

## **PUBLIC RULING BR Pub 09/01**

### **PAYMENTS MADE BY PARENTS OR GUARDIANS OF STUDENTS TO STATE SCHOOLS – GST TREATMENT**

**Note** (not part of ruling): This ruling is a reissue of Public Ruling BR PUB 03/04 (*Tax Information Bulletin* Vol 15, No 7 (July 2003)) which expired on 20 June 2006. This ruling is substantially the same as the expired ruling but expands some of the examples and takes into account consequential amendments to the Goods and Services Tax Act 1985, and the Crown Entities Act 2004.

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

#### **Taxation Laws**

This Ruling applies in respect of sections 8 and 10(2) and the definition of “consideration” in section 2 of the Goods and Services Tax Act 1985.

#### **The Arrangement to which this Ruling applies**

The Arrangement is the payment of amounts (whether described as “school fees”, “activity fees” or otherwise) by parents or guardians of pupils who are New Zealand citizens or New Zealand residents (or who are otherwise not foreign students under the Education Act 1989) and who are enrolled at state schools (including schools integrated within the state system of education under the Private Schools Conditional Integration Act 1975) to the Board of Trustees of such a school.

#### **How the Taxation Laws apply to the Arrangement**

The Taxation Laws apply to the Arrangement as follows:

Payments made by parents or guardians of children, who are New Zealand citizens or New Zealand residents (or who are otherwise not foreign students under the Education Act 1989) and who are enrolled at state schools, to the Board of Trustees of such a school for the purpose of a general fund to assist with meeting school costs, are not consideration for the supply of education to which there is a statutory entitlement and which the Board has a statutory obligation to provide free of charge. Therefore, GST is not payable on such amounts.

If other services, not integral to the supply of education services to which there is a statutory entitlement, are supplied on the basis that the supply is conditional on payment being made for such services, the payment is consideration for that supply. GST is chargeable on payments made in those circumstances.

#### **The period or income year for which this Ruling applies**

This Ruling will apply for the period 21 June 2006 to 20 June 2013.

This Ruling is signed by me on the 23<sup>rd</sup> day of March 2009.

Susan Price  
Director, Public Rulings

## COMMENTARY ON PUBLIC RULING BR Pub 09/01

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 09/01 ("the Ruling").

The subject matter covered in the Ruling was previously dealt with in Public Ruling BR PUB 03/04 (*Tax Information Bulletin* Vol 15, No 7 (July 2003)). The Ruling applies for the period from 21 June 2006 to 20 June 2013.

### Background

Under section 93 of the Education Act 1989 ("Education Act"), every state school must have a Board of Trustees. State primary and secondary schools are controlled and managed by their Boards of Trustees: section 75 of the Education Act. Under section 75, except to the extent that any enactment or the general law of New Zealand provides otherwise, a school's Board has complete discretion to control the management of the school as it thinks fit. Grants are paid out of public money to Boards for the purpose of administering their schools: section 79 of the Education Act.

The Private Schools Conditional Integration Act 1975 ("PSCI Act") enables private schools originally established to provide education with a special character to become part of the state system of education as an integrated school. As with other state schools, an integrated school's controlling authority is its Board of Trustees: section 25(5) of the PSCI Act.

Every Board must have a written charter. The purpose of the charter is to establish the missions, aims, objectives, directions and targets of the school Board that will give effect to the Government's national education guidelines and the Board's priorities: section 61 of the Education Act.

The effect of a school charter is that it is an undertaking by the Board to the Minister of Education to take all reasonable steps to ensure the school is managed, organised, and administered for the purposes set out in the school charter and the school, its students, and community achieve the aims and objectives set out in the school charter: section 63 of the Education Act. A school charter will not take effect if the Secretary for Education determines it is inconsistent with the Education Act or the national administration guidelines: section 63A of the Education Act.

The national education guidelines are defined in section 60 of the Education Act as being:

all the national education goals, foundation curriculum policy statements, national curriculum statements, national standards and national administration guidelines, for the time being in force under section 60A of this Act:

Section 60A(1)(c) of the Education Act sets out the national administration guidelines which the Minister may publish from time to time:

- (c) National administration guidelines, which are guidelines relating to school administration and which may (without limitation)—
  - (i) set out statements of desirable codes or principles of conduct or administration for specified kinds or descriptions of person or body, including guidelines for the purpose of section 61:
  - (ii) set out requirements relating to planning and reporting including—
    - (A) scope and content areas, where appropriate:
    - (B) the timeframe for the annual update of the school charter:

- (C) broad requirements relating to schools' consultation with parents, staff, school proprietors (in the case of integrated schools) and school communities, and the broad requirements to ensure that Boards take all reasonable steps to discover and consider the views and concerns of Maori communities living in the geographical area the school serves, in the development of a school charter:
- (D) variations from the framework for school planning and reporting for certain schools or classes of schools, based on school performance:
- (iii) communicate the Government's policy objectives:
- (iv) set out transitional provisions for the purposes of national administration guidelines.

