

## **PUBLIC RULING BR PUB 18/06: GOODS AND SERVICES TAX - PAYMENTS MADE BY PARENTS TO STATE AND STATE INTEGRATED SCHOOLS**

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This Public Ruling, BR Pub 18/06, is a reissue of BR Pub 14/06. For more information about earlier publications of this Public Ruling see the Commentary to this Ruling.

This Ruling is substantially the same as the BR Pub 14/06, which expired on 20 June 2018. Some parts have been rewritten to improve readability, legislative changes have been included, and a new example (Example 5) has been added.

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

### **Taxation law**

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

This Ruling applies in respect of ss 8 and 10(2) and the definition of "consideration" in s 2.

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

The Arrangement is:

- the payment of amounts (whether described as "school fees", "donations", "voluntary contributions", "activity fees" or otherwise)
- to the board of trustees of a state or state integrated school
- by parents or guardians of students enrolled at such a school (who are not international students under the Education Act 1989).

### **How the taxation law applies to the Arrangement**

The taxation law applies to the Arrangement as follows:

GST is not chargeable on payments made to the board of trustees of a state or state integrated school by parents or guardians of students enrolled at such a school (and who are not international students under the Education Act 1989), where the payments are made to assist the school with the cost of delivering the education services that the student has a statutory entitlement to receive free of charge.

GST is chargeable on payments made for supplies of other goods or services, not integral to the supply of education to which the student has a statutory entitlement, where that supply is conditional on the payment being made.

In this Ruling state non-integrated schools and partnership schools kura hourua, are referred to as "state schools". Any references to a state school's board of trustees should be read as also a reference to the sponsor of a partnership school kura hourua.

### **The period for which this Ruling applies**

This Ruling will apply for the period beginning 21 June 2018 and ending on 20 June 2023.

This Ruling is signed by me on 21 June 2018.

**Tania Sauvao**

Manager, Public Rulings

# COMMENTARY ON PUBLIC RULING BR PUB 18/06

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 18/06 ("the Ruling").

Legislative references are to the Goods and Services Tax Act 1985 (the GST Act) unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this commentary.

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## Summary

1. In accordance with Ministry of Education guidance, boards of trustees of state and state integrated schools are permitted to ask parents or caregivers for voluntary contributions, including contributions towards the cost of delivering **the school's** curriculum. In addition, schools may offer for sale consumables, stationery, clothing and optional activities that do not form part **of the delivery of the school's** curriculum. Schools are permitted to charge for these additional things, but students are not obliged to buy them.
2. This Ruling addresses whether payments (however described) made by parents to state and state integrated schools are subject to GST. In this commentary, state non-integrated schools, including partnership schools kura hourua, are referred to **as "state schools", and similarly any references to a state school's board of trustees** should be read as a reference to the sponsor of a partnership school kura hourua. **Further, the word "parents" includes guardians or caregivers of students who also** make payments to state or state integrated schools.

## **Background**

### ***Application of this Ruling***

3. This Ruling applies for the period from 21 June 2018 to 20 June 2023.
4. The subject matter covered in this Ruling was addressed in:
  - “Public Ruling BR Pub 14/06: Payments made by parents or guardians of students to state schools – GST treatment” *Tax Information Bulletin* Vol 26, No 9 (October 2014): 3 (expired);
  - “Public Ruling BR Pub 09/01: Payments made by parents or guardians of students to state schools – GST treatment” *Tax Information Bulletin* Vol 21, No 3 (May 2009): 4 (expired); and
  - “Public Ruling BR Pub 03/04” *Tax Information Bulletin* Vol 15, No 7 (July 2003): 6 (expired).
5. This Ruling also withdraws and replaces “Question 70” *Public Information Bulletin* No 158 (November 1986).

