

TERTIARY STUDENT ASSOCIATION FEES

PUBLIC RULING - BR Pub 99/1

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 95/8 which was published in TIB Volume Seven, No. 6, December 1995, but its period of application is from 1 April 1999 to 31 March 2002 and some formatting changes have been made. BR Pub 95/8 applies up until 31 March 1999.

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 1994 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 single 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 single fee to the tertiary student association to become a member of the student association is not a gift for the purposes of section KC 5(4). The student is not entitled to a rebate under section KC 5.

The period for which this Ruling applies

This Ruling will apply for the period 1 April 1999 to 31 March 2002.

This Ruling is signed by me on the 11th day of January 1999.

Martin Smith

General Manager (Adjudication & Rulings)

COMMENTARY ON PUBLIC RULING BR Pub 99/1

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 99/1 (“the Ruling”).

Background

If the recipient has charitable status, section KC 5 of the Income Tax Act 1994 (“the Act”) provides a rebate for the donor of a gift of money in certain circumstances.

If a student pays a single fee to a student association to become a member of that association, the association has charitable status, and the fee as a whole confers some rights on members, the issue is whether the fee is a “gift”.

The subject matter was previously dealt with in public ruling BR Pub 95/8 that expires on 31 March 1999. This public ruling replaces BR Pub 95/8 on 1 April 1999. 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 states:

- (1) In the assessment of every taxpayer, other than an absentee or a company or a public authority or a Maori authority or an unincorporated body, or a trustee assessable and liable for income tax under sections HH 3 to HH 6, HK 14, and HZ 2, there shall be 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 income 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 one 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 one 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 one or more of the purposes within New Zealand specified in paragraph (aa):
 - (ae) - (bt) [A list of organisations]

- (2) The rebates provided for in this section shall not, in the case of any taxpayer, in any income year exceed in the aggregate the smaller of-
- (a) $33\frac{1}{3}\%$ of the aggregate of all gifts described in subsection (1):
 - (b) \$500.
- (3) No rebate shall be 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.
- (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, HK 14, HZ 2), can claim a rebate if that person:

- makes a gift (not being a testamentary gift) of money of \$5 or more;
- to any of the organisations listed in s KC 5(1) or any special appeal fund allowed by the Commissioner; and
- the recipient in the opinion of the Commissioner applies the funds for a charitable purpose; and
- the taxpayer furnishes to the Commissioner a receipt evidencing the making of the gift by the taxpayer to the recipient.

Furthermore, if a subscription is paid by the taxpayer to any organisation listed 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 society, institution, association, organisation, trust, or fund.

The payment of a single fee to a student association to become a member of the student association is not a "gift" under section KC 5, as the fee as a whole confers some rights on members. As the payment of the fee is not a gift, the student is not entitled to a rebate under section KC 5. There are two reasons for this view:

1. Payments of student association fees are not "gifts" in the ordinary meaning of that word, as payment is not voluntary, and benefits may arise from the payment.
2. Section KC 5(4) expands the meaning of "gift" for the purposes of section KC 5. A subscription will only qualify as a "gift" for the purposes of section KC 5 if the payer receives no rights to do anything, receive anything, or to have access to anything in return for the payment of the subscription. If any rights are conferred by any part of the subscription, section KC 5 does not apply, and no rebate is available.

The meaning of the term “gift”

In *Mills v Dowdall* [1983] NZLR 154, (in the Court of Appeal) the nature of a gift was referred to by Cooke J who said:

in general a gift is something truly gratuitous, although it is possible that nominal or very small considerations may not prevent transactions from being classed as gifts for some purposes: see 20 *Halsbury's Laws of England*.

In the same case, Richardson J said that at common law, the term “gift” refers to:

a transaction where the owner of property conveys the ownership of that property to another without consideration.

Similar views were expressed in *Federal Commissioner of Taxation v McPhail* [1966] 117 CLR 111, (known as “the *McPhail* rule”) where the Court held that a “gift” has the following attributes:

- The property transferred was transferred voluntarily and not as the result of a contractual obligation to transfer it; and
- The transferor by way of return received no advantage of a material nature.

A similar view was taken by the Federal Court of Australia in *Klopper & Anor v FC of T* [1997] ATC 4186, which applied *Cyprus Mines Corporation v FC of T* 78 ATC 4468, and made reference to the *McPhail* rule. In *Klopper & Anor v FC of T* the taxpayers made donations to the Australian Sports Aid Foundation (ASAF). The Oceanic Racing Club of Australia received funds from ASAF that it credited to an account belonging to the taxpayers. The Court held that the donations made by the taxpayers were not gifts. It could not be said that the payments were free from contractual obligation and voluntary. It could not be said that the taxpayers received no advantage of a material character as a result of making the donations.