Under section 3 of the Education Act, everyone who is not a foreign student (that is, generally a New Zealand citizen or resident) is entitled to free enrolment and free education at any state school during the period beginning on their 5th birthday and ending on the 1<sup>st</sup> of January after their 19th birthday.

Students enrolled at an integrated school are entitled to free education on the same terms and conditions as students enrolled at other state schools: section 35(1) of the PSCI Act. However, the proprietors of an integrated school may require payment of attendance dues as a condition of enrolment and attendance: section 36 of the PSCI Act. The money received from attendance dues can be used only for the purpose of meeting debts, mortgages, liens, or other charges relating to the school premises or for improvements required under the integration agreement or for capital works required by the Minister of Education under section 40(2)(d) of the PSCI Act: section 36(3) of the PSCI Act. Attendance dues paid to the proprietors of integrated schools are subject to GST, being payments to secure the enrolment of a pupil in a school for which the proprietors provide the buildings and ensure the special character: *Turakina Maori Girls College Board of Trustees v CIR* (1993) 15 NZTC 10,032.

Each year parents or guardians of students enrolled at state schools may be asked by school Boards to pay a nominated amount to assist with meeting school costs. Schools may refer to these payments as "fees". In the case of integrated schools such fees are in addition to attendance dues payable to the proprietors.

The Ministry of Education issued an updated circular (Circular 1998/25) on 23 June 1998 which sets out the rights of Boards of Trustees, parents and students regarding the request for donations and other forms of payments in schools. The circular states that whatever terms are used to describe such payments, they are in fact donations and cannot be made compulsory.

Schools may also ask for payments to cover a variety of items, including the cost of class trips, the cost of materials in practical subjects such as workshop technology, or fees for performances by visiting drama groups. These payments are commonly referred to as "activity fees".

The Ruling addresses the issue of whether such payments (however described, but commonly referred to as "school fees" or "activity fees") are subject to GST.

## Legislation

Under section 8 of the Goods and Services Tax Act 1985 ("GST Act"), GST is charged on supplies (other than exempt supplies) made by a registered

person in the course or furtherance of a taxable activity by reference to the value of the supply.

The value of the supply is determined under section 10(2) of the GST Act, which states:

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

The definition of “consideration” in section 2 of the GST Act reads:

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

## **Application of the legislation**

### ***Scheme of the Goods and Services Tax Act 1985***

Under section 8(1) of the GST Act, GST is chargeable on the supply of goods and services by a registered person in the course or furtherance of a taxable activity carried on by that person by reference to the value of the supply. The value of the supply is the consideration provided for the supply (including both monetary and non-monetary consideration): section 10(2) of the GST Act.

GST is chargeable on payments made to the Board of Trustees of a state school that is a registered person if such payments are “consideration” as defined in the GST Act. Generally, the Board of Trustees of a state school will be a registered person as the activities of a school Board are a taxable activity for GST purposes. This is on the basis that every Board of Trustees of a state school is a Crown entity for the purposes of the Crown Entities Act 2004: section 7(1)(d). Under section 2 of the GST Act a Crown entity is a “public authority” and pursuant to section 6(1)(b) the term “taxable activity” includes the activities of any public authority. Section 5(6) of the GST Act deems that a school Board (as a public authority) is supplying goods and services where it brings to charge revenue received from the Crown for the supply of outputs (in this case, the supply of education services). For example, the operational funding received by school Boards from the Crown is “revenue from the Crown” and is the consideration for the supply of those services.

Any other amounts received by a school Board will also be subject to GST where the amount is “consideration” for GST purposes.

As discussed later in this commentary, a payment from a parent for services which a school Board has a statutory obligation to provide free of charge, is not consideration. However, a payment from a parent for other services, not integral to the supply of education services, is consideration. To make this distinction it is necessary to understand what is “consideration” and what education services a school Board has a statutory obligation to provide free of charge.

## ***Consideration***

The statutory definition of "consideration" is wider than the contract law meaning of "consideration". In *The Trustee, Executors and Agency Co NZ Ltd v CIR* (1997) 18 NZTC 13,076, Chisholm J commented in respect of the definition of "consideration" (at p 13,085):

In the context of this matter I am not persuaded that it is helpful or appropriate to reflect upon the ordinary meaning of the word. The statutory definition extends the ordinary meaning and it is the scope of the extended statutory definition which needs to be determined.

The following principles can be drawn from the cases on the statutory definition of "consideration".

- Under the first part of the definition of "consideration", it is irrelevant whether the payment is voluntary. No contract between the person making the supply and the person providing the consideration is necessary. The supply need not be made to the person who makes the payment: *Turakina*. In *Turakina McKay J*, referring to the definition, said (at p 10,036):

It is clear from this definition that the supply of any service for consideration is part of a "taxable activity" under sec 6, even though it is to a person other than the person who provides the consideration. Likewise, the value of the supply is to be measured by the consideration, whether or not the consideration is provided by the person to whom the service is supplied. It is not necessary that there should be a contract between the supplier and the person providing the consideration, so long as the consideration is "in respect of, in response to or for the inducement of the supply".

