

TERTIARY STUDENT ASSOCIATION FEES

PUBLIC RULING – BR Pub 05/11

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 03/02 which was published in *Tax Information Bulletin* Vol 15, No 5 (May 2003), and BR Pub 99/1 which was published in *Tax Information Bulletin* Vol 11, No 1 (January 1999). BR Pub 03/02 applied up until 31 March 2005. The Income Tax Act 2004 came into force on 1 April 2005, and legislative references are now to that Act. BR Pub 05/11 applies on 1 April 2005 for an indefinite period.

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

Taxation Laws

All legislative references are to the Income Tax Act 2004 unless otherwise stated.

This Ruling applies in respect of section KC 5 of the Act.

The Arrangement to which this Ruling applies

The Arrangement is the payment by a student at a tertiary institution, of a tertiary student association fee as a membership fee to that tertiary student association.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- The payment of a tertiary student association membership fee is not a gift for the purposes of section KC 5(4) where *any* rights arising from membership are conferred by the payment, and/or where the payment is compulsory. Accordingly, a rebate will not be available under section KC 5.

The period for which this Ruling applies

This Ruling will apply on 1 April 2005 for an indefinite period.

This Ruling is signed by me on the 8th day of June 2005.

Susan Price

Senior Tax Counsel

COMMENTARY ON PUBLIC RULING BR Pub 05/11

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in public ruling BR Pub 05/11 (“the Ruling”).

For the purposes of this commentary, reference to “associations” includes reference to societies, institutions, associations, organisations, trusts or funds.

Background

Section KC 5 of the Income Tax Act 2004 (“the Act”) provides a rebate to a donor of a gift of money in certain circumstances, where the recipient of the gift is a non-profit body whose funds are applied wholly or principally to any charitable, benevolent, philanthropic, or cultural purpose(s) within New Zealand.

The issue dealt with in the Ruling is whether a tertiary student association membership fee is a “gift” within the meaning of section KC 5 of the Act.

The subject matter was previously dealt with in public ruling BR Pub 03/02, which expired on 31 March 2005. This public ruling replaces BR Pub 03/02, effective 1 April 2005. The previous ruling concluded that if a student pays a single fee to the student association to become a member of the student association, and the fee as a whole confers some rights on members, the payment is not a gift for the purposes of section KC 5(4). As the payment of the fee is not a gift, the student is not entitled to a rebate under section KC 5.

Legislation

Section KC 5 provides:

- (1) A taxpayer, other than an absentee, or a company, or a public authority, or a Maori authority, or an unincorporated body, or a trustee liable for income tax under sections HH 3 to HH 6 and HZ 2, is allowed as a rebate of income tax the amount of any gift (not being a testamentary gift) of money of \$5 or more made by the taxpayer in the tax year to any of the following societies, institutions, associations, organisations, trusts, or funds (being in each case a society, an institution, an association, an organisation, a trust, or a fund in New Zealand), namely:
 - (aa) a society, institution, association, organisation, or trust which is not carried on for the private pecuniary profit of any individual and the funds of which are, in the opinion of the Commissioner, applied wholly or principally to any charitable, benevolent, philanthropic, or cultural purposes within New Zealand:
 - (ab) a public institution maintained exclusively for any 1 or more of the purposes within New Zealand specified in paragraph (aa):
 - (ac) a fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand specified in paragraph (aa),

by a society, institution, association, organisation, or trust which is not carried on for the private pecuniary profit of any individual:

(ad) a public fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand specified in paragraph (aa):

(ae) - (cl) [provide a list of organisations.]

(2) The rebates provided for in this section must not, in the case of any taxpayer, in any tax year exceed in the aggregate the smaller of—

(a) $33\frac{1}{3}\%$ of the aggregate of all gifts described in subsection (1):

(b) \$630.

(3) No rebate is allowed under this section in respect of any gift unless the taxpayer furnishes to the Commissioner in support of the taxpayer's claim for the rebate a receipt evidencing to the satisfaction of the Commissioner the making of the gift by the taxpayer.