The Australian Administrative Appeals Tribunal also referred to the *McPhail* rule in *Hodges v FC of T* [1997] ATC 2158 and *Australian Dairy Corporation v FC of T* [1998] ATC 2059. In both cases, as there was an element of benefaction, it could not be said that a “gift” was made.

Payments of student association fees are not “gifts” in the ordinary meaning of that word, as payment is not voluntary and benefits may arise from the payment.

The definition of gift in section KC 5(4)

Section KC 5(4) expands the meaning of “gift” for the purposes of section KC 5, to include subscriptions paid to a society, institution, association, organisation, trust, or fund, 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.

It is arguable whether student association fees are subscriptions. There are many definitions of “subscription”, some of which are wide enough to include student association fees.

In *Case M128* (1990) 12 NZTC 2,825 payments to a school for camp fees, a school trip, stationery, and a manual were not gifts. They conferred rights on the pupil. The Taxation Review Authority (“Authority”) noted that the Commissioner had allowed school activity fees as a deduction because they came within the expanded definition of “gift”. Other fees that conferred a right were not allowed as a deduction. The Authority did not comment on what the definition of a subscription was.

However, assuming that the fees paid are a subscription, the 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 on the payer. A subscription will only qualify as a “gift” for the purposes of section KC 5 if the payer receives no rights to do anything, receive anything, or to have access to anything in return for the payment of the subscription. Thus, the payment of a subscription is in the nature of a donation because the payer does not get any direct rights in return for the payment. The requirement that the subscription confers no rights does not contain any words of apportionment (such as “to the extent to which”). It 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.

The provision refers only to rights being conferred: the rights do not have to be exercised or enjoyed by the taxpayer.

In *Case J76* (1987) 9 NZTC 1,451, a taxpayer paid the fees of a number of disadvantaged children at a school which qualified as a charitable institution. The Authority held that the payments were not gifts, as the payment of the fees meant that the school had a contractual duty to educate the children. The Authority quoted the expanded definition of gift, but did not discuss either the definition of “subscription”, or whether the payments were a subscription (and thus covered by the extended definition of gift). The case was decided in terms of whether the fees paid were a “gift” in the ordinary meaning of the word.

Students attending tertiary institutions pay a sum for membership of a student association or union. Being a member commonly gives rights to benefits from the student association and other organisations, such as:

- Access to advice, welfare, and counselling services.
- Liaison services between students and teaching staff.
- Access to newsletters and other information.
- Facilities on campus, such as the library, health facilities, sports and recreation facilities.
- Student discounts on various goods and services.

In addition, it could also be argued that the payment of the student association fee is one of a number of payments a student must make, and things a student must do, in order to qualify for enrolment at a tertiary institution. If the student association fee (or a substitute payment to a charity of the student's choice) is not paid, the student does not qualify for enrolment. The payment of the student association fee, therefore, confers a further right on students - the right to enrolment if the other conditions of enrolment are met. Similarly, payments to the student association (together with payment of other fees and meeting terms) give students the right to attend university and sit examinations.

The student makes his or her payment to the student association, not to any other body which may later be allotted funds by the student association (for example, trust funds, hardship funds). The payment to the student association is a payment that confers rights on the student.

Compulsory student membership is incorporated into statute in section 229 of the Education Act 1989. Under this section a University Council has the power to impose and collect student association membership fees from its students. This section remains unchanged at present. However, section 3 of the Voluntary Student Membership Bill 1997 intends to repeal section 229 and introduce voluntary student association membership.

If the Bill is enacted it will not change the tax treatment of student association membership fees under section KC 5. A voluntary payment of student membership fees to a student association would fail to meet the requirements of section KC 5(4). That is, the payment would give rise to rights that the student could claim. At a minimum this would include the right to vote at an AGM and receive an annual newsletter. If the student receives any rights from the payment of that fee, section KC 5 does not apply, and no rebate is available. Any legislative change that makes tertiary student membership voluntary would therefore not alter the tax treatment of student association fees under section KC 5.

For the reasons outlined above, section KC 5 does not apply if the payment of a student association fee confers any rights. In these circumstances, no rebate is available.

Example

A student enrolls at a Polytech. He pays the student 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 on 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 Polytech and no rights are conferred because of the payment, a gift is made and a rebate is allowed.