- The supply also need not be made by the person who receives the payment. In the *Trustee, Executors* case Chisholm J said (at p 13,086):

in my opinion the crucial factor is the strength of the connection between the payment and the supply. If there is sufficient proximity between the supply and payment to satisfy the requirement that the payment is "in respect of" (or "in response to, or for the inducement of") the supply of goods then the payment qualifies as "consideration" notwithstanding that the payment is made to a third party.

- Although the statutory definition of "consideration" is wider than the contract law meaning, not every payment a registered person receives is "consideration" for GST purposes. A distinction is drawn between a payment in respect of the payee's taxable activity and a payment that is consideration for a supply of goods and services: *Director-General of Social Welfare v De Morgan* (1996) 17 NZTC 12,636.
- For a payment to be "consideration" within the first part of the definition there must be a sufficient relationship between the making of the payment and the supply of goods or services. See *CIR v NZ Refining Co Ltd* (1997) 18 NZTC 13,187; *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075; *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147; *Trustee, Executors*.

In *NZ Refining* Blanchard J said (at p 13,193):

It is fundamental to the GST Act that the tax is levied on or in respect of supplies. It is not a tax on receipts or on turnover; it is a tax on transactions: *CIR v Databank Systems Ltd*. It is therefore necessary, as Mr Green submitted, to distinguish between supplies and the taxable activity (as defined in s 6) in the course of which they are

made. The definition in s 6 itself requires a nexus between a supply and consideration, as does s 10.

The tax itself is levied by s 8 on a supply in the course or furtherance of a taxable activity and is "by reference to the value of that supply". Section 10 provides that the value of a supply is "to the extent of the consideration for the supply" the amount of the money involved or the non-monetary open market value of the consideration. Already, before turning to the definition of "consideration", it can be seen that, again, a linkage between supply and consideration is requisite to the imposition of the tax.

**The definition of "consideration", though broad, cannot and does not dispense with that requirement. To constitute consideration for supply a payment must be made for that supply, though it need not be made to the supplier nor does the supply have to be made to the payer.**

**There is a practical necessity for a sufficient connection between the payment and the supply. The mechanics of the legislation will otherwise make it impossible to collect the GST.**

[Emphasis added.]

- An expectation that the payee will supply goods and services is not enough. It is not sufficient that the person who receives the payment carries out some activity that has the effect of benefiting either the person making the payment or some other person. It is also not sufficient that the payment enables the payee to carry on its activity. Hence, a payment by the Crown to a charitable trust the Crown had established to promote the economic development and well-being of the Chatham Islands' inhabitants and the provision of services in the interests of the community was not consideration for GST purposes. The trustees were fulfilling their fiduciary duties under the trust, and the payment was not an inducement for the performance of services by the trustees: *Chatham Islands*.
- The expressions "in respect of, in response to, or for the inducement of" in the definition of "consideration" involves an element of reciprocity: *Taupo Ika Nui Body Corporate; Chatham Islands Enterprise Trust*.
- It is necessary to consider the legal arrangements between the parties to determine whether a payment is consideration. In the *Chatham Islands* case, Blanchard J commented (at para 17):

Although the linkage or nexus between a payment and the activity to which it gives rise may be very broad, it is still necessary to have regard to the legal form which is being employed:

... in taxation disputes the Court is concerned with the legal arrangements actually entered into ... not with the economic or other consequences of the arrangements.

(*C of IR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 at p 13,192 citing *Marac Life Assurance Ltd v C of IR* [1986] 1 NZLR 694 at p 706 [also reported as *Marac Life Assurance Ltd v CIR; C IR v Marac Life Assurance Ltd* (1986) 8 NZTC 5,086 at pp 5,097, 5,098]. The tax being one on transactions, it is necessary to pay close attention to the legal nature of what has been done.

## **Statutory arrangement relating to provision of education in state schools**

### *Role and accountability of school Boards*

In *Maddever v Umawera School Board* [1993] 2 NZLR 478 Williams J discussed the role of school Boards (at p 505).

The [Education Act 1989] was based on *Administering for Excellence: The Report of the Task Force to Review Education Administration* (the Picot report (1988)) which

found that the existing administrative structure of the Education Act 1964 was over-centralised and overly complex. Its recommendations for change were largely implemented in the Education Act 1989, the title of which states that it is "An Act to reform the administration of education". The statute brought about a marked devolution of decision making away from the Minister of Education so that schools became the basic unit of education administration. The primary mechanisms in the statute to achieve the legislative objectives were the novel concept of Boards of Trustees who were given by s 75 broad powers to manage schools and the idea of a school charter.

Williams J then referred to the requirements relating to charters in section 61 of the Education Act and went on to say (at p 505):

It is thus clear that the [Education Act 1989] contemplates that the board, in consultation with the Minister, should have a significant role in determining the school's educational goals and a degree of independence in deciding how those goals should be achieved. While the Ministry of Education influences a school's broad objectives through the application of the national educational guidelines established under s 60A ... and the Minister also has a power of approval of school charters, the guidance thus provided is in rather general terms. It is for the parents, staff and other persons to largely determine the distinctive character of the charter for a particular school.