(3AA) Despite subsection (3), a rebate is allowed under this section if a tax agent makes an application for a refund under section 41A of the Tax Administration Act 1994 on behalf of a person and—

(a) the tax agent sights the receipt evidencing the making of the gift for which a claim is being made; and

(b) the person retains the receipt for 4 tax years after the tax year to which the claim relates.

(3A) A refund may be made under this section only if section 41A of the Tax Administration Act 1994 is complied with.

(4) In this section, **gift** includes a subscription paid to a society, institution, association, organisation, trust, or fund, only if the Commissioner is satisfied that the subscription does not confer any rights arising from membership in that or any other society, institution, association, organisation, trust, or fund.

Application of the Legislation

Under section KC 5, a taxpayer other than an absentee, company, public authority, Maori authority, unincorporated body, or trustee liable for income tax (sections HH 3 to HH 6, HZ 2), can claim a rebate if:

- that person makes a gift (not being a testamentary gift) of money of \$5 or more;
- the gift is made to any of the associations listed in section KC 5(1);
- the recipient, in the opinion of the Commissioner of Inland Revenue (“the Commissioner”), applies its funds wholly or principally for charitable, benevolent, philanthropic, or cultural purposes, or is maintained (subparagraphs (ab) and (ac)) or established and maintained exclusively for one or more of those purposes (subparagraph (ad));

- the taxpayer furnishes to the Commissioner a receipt evidencing the making of the gift by the taxpayer to the recipient, or a tax agent makes the refund application on behalf of the taxpayer and the requirements of section KC 5(3AA) are satisfied; and
- section 41A of the Tax Administration Act 1994 is complied with.

Furthermore, if the gift is a subscription paid to any association specified in section KC 5(4), the Commissioner must be satisfied that the subscription does not confer any rights arising from membership in that or any other association.

Tertiary student association fees are considered “subscriptions” for the purposes of section KC 5(4), as students receive the services provided by the student association, and the rights attaching to membership of that association in return for the fee, or can be said to be applying to participate in the association. As such, *any* rights arising from membership, which are conferred by the payment of a tertiary student association fee, will preclude such fee from the definition of “gift” in section KC 5(4), and accordingly no rebate will be available under section KC 5.

The definition of “gift” in section KC 5(4)

Section KC 5(4) operates as an exhaustive provision with respect to when subscriptions will constitute “gifts” for the purposes of section KC 5, and includes only subscriptions paid to an association if the Commissioner is satisfied that the subscription does not confer any rights arising from membership in that or any other association.

In *Case M128* (1990) 12 NZTC 2,825, the Taxation Review Authority (“the Authority”) noted that the Commissioner had allowed the general school activity fee paid to State schools as a deduction, because such fees came within the expanded definition of “gift”. However, the Authority held that payments to a school for camp fees, a school trip, stationery, and a manual were not gifts, as they conferred particular rights on the pupil.

Tertiary student association fees will only be a “gift” for the purposes of section KC 5(4), and will only qualify for a rebate, if the Commissioner is satisfied that the payment does not confer *any* rights arising from membership. Such rights may include things such as rights to do anything, receive anything, or have access to anything in return for the payment. If no rights are received, the payment of a subscription is considered to be in the nature of a donation, because the payer does not get any direct rights in return for the payment. The requirement that a subscription confer no rights does not contain words of apportionment (i.e. “to the extent to which”), but is absolute in its terms. Accordingly, if any rights are conferred by any part of the subscription, section KC 5 does not apply, and no rebate is available. It should be noted that section KC 5(4) refers only to rights being conferred: the rights do not have to be exercised or enjoyed by the taxpayer.

Students attending tertiary institutions may pay a sum for membership of a student association or union. Tertiary student association fees will commonly give rise to the following types of rights or benefits:

- Access to advice, welfare, and counselling services.
- Access to liaison services between students and teaching staff.
- Access to newsletters and other information.
- Access to facilities on campus, such as library, health, or sport and recreation facilities.
- Discounts on various goods and services.
- Voting rights in respect of the election of association executives, and also at general meetings.

In addition, it may also be that the payment of a student association fee (or a substitute payment to a charity of the student's choice)¹ is one of a number of payments a student must make, or things a student must do, in order to qualify for enrolment at the particular tertiary institution. The payment of a student association fee may, therefore, confer a further right on students – the right to enrolment if the other conditions of enrolment are met.