### ***Ministry of Education guidance in Circular 2018/01***

6. The Ministry of Education provides guidance to boards of trustees, proprietors, sponsors, parents and students in relation to requests for donations and other forms of payments to schools. This guidance is provided in ***Circular 2018/01: Payments by parents of students in schools*** (Ministry of Education, 2018). The circular explains the types of payments boards of trustees, proprietors and sponsors may seek from parents and students at state and state integrated schools.
7. The circular states that no payments sought by boards of trustees and proprietors from parents are compulsory except for the attendance dues payable to the proprietors of state integrated schools and charges by schools for voluntary purchases of goods and services where parents have agreed to the purchase. No charges, including “fees” or “levies” should be associated with the delivery of the curriculum.

## ***Education framework***

### ***School governance***

8. Every state and state integrated school must have a board of trustees: s 93 of the Education Act 1989. A board is responsible for the governance of a school, including setting the policies by which the school is to be controlled and managed. **A board’s primary objective in governing the school is that every student at the school is able to attain his or her highest possible standard in educational achievement.** A board has complete discretion to perform its functions and exercise its powers as it thinks fit, subject to the Education Act and any other enactment and the general law of New Zealand: Schedule 6 to the Education Act. Grants are paid out of public money to boards for the purpose of administering their schools: s 79 of the Education Act.

9. State integrated schools were mostly private schools established to provide education with a special character that have become part of the state system of education. When a private school is integrated into the state system it must be controlled and managed and operate in all respects as if it were a state school: s 440 of the Education Act. Therefore, as with other state schools, a state integrated **school's** governing body is its board of trustees. State integrated **schools also have a proprietor, who looks after the school's land and buildings and determines and supervises the school's special character.**
10. 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. The charter gives effect to both **the Government's** goals, curriculum statements, performance measures and guidelines published under s 60A of the Education Act and the **board's priorities: s 61** of the Education Act.
11. 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 that the school and its students and community will achieve the aims and objectives set out in the school charter: s 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: s 63A of the Education Act. (From 2019, school charters will be replaced by four-year strategic plans and annual implementation plans.)

#### *Free education*

12. Everyone who is not an international 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 fifth birthday and ending on 1 January after their 19th birthday: s 3 of the Education Act.
13. Students enrolled at any state integrated school must be given free education on the same terms and conditions as students enrolled at other state schools: s 441 of the Education Act. However, the proprietor of a state integrated school may require payment of attendance dues as a condition of enrolment and attendance: s 447 of the Education Act. The money received from attendance dues may be used only for improvements to the school buildings and associated facilities as required by any integration agreement, for capital works required by the Minister of Education under s 456(2)(d) of the Education Act, and for meeting debts, mortgages, liens or other charges relating to the school premises. Attendance dues paid to the proprietors of state integrated schools are subject to GST, being payments to secure the enrolment of a student 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 (CA).
14. Each year, parents or guardians of students enrolled at state and state integrated schools may be asked by their school's board to pay nominated amounts to assist the school with its costs, including the cost of delivering its curriculum. Schools **may refer to these payments as "donations", "voluntary contributions" or the like.** In the case of state integrated schools, such payments are in addition to attendance dues payable to the proprietor.

## Application of the legislation

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

15. GST is chargeable on a 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: s 8(1). The value of the supply is the **consideration** provided for the supply (including both monetary and non-monetary consideration): s 10(2).
16. 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 Act. Any charitable trusts or parent-teacher associations for the same school should be **considered separately when determining the school's GST registration**. Generally, the board of a state or state integrated school will be a registered person, because the activities of a school board are taxable activities for GST purposes. This is on the basis that every board of trustees of a state or state integrated school is a Crown entity for the purposes of the Crown Entities Act 2004: s 7(1)(d). A Crown entity is a "public authority" (s 2) and, pursuant to s 6(1)(b), the term "taxable activity" includes the activities of any public authority. Section 5(6) deems that a school board (as a public authority) is supplying goods and services where it receives revenue from the Crown for the supply of outputs (in this case, the supply of education services). For example, a school board is deemed to be making a GST supply when it receives operational funding from the Crown for the supply of education services. The operational funding is the consideration for that supply.
17. GST is chargeable on that supply by the board of trustees of a state or state integrated school by reference to the "consideration" provided for the supply: s 8.