Williams J noted that the accountability of school Boards was achieved in several ways, including the requirement that Boards must adhere to their charters.

The policy of the Education Act, therefore, is to decentralise the administration of education so that Boards of Trustees are responsible for the control and management of the schools. Although school Boards have considerable power to manage schools, such powers are subject to any enactment and the law of New Zealand: sections 72 and 75 of the Education Act. The Education Act provides for several ways to achieve accountability by Boards, including the obligation for Boards to adhere to their school charters (which must incorporate guidelines specified by the Minister of Education for the education services to be provided).

#### *What are education services?*

The term "education" is defined in the *Concise Oxford Dictionary* (11<sup>th</sup> ed, 2006) as:

the process of educating or being educated. > the theory and practice of teaching.  
> information about or training in a particular subject.

It is possible to define the limits of the obligation of school Boards to provide education services (and, therefore, the scope of the entitlement to free education). The national education guidelines issued by the Minister of Education specify:

- the outcomes desired from the school system;
- the policy concerning teaching, learning, and assessment for the purposes of underpinning and giving direction to how curriculum and assessment responsibilities are to be managed;
- the subjects in which education is to be provided (including areas and levels of knowledge).

The Minister of Education specifies through national education guidelines or by regulation, in broad terms, the type, level, and standard of instruction or education to be provided in state schools.

Every school must have a school charter. The purpose of the charter is to establish the missions, aims, objectives, directions and targets of the school Board that will give effect to the Government's national education guidelines and the Board's priorities: section 61 of the Education Act. Although the Board has a significant role (through the preparation of the school's charter) in determining the school's aims and objectives and how these are to be achieved, the charter does not take effect if the Secretary for Education determines that it is inconsistent with the Education Act or the national administration guidelines: section 63A of the Education Act. The effect of a school charter is that it is an undertaking by the Board to the Minister of Education to take all reasonable steps to ensure the school is managed, organised, and administered for the purposes set out in the school charter and the school, its students, and community achieve the aims and objectives set out in the school charter: section 63 of the Education Act.

Therefore, school Boards have an obligation to provide education (which complies with the requirements of the national education guidelines). New Zealand citizens and residents (or children who are otherwise not foreign students under the Education Act 1989) have a statutory right to free enrolment and free education at any state school: section 3 of the Education Act 1989. The provision of free education in state schools is supported by a grant by the Crown: section 79 of the Education Act.

#### *Ministry of Education circular*

The Ministry of Education (which is responsible for developing the national education guidelines and reviewing school charters) issued a circular (Circular 1998/25) to Boards of Trustees and principals of state and integrated schools on the rights of Boards, parents, and students in relation to requests for donations and other forms of payments in schools. The Ministry's views are as follows.

- No charge may be imposed for materials used in delivering the curriculum such as photocopying charges, charges for using musical instruments or computer facilities. This is because the right to free education implies that there should be no charge for materials used in the delivery of the curriculum. However, students may be charged for the hire of musical instruments owned by the school and used outside the basic delivery of the music curriculum. A charge may be made for costs involved in project work (such as the production of a T-shirt in a design class) if the student takes ownership of the finished product. Schools cannot, however, insist that the students take the finished product home.
- No charge may be imposed for a student's attendance at a school camp that is a compulsory part of the school's curriculum or part of the content of a particular course at the school. The Ministry of Education stated in Circular 1998/25 that it considers:

It is reasonable, however, for parents to be asked to contribute towards the cost of food and towards the costs which are involved in travel to and from the camp. In cases where parents are unwilling or unable to pay for a camp, teachers should try to provide work which will be an appropriate alternative to the camp. In cases where attendance at an outdoor or recreational activity is voluntary, parents should expect to meet the costs involved if they agree to their children's participation.

- Students should not be excluded from activities organised away from school as part of the curriculum (for example, field work in geography or biology and outdoor education programmes). The Ministry of Education stated in Circular 1998/25 that:



It is reasonable to expect parents to pay the travel costs which are inevitably connected with such activities, provided the staff have made every effort to minimise costs by ensuring that the activities are held as close to the school as possible. In cases where parents are unwilling or unable to pay for a trip, teachers should provide an alternative which would give the student an insight into the curriculum experience covered by the trip. To avoid misunderstanding which may lead to later problems with payment, boards should ensure that parents are made aware of the situation at the beginning of the year.