Any of the above, or any other rights arising from membership, which are conferred by the payment of a tertiary student association fee will preclude such a fee from the definition of “gift” in section KC 5(4), and accordingly no rebate will be available under section KC 5.

The Education (Tertiary Students Association Voluntary Membership) Amendment Act 1998 (“the 1998 EAA”), which came into force on 11 August 1998, abolished compulsory student association membership, except where a referendum of students at an institution determined that membership of the association at that institution would be compulsory.

The 1998 EAA was subsequently repealed, from 8 July 2000, by the Education Amendment Act 2000 (“the 2000 EAA”). The 2000 EAA also inserted new provisions into the Education Act 1989, to the effect that tertiary student association membership is now *prima facie* compulsory, with the ability for a vote of all students at a particular institution to make membership of that association voluntary.

Where tertiary student association fees are voluntary, it may well be that some or all of the services listed above are available to all students, whether paying association members or not. However, students who pay association fees may also be accorded

¹ The Education Act 1989 provides that a student association may exempt any student from membership of the association on the grounds of conscientious objection; and, if exempted, the association must pay the student's membership fee to a charity of its choice.

the right to vote to elect association executives, and at general meetings. Further, students who pay association fees may have access to discounts not available to non-paying students. As stated above, *any* rights arising from association membership, which are conferred by the payment of a tertiary student association fee will preclude such a fee from the definition of “gift” in section KC 5(4), and accordingly no rebate will be available under section KC 5.

Where tertiary student association fees are voluntary, it may be that there are in fact *no* rights arising from membership in that or any other association, conferred upon students who elect to pay association fees. It is only in this circumstance that the payment of such fees will constitute a gift within the meaning in section KC 5(4), and a rebate will be allowable accordingly, provided the other criteria of section KC 5 are satisfied. *Any* right conferred by the payment of student association fees will be sufficient to prevent the rebate from being available.

It should be emphasised that it will *only* be in the very limited circumstances detailed above that a rebate will be available.

In the event that there are in fact no rights arising from membership in a tertiary student association with compulsory fees, the payment of such fees will also not be considered a gift for the purposes of section KC 5(4), as it would fail to meet the fundamental precept that a gift must be something transferred *voluntarily*, and not as a result of a contractual or other obligation to transfer it². Given that section KC 5(4) operates to *extend* the definition of the term “gift” to include certain subscriptions, the general common law requirement for a gift to be voluntary remains applicable, and it is only the common law consideration of whether any advantage or benefit of *material character* is received in return, which is modified by section KC 5(4).

Example 1

A student enrolls at a university, the student association of which has compulsory membership. The student pays the association fees, and is able to use the gym facilities, counselling services, and the subsidised health care programme. The student association has charitable status.

As the payment of the student association fees confers certain rights upon the student, the payment does not qualify for a rebate as a donation to the student association.

However, if a person who is not a student makes a donation to the student association at the university and no rights are conferred because of the payment, a gift is made and a rebate is allowed.

Example 2

² In this regard, see for instance *Mills v Dowdall* [1983] NZLR 154, *Federal Commissioner of Taxation v McPhail* (1968) 117 CLR 111, *Lawson Klopper & Anor v Deputy Commissioner of Taxation* (1997) 97 ATC 4179, *Hodges v FC of T* (1997) 97 ATC 2158, *Australian Dairy Corporation v FC of T* (1998) 98 ATC 2059, and *Case J76* (1987) 9 NZTC 1,451.

A student enrolls at a polytechnic, the student association of which has voluntary membership. The student believes in and wishes to support the work of the association, and so elects to pay the association fees. The services provided by the association are available to all students at the polytechnic, regardless of whether they are paying members or not. No discounts are available to students who have contributed association fees. The association's Constitution deems all students at the polytechnic to be "members", and accordingly able to exercise all membership rights, for instance the right to vote at general meetings. The student association has charitable status.

As the payment of the student association fee does not confer *any* rights upon the student, a rebate will be available, provided the other criteria set out in section KC 5 are satisfied (these criteria are listed under the heading "Application of the Legislation", above).