### ***Definition of "consideration" for GST purposes***

18. The statutory definition of "consideration" in the Act is wider than the contract law meaning of the term. In *Trustee, Executors and Agency Co NZ Ltd v CIR* (1997) 18 NZTC 13,076 (HC), Chisholm J commented in respect of the definition of "consideration" (at 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.
19. The following seven principles are drawn from the cases on the definition of "consideration" in the Act.

### ***Whether the payment is voluntary is irrelevant***

20. 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 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.

*Supply need not be made by the person who receives the payment*

21. The supply also need not be made by the person who receives the payment. In *Trustee, Executors and Agency Co*, Chisholm J said (at 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.

*Not every payment received is "consideration"*

22. 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 (CA).

*Payment and the supply must be connected*

23. For a payment to be "consideration" within the first part of the definition, a sufficient relationship must exist between the making of the payment and the supply of goods or services: *CIR v NZ Refining Co Ltd* (1997) 18 NZTC 13,187 (CA); *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA); *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147 (HC); *Trustee, Executors and Agency Co; Rotorua Regional Airport Ltd v CIR* (2010) 24 NZTC 23,979 (HC).
24. In *NZ Refining*, Blanchard J said (at 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 ... 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]

*Expectation of a supply of goods and services is not enough*

25. 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.

26. 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*.

#### *Element of reciprocity must exist*

27. The expression "in respect of, in response to, or for the inducement of" in the definition of "consideration" involves an element of reciprocity: *Taupo Ika Nui; Chatham Islands; Rotorua Regional Airport*.

#### *What are the legal arrangements between the parties*

28. It is necessary to consider the legal arrangements between the parties to determine whether a payment is consideration. In *Chatham Islands*, Blanchard J commented (at [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. The tax being one on transactions, it is necessary to pay close attention to the legal nature of what has been done.

#### **Role and accountability of school boards**

29. In *Maddever v Umawera School Board* [1993] 2 NZLR 478 (HC), Williams J discussed the role of school boards (at 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 and the Department 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 the school charter.



30. Williams J then referred to the requirements relating to charters in s 61 of the Education Act and went on to say (at 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.

31. Williams J noted that the accountability of school boards was achieved in several ways, including the requirement that boards must adhere to their charters.
32. The policy of the Education Act, therefore, is to decentralise the administration of education so boards of trustees are responsible for controlling and managing the schools. Although school boards have considerable power to manage schools, such powers are subject to any enactment and the law of New Zealand: Schedule 6 to 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).

### **Scope of free education**

33. A student's statutory entitlement to free education is established in s 3 of the Education Act:

#### **3 Right to free primary and secondary education**

Except as provided in this Act, every person who is not an international student is entitled to free enrolment and free education at any State school or partnership school kura hourua during the period **beginning on the person's fifth birthday and ending on 1 January after the person's 19th birthday**.

34. "Education" is not defined in the Education Act. **The term "education" is defined in the *Concise Oxford Dictionary* (12th ed, Oxford University Press, 2011) as:**

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

35. It is possible to define the limits of the obligation of school boards to provide education services (and, therefore, the scope of **a student's** entitlement to free education). The national education guidelines issued by the Minister of Education specify the:
- outcomes desired from the school system;
  - policy concerning teaching, learning, and assessment for the purposes of underpinning and giving direction to how curriculum and assessment responsibilities are to be managed; and
  - subjects in which education is to be provided (including areas and levels of knowledge).
36. 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. The national education guidelines are all the national education goals, foundation curriculum policy statements, national

curriculum statements, national standards, and national administration guidelines in force at the time under s 60A of the Education Act.

37. 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:** s 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: s 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 that the school and its students and community achieve the aims and objectives set out in the school charter: s 63 of the Education Act. (From 2019, school charters will be replaced by four-year strategic plans and annual implementation plans.)
38. Therefore, school boards have an obligation to provide education that complies with the requirements of the national education guidelines. New Zealand citizens and residents (and not international students under the Education Act) have a statutory right to free enrolment and free education at any state school: s 3 of the Education Act. The provision of free education in state schools is supported by a grant from the Crown: s 79 of the Education Act.