- Boards cannot require a student to purchase a workbook that accompanies a course and in which answers are written. However, the Ministry of Education states in Circular 1998/25 that if, a student chooses to purchase a workbook, a charge may be imposed. The Ministry considers that workbooks lie between textbooks, which are provided free to students, and stationery, which students are expected to provide for themselves.
- No charge may be imposed for programmes such as Reading Recovery, English for Speakers of Other Languages, special education services (speech therapy, behaviour or learning difficulties), or music tuition. In Circular 1998/25, the Ministry of Education states that resourcing is provided to schools for these programmes as part of the conventional curriculum or through the Ongoing Resource Scheme, Specialist Education Services, or Special Education Grant.
- No charge may be imposed where secondary schools purchase tertiary level courses that they offer to senior students as part of the school programme. However, where the school merely facilitates a student's enrolment in a tertiary course, the student would be enrolled only part time at the school, so would be required to pay the fees associated with the tertiary course.
- A charge may be imposed for in-school activities at which attendance is voluntary such as performances by visiting drama groups.
- Under the national education guidelines Boards are required to report on student progress and Boards are subject to the Official Information Act 1982 and Privacy Act 1993. Therefore, Boards are not entitled to withhold items such as students' reports or leaving certificates to encourage parents to pay school donations or resolve unpaid debts for services the school has provided.

The Commissioner accepts the Ministry of Education's views as expressed in Circular 1998/25. The supply of services that are necessary to the supply of education services (in which a school Board has an obligation under its charter to provide instruction and in which participation by students is compulsory) are also within the scope of education services to which there is a statutory entitlement to receive free of charge. Services that are necessary to the supply of education services include the:

- use of materials or goods necessary for delivering the curriculum (for example, the use of computers, photocopying charges for materials used in delivering the curriculum, and materials for practical subjects (such as woodwork));
- right to participate in activities that are a compulsory part of the curriculum (for example, outdoor education camps that are part of the curriculum or fieldwork in geography or biology); and

- provision of programmes such as Reading Recovery, English for Speakers of Other Languages, and special education services (for speech therapy or behavioural or learning difficulties).

There is a distinction between the supplies described above and supplies made in circumstances where the supply made is not necessary to the supply of education services and students have a choice as to whether to receive the supply. Examples of such supplies include:

- goods supplied where there is a very clear take-home component such as stationery or materials where a student is entitled to ownership of a finished product from practical classes such as woodwork. In such circumstances a school may not insist that the student take ownership of such goods; or
- attendance at or participation in activities that is voluntary; or
- transport to or from school activities (such as a camp) or food supplied at a camp.

### ***Whether sufficient relationship between payment and a supply***

Pursuant to section 5(6) of the GST Act, where a school Board brings to charge as revenue amounts received from the Crown, such as operational grants for the supply of education services, that supply is deemed to be a supply for GST purposes. The amounts paid by the Crown are consideration, being a payment made in respect of the supply of services.

The grant the Crown provides for the supply of education services in terms of the undertaking given to the Minister of Education may be taxed only once, but GST is chargeable on any separate supply the Board makes to parents: *Case R34* (1994) 16 NZTC 6,190; *Suzuki NZ Ltd v CIR* (2001) 20 NZTC 17,096.

In *Suzuki* the taxpayer had an obligation to repair defective vehicles under a warranty the taxpayer gave to its customers. In turn, the taxpayer had a warranty from its parent company (from which the taxpayer had purchased the vehicles) and had received payments from the parent company for carrying out the obligations of the parent company under the parent company's warranty. There were two separate supplies: the supply of repair services under the warranty to customers and the supply of repair services to satisfy the obligations of the parent company under its warranty. As two separate supplies were made, the Court of Appeal did not accept that the Commissioner had sought to impose tax on the same supply (at para 24).

The Court of Appeal said (at para 23):

This is simply an instance of the common enough situation in which performance obligations under two separate contracts with different counter-parties overlap, so that performance of an obligation under one contract also happens to perform an obligation under another. In such case a supply can simultaneously occur for GST purposes under both contracts. There is a nexus in both cases between the performance and the consideration given by the other party.

In some circumstances an existing statutory obligation may mean that there is an insufficient relationship between the payment and a supply. Two GST cases have related to a situation where the parties had statutory rights or obligations outside any contractual relationship there might have been between the parties: *Television NZ Ltd v CIR* (1994) 16 NZTC 11,295; *Case U1* (1999) 19 NZTC 9,001.

The *Television NZ* case concerned payments the Department of Maori Affairs made to the Broadcasting Council (whose assets and liabilities were later vested in Television New Zealand) for the purpose of a training scheme operated by the Broadcasting Council (and later Television New Zealand) for Maori trainees. The taxpayer's argument was that a supply had not been made for the payment because in collaborating with the Department of Maori Affairs, the Broadcasting Council was merely discharging a statutory obligation to be a good employer (which included operating a personnel policy that complied with the principle of being a good employer, including recognition of the aims and aspirations of Maori, the employment requirements of Maori, and the need for greater involvement of Maori as employees of the Broadcasting Council).

Tompkins J held that the Broadcasting Council had made a supply of services, being the provision of the training programme. There was a contractual obligation to provide the services, and the fact the supply was in accordance with the statutory obligations of the Broadcasting Council did not affect the conclusion that a supply was made under the contract.

