within the charitable organisation's specified purposes. The employee is not employed in a business activity that is carried on by the charitable organisation outside its specified purposes.

Example 2: Farming activity within private school

The organisation from Example 1 also conducts a farming business on land adjacent to the private school. The farming operation is carried on as a business and it directly facilitates the practical component of the school's agricultural courses. The organisation provides a car to its farm manager for work and private use.

The organisation is not liable for FBT on the benefit arising from the private use or availability for private use of the car provided to the farm manager. This is because the farm manager is employed by the charitable organisation to carry out its specified purposes (ie, the advancement of education). In this case, the carrying on of the farming business falls within the specified purposes of the organisation because of its direct relationship with the private school's agricultural curriculum.

Example 3: Farming activity outside private school

This example has the same facts as in Example 2, except the farming business does not directly facilitate the education of the students at the private school. Any profits earned are put back into the school. However, the farm is not used to educate students at the school.

In this situation, the organisation is liable for FBT on the benefit arising from the private use or availability for private use of the car provided to the farm manager. This is because the farm manager is employed in a business activity that falls outside the specified purposes of the organisation. This remains the case despite the fact the profit made from the farming activity is put back into the private school.

Example 4: Employee in food bank and shop

A charitable organisation has the principal purpose of relieving poverty by running a food bank. The organisation is a charitable organisation for the purposes of the FBT rules because it is not carried on for the private gain of any individual and its funds are applied wholly or mainly for charitable purposes (ie, the relief of poverty) within New Zealand. The organisation also runs a shop that sells office supplies (purchased from a wholesaler) to the public. The profit made from the shop is used to purchase food for the food bank.

The organisation has a policy of providing low-interest loans to all employees. Peter is employed by the organisation to work three days a week in the shop and two days a week in the food bank. He receives a low-interest loan from the organisation.

A fringe benefit arises to the extent to which Peter's employment consists of the charitable organisation carrying on a business activity that is outside the organisation's charitable purposes. In this case, 60% of Peter's employment is for the charitable organisation carrying on a business activity that is outside that organisation's charitable purposes. Therefore, the charitable organisation is liable for FBT on 60% of the value of the fringe benefit arising from the provision of the low-interest loan to Peter.

Example 5: Voluntary work in food bank

This example has similar facts to Example 4, except that Peter is employed to work in the shop only two days a week, and for the remaining three days he volunteers to work for the organisation in the food bank. The low-interest loan is available to anyone who works regularly (as an employee or a volunteer) in the food bank.

In this situation, the organisation is not liable for FBT on the benefit arising from the provision of the low-interest loan to Peter. This is because the benefit is not received mainly in connection with Peter's paid employment, but instead is received mainly in connection with his unpaid role as a volunteer in the food bank. This is because Peter predominantly works as a volunteer in the food bank. The benefit is not a fringe benefit and therefore no apportionment is required.

Example 6: Fuel card

A charitable organisation employs a secretary at its head office. The secretary's employment involves administrative matters relating to the running of the organisation. The secretary's salary is $40,000 for the tax year. On top of the salary, the organisation provides the secretary with a fuel card for use at a local petrol station. The fuel card is in the organisation's name and the organisation is liable to pay any amounts charged to the card. The secretary uses the card to obtain at least $80 worth of petrol every week.

The provision of the fuel card to the secretary is a fringe benefit. It does not matter that the secretary is employed in an activity within the charitable organisation's charitable purposes (ie, administrative work at an organisation's head office). The organisation is liable for FBT because the benefit is provided by way of a short-term charge facility and the value of the benefit is more than $1,200 in the tax year, being the lesser of 5% of the secretary's salary or wages for the tax year and $1,200. The benefit, therefore, is a fringe benefit under s CX 25(2).

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