### **Ministry of Education Circular 2018/01**

39. The Ministry of Education provides guidance to boards of trustees and principals of state and state integrated schools and the proprietors of state integrated schools, and the sponsors of partnership schools kura hourua on the rights of boards, proprietors, sponsors, parents, and students in relation to requests for donations and other forms of payments in schools. That guidance is in *Circular 2018/01*.
40. In the circular, the Ministry makes the following nine points.

#### ***Payments sought from parents are not compulsory except for attendance dues and charges for voluntary purchases***

41. Payments sought from parents are not compulsory except for the attendance dues payable to the proprietors of integrated schools. Charges by schools for voluntary purchases of goods and services can be enforced, but only if the parent has agreed to make the purchase.
42. When communicating with parents, boards of trustees must clearly distinguish between requests for donations and for charges. The circular states:

Requests for payment must make a clear distinction between attendance dues, charges, and donations - **and between board of trustees’ and proprietors’ items.**

Ideally, invoices should specify attendance dues (for state-integrated schools) and charges for agreed optional goods or services only. Strictly speaking, schools cannot **“invoice” donations as non-payment of donations does not give rise to a debt that is owed.** On the other hand, it can make practical sense to list all requests for payments in a single document. In such cases, it must be made very clear which payments are voluntary and which are not. It is misleading to include a donation within a total which is described as **‘Balance Due’, or as being owed by a family.**

*Charges may not be imposed for materials used in delivering the curriculum*

43. Charges may not be imposed for materials used in delivering the curriculum such as for using photocopiers, musical instruments or computer facilities. The most a school board can do is ask for a donation in the same way as it asks for a general donation. This is because the statutory right to free education implies there should be no charge for materials or equipment used in the delivery of the curriculum.
44. However, students may be charged for the hire of musical instruments owned by the school and used outside the 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) but only if the student agrees to take ownership of the finished product. Schools cannot insist that students take finished products home.

*Charges may not be imposed for attendance at a school camp as part of the curriculum*

45. Charges may not be imposed for a student's attendance at a school camp that is **part of the school's curriculum, including part of the content of a particular course** at the school. The Ministry of Education considers it is reasonable for parents to be asked to contribute towards the cost of food and the cost of travelling. Such a request for a contribution is a request for a donation. Students may not be excluded from attending a camp that is part of curriculum delivery.
46. If students are given the choice of participating in a school camp that does not form part of the delivery of the curriculum, the school may impose a charge.

*Students may not be excluded from attending a camp that is part of the curriculum because they cannot or will not pay a donation towards the cost*

47. Students may not be excluded from attending a camp or going on a trip that is part of curriculum delivery (for example, field work in geography, biology and outdoor education programmes) because of an inability or unwillingness to pay a donation towards the **activity's cost. It is reasonable for parents to be asked to contribute** towards the cost of food and towards the costs which are involved in travel. Such a request for a contribution is a request for a donation.

*Boards cannot require students to purchase a workbook that accompanies a course*

48. Boards cannot require a student to purchase a workbook that accompanies a course and in which answers are written. Boards of trustees may sell workbooks, but purchase cannot be compelled.
49. Once a parent has opted to purchase the workbook, the cost becomes an enforceable charge. The circular states that if a workbook is made compulsory then a board of trustees may ask for only a donation towards the costs.

*Charges may not be imposed for some special curriculum programmes*

50. Charges may not be imposed for curriculum programmes such as Reading Recovery, English for Speakers of Other Languages, special education services (speech therapy, behaviour or learning difficulties) or music tuition from Itinerant Teachers of Music.

*Charges may not be imposed where tertiary-level courses are purchased as part of a secondary school programme*

51. Charges may not 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, meaning the student would be enrolled only part time at the school, the student is required to pay the fees associated with the tertiary course.**

*Charges may be imposed for in-school activities at which attendance is voluntary*

52. A charge may be imposed for in-school activities at which attendance is voluntary and conditional on payment being made such as performances by visiting drama groups, lunchtime sport or education outside the classroom opportunities.