Under contract law, the performance of a statutory duty is not consideration, although the undertaking of something more than the bare discharge of the duty can be good consideration: *Ward v Byham* [1956] 2 All ER 318; *Williams v Williams* [1957] 1 All ER 305. The *Television NZ* case is consistent with that principle. There was reciprocity between the Broadcasting Council and Department of Maori Affairs. Payment would not have been made if the services had not been provided. The Broadcasting Council had discretion about how it would carry out its statutory obligation to be a good employer. The provision of training services under the agreement with the Department of Maori Affairs was in accordance with the Broadcasting Council's statutory obligations, but there was no direct and specific statutory obligation to provide the training.

In *Case U1* the taxpayer had granted a lease under which the tenant had an obligation to pay rates (in addition to rental). The tenant was an "occupier" under the Rating Powers Act 1988 (being the lessee of a property under a lease for a term of not less than 12 months). Under that Act the occupier had primary liability to pay rates. The issue in *Case U1* was whether the payment of rates formed part of the consideration for the lease. (Hence, the issue considered in *Case U1* is slightly different from that considered in the *Television NZ* case.) Judge Barber considered and rejected the argument that the payment of rates was consideration (as the obligation contained in the lease to pay rates was "in respect of" the lease). He also rejected the argument that the payment of rates by the lessee was part of the inducement to persuade the landlord to lease the farm at the rental figure agreed on and was also part of the lessee's response to the granting of the lease. Judge Barber considered that the lease merely recorded the legal position and was not consideration, as the payment of rates by the lessee satisfied the lessee's own statutory obligation rather than an obligation of the lessor. (However, the payment of rates by a lessee under a lease would be part of the consideration for the lease, if the lessor was primarily liable for the payment of rates and the lessee had accepted an obligation under the lease to meet the lessor's liability.)

In the *Television NZ* case the statutory obligation was expressed in general terms. However, in *Case U1* the lessee had a specific statutory obligation to pay rates.

Payments made by parents or guardians may supplement the Crown grant to the school. School Boards have a considerable degree of autonomy as to how their funds are used. How the amounts paid are used is not the test of whether a supply is made for the payment: *Chatham Islands. Turakina* also confirms that how payments are used does not determine the nature of the supply for the payments. In *Turakina* the court (at p 10,037) rejected the taxpayers' argument that because attendance dues were applied to meet mortgage obligations of the proprietors of the schools, the attendance dues were paid for exempt supplies (being the payment or collection of any amount of interest, principal, or any other amount in respect of a debt security in terms of sections 14(1)(a) (previously section 14(a)) and 3(1)(ka) of the GST Act).

There is an expectation that amounts paid by parents will be used for the purposes of the school. However, the Commissioner considers that as the supply of education services is not conditional on payment being made by parents and as students have a statutory right to receive education services in a state school free of charge if they are "domestic students", there is an insufficient relationship between the payments and the supply of education services to which there is a statutory entitlement. The Commissioner also considers that when the payments made by parents are not made for any particular purpose and the school Boards do not undertake any obligations in return for payment, there is not a sufficient relationship between the payment and any other supply: *Chatham Islands*.

Some school Boards may attempt to collect amounts unpaid by withholding items, for example, reports, leaving certificates, or school magazines, until payment is made. It is possible to argue that although school Boards have an obligation to the Minister of Education to supply education services, if there is a threat to withhold education services unless payment is made, there is a separate obligation to parents to supply education services under a separate transaction with the parents. On that basis it could be argued that the payments are consideration, being a payment for the inducement of the supply of education services.

The relationship between the pupils and the school Board is based at least partly on the Education Act: *Grant v Victoria University of Wellington* 13 November 1997, Ellis J, HC Wellington CP312/96; *A-G v Daniels* [2002] 2 NZLR 742. There is a statutory right to free education. School Boards have a corresponding statutory obligation to provide education in state schools free of charge. Although Boards may represent that education services would not be supplied if payment is not made, the true legal nature of the transaction is that the Board cannot require payment for the supply of education services as students have a statutory entitlement to receive education free of charge. In the *Chatham Islands* case Tipping J commented (at para 25):

GST is payable on transactions. When deciding whether a particular transaction is of a kind which attracts GST, it is important to analyse carefully its legal characteristics.

A person may waive a statutory benefit conferred on that person under a statute if the waiver does not infringe some public right or public policy: *Bowmaker Ltd v Tabor* [1941] 2 All ER 72; *Reckitt & Colman (NZ) Ltd v Taxation Board of Review* [1966] NZLR 1032. To determine whether a statutory right to free education can be waived, it is appropriate to consider whether the purpose of the legislation under which the right is conferred would be infringed by the waiver or contracting out: *Johnson v Moreton* [1978] 3 All ER 37; *Lieberman v Morris* (1944)69 CLR 69.

Sections 20 and 25 of the Education Act require all New Zealand citizens and residents between the ages of 6 and 16 to be enrolled at a state-registered school and to attend the school. Private schools must satisfy requirements as to the suitability of premises, staffing, equipment, and curriculum and, in order to be registered, must give students a tuition no lower in standard than that of tuition given to students enrolled at state schools: section 35A of the Education Act. The purpose of the PSCI Act was to enable private schools, originally established to provide education of a special character, to be brought within the state system of education as integrated schools. As with other schools in the state system, the Board of a private integrated school is responsible for providing education free of charge to its pupils.