*Boards may not withhold items such as leaving certificates to motivate parents to pay school donations*

53. Boards must report on student progress and 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 goods or services the school has provided.

***Commissioner accepts the views in Circular 2018/01***

54. **The Commissioner accepts the Ministry of Education's views as expressed in Circular 2018/01.** 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) is within the scope of education services to which there is a statutory entitlement to receive free of charge.
55. 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, of photocopiers for copying materials used in delivering the curriculum, and for materials for practical subjects);
  - the right to participate in activities that are a compulsory part of the curriculum (for example, camps that are part of the curriculum or fieldwork in geography or biology); and
  - the 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).
56. A distinction exists 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 or their parents have a choice as to whether to receive the supply. Such supplies include:
- goods supplied with a clear take-home component (such as stationery or materials) where a student is entitled to ownership of a finished product from practical classes, although a school may not insist that the student take ownership of such products; and
  - attendance at or participation in extra-curricular activities that are optional.

## **Supply of education services**

57. Where a school board brings to charge as revenue amounts received from the Crown, such as operational grants for the supply of education services, the delivery of outputs by the grant recipient is deemed to be a supply for GST purposes: s 5(6). This means payments the Crown makes, such as operational grants, are consideration, being payments made for **a school's** supply of education services to students.
58. The **Crown's** grant is provided for the supply of education services in terms of the undertaking given by the board to the Minister of Education. A supply may be taxed only once, although GST may be chargeable on any separate supplies the board makes to parents: **Case R34** (1994) 16 NZTC 6,190 (TRA); **Suzuki NZ Ltd v CIR** (2001) 20 NZTC 17,096 (CA).
59. In **Suzuki**, the taxpayer was obligated 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 [24]).
60. The Court of Appeal said at [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.
61. **Suzuki** clarifies that sometimes simultaneous GST supplies might arise under arrangements with different parties, but for GST to be chargeable on those supplies a sufficient relationship must exist between each supply and the consideration given in return for that supply.

## **Link between payment and supply where a statutory right exists**

62. In some circumstances an existing statutory obligation may mean the relationship between the payment and a supply is insufficient. Two GST cases have addressed the situation where the parties had statutory rights or obligations outside any contractual relationship that might have existed between the parties: **Television NZ Ltd v CIR** (1994) 16 NZTC 11,295 (HC); **Case U1** (1999) 19 NZTC 9,001 (TRA).
63. **Television NZ** concerned payments the Department of Maori Affairs made to the Broadcasting Council (the assets and liabilities of which were later vested in Television New Zealand). The payments were for a training scheme operated by the Broadcasting Council (and later Television New Zealand) for Māori trainees. Television New Zealand argued 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. Being a good employer included operating a personnel policy that complied with the principle of being a good employer, including recognising the aims and aspirations

of Māori, the employment requirements of Māori, and the need for greater involvement of Māori as employees of the Broadcasting Council.

64. Tompkins J held that the Broadcasting Council had made a supply of services, being the provision of the training programme. A contractual obligation existed 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.
65. 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 (CA); *Williams v Williams* [1957] 1 All ER 305 (CA). The *Television NZ* case is consistent with that principle. Reciprocity existed between the Broadcasting Council and the 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.**
66. 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 the Rating Powers Act 1988, 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.)
67. Judge Barber considered and rejected the argument that the payment of rates was consideration (because **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 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, because 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 were primarily liable for the payment of rates, and the lessee had accepted an obligation under the lease to meet the **lessor's liability.**)
68. In *Television NZ*, the statutory obligation was expressed in general terms. However, in *Case U1*, the lessee had a specific statutory obligation to pay rates.

### ***Payments by parents and the statutory right to free education***

69. 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*.
70. *Turakina* also confirms that how payments are used does not determine the nature of the supply for the payments. In *Turakina*, the court (at 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 ss 14(1)(a) (previously ss 14(a)) and 3(1)(ka)).