Parents can choose to have their children educated at non-state schools. It could be argued that in that sense the statutory entitlement to free education can be waived. However, the public policy objective expressed in the Education Act is that all children are to receive education of a minimum standard. The provision of public funding for education and the entitlement to free education are intended to ensure that cost is not a barrier to access to education. That free education is provided for a public purpose is confirmed by the 1993 statement of national education goals (*New Zealand Gazette* No 58, 29 April 1993), which states:

**Education is at the core of our nation's efforts to achieve economic and social progress. In recognition of the fundamental importance of education, the Government sets the following goals for the education system of New Zealand.**

1. The highest standards of achievement, through programmes which enable all students to realise their full potential as individuals, and to develop the values needed to become full members of New Zealand's society.
2. **Equality of educational opportunity for all New Zealanders, by identifying and removing barriers to achievement ...**  
...
6. Excellence achieved through the establishment of clear learning objectives, monitoring student performance against those objectives, and programmes to meet individual need.

[Emphasis added.]

Therefore, it can be argued that the right to free education is not solely a private right. If Boards were able to impose a requirement for the payment of "fees" and individual parents were able to waive the right to free education, the purpose of the legislation would be infringed.

Although school Boards have wide discretion to manage and control schools, such powers cannot be exercised in a manner inconsistent with a statutory provision: sections 72 and 75 of the Education Act. The Commissioner's view is that school Boards do not have the power to require the payment as a condition of the provision of education or any other services or items that are properly regarded as being integral to the supply of education to which there is a statutory entitlement. The Commissioner acknowledges that, given that an illegal activity can be a taxable activity and given that the definition of "consideration" does not require a contract to exist between the supplier and recipient for a payment to be consideration, payment need not be enforceable for the payment to be consideration. Therefore, the fact the transaction is invalid because the parties do not have the power to enter into a transaction, does not mean the transaction would not be recognised for GST purposes: *C & E Commrs v Oliver* [1980] 1 All ER 353. However, the statutory entitlement to education cannot be altered by a representation that education services are conditional on the payment of "fees".

Therefore, amounts paid to the Board of Trustees of a state school are not consideration for the supply of education services, even if there were a representation that reports or other information relating to the assessment of students would be withheld unless payment was made (albeit contrary to the legal position). However, if school Boards supplied other goods or services not integral to the supply of education services on the basis that the supply was conditional on payment being made, the payment would be consideration for that supply. If the payment made includes a charge for an item that is not integral to the supply of education services, such as a school magazine, there will be a case for apportionment of the payment. Section 10(18) of the GST Act states:

Where a taxable supply is not the only matter to which a consideration relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.

## **Conclusion**

Amounts paid by parents are not consideration for the supply of education services to which there is a statutory entitlement, for the following reasons:

- The definition of consideration under the GST Act is not the same as the contract law definition. A contract is not required between parents and school Boards for the payments to be consideration for GST purposes: *Turakina*. However, for the payments to be consideration for a supply, there must be a sufficient relationship between payments and a supply: *NZ Refining; Chatham Islands; Suzuki; Trustee, Executors*.
- As there is a statutory right to free education, in circumstances where the amounts are not paid for any particular purpose or for the Board undertaking any specific obligation there is not a sufficient connection between the payments and a supply (whether of education services or a supply of a different nature). This is so even though there is an expectation that the payments would be used for the Board's taxable activity: *Chatham Islands; NZ Refining*. The fact the amounts are used to pay for things not covered by the government grant does not establish that they are paid for services of a particular nature: *Turakina; Chatham Islands*.
- It is possible to argue that where a representation is made that education services would be withheld if payment is not made, the payments would be made "in respect of, in response to or for the inducement of" the supply of education services. However, as there is a statutory entitlement to free education in state schools, the true legal position is that education services would be provided whether or not payment was made. Therefore, there would not be a sufficient connection between the payment of "fees" and the supply of education services to which there is a statutory entitlement.
- GST consequences are determined on the basis of the legal character of the transaction: *Chatham Islands*. The relationship between parents and school Boards is based on the Education Act, which requires Boards of state schools to provide education and entitles students to free enrolment and education at state schools, and the PSCI Act, which entitles students enrolled at integrated schools to free education on the same terms and conditions as in state schools. The true legal nature of the arrangement between parents and the school Board is that school Boards have a statutory obligation to provide free education and students have a right to

free education. The supply of education services is not conditional on the payment being made, and payment is not required for the supply of education services.