71. An expectation exists that amounts paid by parents will be used for the purposes of the school. However, the Commissioner considers that, because the supply of education services is not conditional on payment being made by parents and because students have a statutory right to receive education services in a state or state integrated school free of charge (if they are not international students), the relationship is insufficient between the payments made by parents and the supply of education services to which a statutory entitlement exists. In addition, the Commissioner 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, this more strongly supports the conclusion that a sufficient relationship does not exist between the payment and any other supply: *Chatham Islands*.
72. Some school boards may attempt to collect amounts unpaid by withholding items (for example, school 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 a threat is made to withhold education services unless payment is made, a separate obligation exists 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.
73. The relationship between students and the school board is based at least in part on the Education Act: *Grant v Victoria University of Wellington* [2003] NZAR 185 (HC); *A-G v Daniels* [2003] 2 NZLR 742 (CA). A statutory right exists to free education: s 3 of the Education Act. All children from the ages of 6 to 16 must be enrolled at a school: s 20 of the Education Act. This means school boards have a corresponding statutory obligation to provide education in state and state integrated 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. This is clearly supported by Circular 2018/01.
74. In *Chatham Islands*, Tipping J commented at [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.

### **No waiver of statutory right**

75. 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 (CA); *Reckitt & Colman (NZ) Ltd v Taxation Board of Review* [1966] NZLR 1,032 (CA). 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 (HL); *Lieberman v Morris* (1944) 69 CLR 69 (HCA).
76. All New Zealand citizens and residents aged from 6 to 16 must be enrolled at a registered school and attend the school: ss 20 and 25 of the Education Act.

77. 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 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]

78. Therefore, 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.

79. Although school boards have wide discretion to manage and control schools, such powers cannot be exercised in a manner inconsistent with a statutory provision: Part 2 of Schedule 6 of the Education Act. **The Commissioner's view is that** school boards do not have the power to require 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 a statutory entitlement exists. This is confirmed in Circular 2018/01.

80. The Commissioner acknowledges that, given an illegal activity can be a taxable **activity and given 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 (QBD). However, the statutory entitlement to education cannot be altered by a representation that education services are **conditional on the payment of "fees"**.

81. Therefore, contributions paid to the board of trustees of a state school, whether for general or specific purposes, are not consideration for the supply of education services, even if there were a representation that schools 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 beyond 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.



82. If a contribution made includes a charge for an item that is beyond the supply of education services, such as a school magazine, a case may be made for apportionment of the payment. Section 10(18) 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

83. Amounts paid by parents are not consideration for the supply of education services to which there is a statutory entitlement. This is for the following six reasons.
84. The first reason is that the definition of consideration under the 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, a sufficient relationship must exist between payments and a supply: *NZ Refining; Chatham Islands; Suzuki; Trustee, Executors and Agency Co*.
85. The second reason is that because free education is a statutory right, when an amount is not paid for any particular purpose or for the undertaking of any specific obligation, a sufficient connection does not exist between the payments and a supply. This is so even though an expectation exists that the payments will be used for the taxable activity: *Chatham Islands; NZ Refining*. The fact the amounts parents pay to boards may be used to meet the cost of things not covered by the Crown grant does not establish the necessary connection that the amounts are paid for services of a particular nature: *Turakina; Chatham Islands*.
86. The third reason is that 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 and state integrated schools to provide education, entitles students at state schools to free enrolment and free education, and entitles students enrolled at state integrated schools to free education on the same terms and conditions as students 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.
87. The fourth reason is that it can be argued 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, because a statutory entitlement to free education exists in State schools, the true legal position is that education services would be provided whether or not payment were made. Therefore, a sufficient connection would not exist between the payment of general or specific amounts and the supply of education services to which there is a statutory entitlement.
88. The fifth reason is that a statutory right conferred on a person may be waived only if the waiver does not infringe the purpose of the legislation: *Bowmaker Ltd; Reckitt & Colman; Johnson; Lieberman*. 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.