- A statutory right conferred on a person may be waived only if the waiver does not infringe the purpose of the legislation: *Bowmaker Ltd v Tabor*; *Reckitt & Colman (NZ) Ltd v Taxation Board of Review*; *Johnson v Moreton*; *Lieberman v Morris*. The purpose of the Education Act is that all children should receive education of a minimum standard, and there should be no barriers to access to such education. That purpose would be infringed by a waiver of the right to free education and an ability of school Boards to require the payment of “fees” for education.
- The scope of the obligation to provide education services is defined by the national education guidelines and by the school’s charter (into which the guidelines are incorporated). The supply of reports and other information relating to the assessment of students is integral to the supply of education services, and such information must be supplied free. The amounts would not be consideration, even if there was a representation that the supply of such information would be withheld unless payment was made (albeit contrary to the legal position).

Therefore, GST is not payable on amounts paid for the purpose of a general fund to assist the schools with meeting costs or for “activity fees” for activities that are an integral part of the course requirements in which the school has an obligation to provide instruction and in which participation by pupils is compulsory. However, if other services not integral to the supply of education services are supplied on the basis that the supply is conditional on payment being made, the payment will be consideration for that supply. If a separate charge is not made for such an item, apportionment may apply: section 10(18) of the GST Act.

For payments made by parents or guardians to schools to be consideration, it must be possible to identify a supply of goods or services other than the supply of education services that the schools must supply in terms of their charters. The issues that need to be considered are:

- whether what is provided to students is within the scope of the statutory entitlement to education services; and
- if the supply made is outside the scope of the statutory entitlement, whether there is a sufficient relationship between the supply and the payment.

### **Examples**

It is assumed for the purposes of the following examples that the students are either New Zealand citizens or New Zealand residents.

#### ***Example 1***

Each year the Board of Trustees of a state school asks parents or guardians of students enrolled at the school to pay a nominated amount to assist with meeting school costs. The Board is not required to use the fee for any particular purpose, and the fee is paid for the general purposes of the school. The only benefits received by pupils are facilities for common use, such as the school library, swimming pool, or computer facilities.

The payment is not consideration for the supply of education services as there is a statutory entitlement for students to receive education free of charge. As the payment is received for the general purposes of the school and the Board of Trustees does not undertake any obligation to supply any goods or services, such payments are not consideration for a supply of a different nature by the Board. Therefore, GST is not chargeable on the payments.

### ***Example 2***

Students at a state school are required to pay a fee for materials used in a clothing class. The students are not required to take ownership of the completed item but will not be entitled to ownership unless payment is made.

A charge cannot be made for the use of materials necessary for the delivery of education services to which there is a statutory entitlement, but a charge can be made for the right to ownership of an item completed using such materials. The fee is not consideration for the use of the materials as the use of such materials is necessary for the provision of instruction in the subject. However, if a student elects to take ownership of the completed item, the fee is consideration for the right to ownership of the item and the Board is liable to account for GST on the fee.

### ***Example 3***

In addition to the general school donation, parents of students at a state school are asked to pay photocopying charges for materials (such as articles, extracts from textbooks, or homework exercises) used in teaching, even though such materials should be provided free of charge. The payment is not consideration. It is implicit in the right to free education that there should be no charge for the cost of materials used in the delivery of the curriculum. The provision of photocopied materials necessary for teaching is integral to the supply of education services. GST is not chargeable on the payment.

However, if a student chooses to purchase a photocopy of an optional workbook or magazine produced by students that the student may retain, the payment made would be consideration for the supply of that item and GST would be chargeable on the payment.

### ***Example 4***

A state school hires a bus to transport students on a field trip to carry out activities that are part of the geography curriculum. Students are asked to pay an amount to cover the cost of hiring the bus. The payment does not relate to the right to participate in the activities carried out on the field trip. Although transport is necessary to enable students to receive instruction in the subject, the supply of transport is not integral to the supply of education. In the same way, transport to the school premises does not constitute education services, although a student must travel to the school in order to receive education services. The payment is consideration for the supply of transport and GST is chargeable on the payment.

### ***Example 5***

Students at a state school are asked to make a payment to cover the costs of food provided at a school camp and transport to the camp site. Attendance at the camp is a compulsory part of the school's curriculum. The payment does not relate to the right to participate in activities at the camp. The payment is



consideration for the supply of food and transport and GST is chargeable on the payment.

(The school may waive payment for food and transport by some students but this does not mean that a payment for food and transport made by other students is not made for the supply of food and transport.)

***Example 6***

A state school asks students to pay for stationery and a workbook that students are entitled to keep. The payment is made for the supply of the stationery and the work book and is consideration. Therefore, GST is chargeable on the payment.

***Example 7***

A drama group puts on a performance at a state school. Attendance by students is voluntary but if students wish to attend a charge is payable. The payment is consideration for the right to attend the performance and GST is chargeable on the payment.

***Example 8***

The Board of Trustees of a state school asks parents or guardians of students enrolled at the school to make a single payment in advance, being the estimated cost of future items such as transport for class trips, workshop technology, and visiting drama groups. These activities are not integral to the supply of education which the school has a statutory obligation to provide. The payment is made for the right to participate in the activities to which the payment relates or for the right to ownership of an item. The entitlement of students to these rights is conditional on payment being made and GST is chargeable on the payment.