89. The sixth and final reason is that 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 were a representation that the supply of such information would be withheld unless payment was made (albeit contrary to the legal position).
90. Therefore, GST is not payable on amounts paid by parents or guardians to school boards to assist the school with meeting the cost of delivering goods and activities that are an integral part of the curriculum that the school has a statutory obligation to provide and in which participation by pupils is compulsory. However, if other services not integral to the supply of those 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: s 10(18).
91. 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 are obliged to supply in terms of their charters. The two 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 for goods or services outside the scope of the statutory entitlement, whether a sufficient relationship exists between the supply and the payment for the payment to be consideration for those goods or services.

## Examples

92. The following eight examples explain the application of the law. The examples are consistent with the guidance in Circular 2018/01. None of the students in the examples are international students.

### Example 1 – General donation

Each year the board of trustees of a state school asks the parents or guardians of students enrolled at the school to make a financial contribution to assist with meeting school costs.

The board is not required to use the contribution for any particular purpose. The contribution is paid for the general purposes of the school, such as the school library, swimming pool and shared computer facilities, all of which are facilities available to any student.

The payment is not consideration for the supply of education services because there is a statutory entitlement for students to receive education free of charge. Because 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 in return for the payment, such payments are not consideration for any supply. Therefore, GST is not chargeable by the school board on the payments.

### **Example 2 – Payment for materials**

Students at a state school are asked to contribute towards the cost of materials used in a clothing class. The students are not required to take ownership of the completed item and will be entitled to ownership only if payment is made.

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

### **Example–3 - Photocopying**

In addition to a general school donation, parents of students at a state school are asked to pay photocopying charges for materials (such as articles, extracts from textbooks and 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 their own copy of a photocopied school magazine produced by students, the payment made would be consideration for the supply of that item, and GST would be chargeable on the payment.

### **Example 4 – School camp**

Students at a state integrated school are asked by the board for a donation towards the costs of a school camp (such as a year 12 outdoor education camp or a year 9 beginning of the year camp). Attendance at the camp is a compulsory **part of the school's curriculum.**

The donation amount is not subject to GST. This is because the payment is not consideration for the supply of education services as students have a statutory entitlement to receive education free of charge. The camp forms part of the supply of education services by the school. The student is entitled to attend the camp regardless of whether payment is made. Therefore, the payment does not have the requisite relationship to any supply for it to be consideration.

### **Example 5 – Ski trip**

Each year, year 11 students have the option of going on a weekend ski trip to Mount Ruapehu. The trip **is not compulsory and does not form part of the school's curriculum.** Parents are asked to pay \$200 to cover costs. Students whose parents do not pay in full are not entitled to attend the ski trip.

This payment is consideration for the right to participate in the ski trip. Therefore, GST is chargeable on the payment.

### **Example 6 – Stationery and workbooks**

A state school charges students for stationery packs and optional workbooks that students are entitled to keep. Parents may choose whether to purchase the stationery packs or workbooks from the school. The payment is made for the supply of the stationery and the workbook, so is consideration. Therefore, GST is chargeable on the payment. (The school may occasionally waive a payment for stationery by some students but this does not mean the payments for stationery made by other students are not made for the supply of stationery.)

### **Example 7 – Visiting drama group**

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

However, when students are required to attend a drama performance as a compulsory part of the curriculum, parents are not obligated to pay. Any payment by parents towards the cost of their child attending a compulsory performance will not be subject to GST.

### **Example 8 – Advance payment of charges**

The board of trustees of a state integrated school asks parents or guardians of students enrolled at the school to make a single payment in advance, in return for future items to be supplied by the school, such as stationery and visiting drama groups, which the family has agreed to receive. The advance payment also includes an amount for a take-home item (such as a letterbox that will be made in workshop technology) that the student chooses to take home once they have built it.

These goods and activities are not integral to the supply of education that 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.

## References

### Subject references

Education

GST

State integrated schools

State schools

### Legislative references

Crown Entities Act 2004, s 7(1)(d)

Education Act 1989, ss 3, 20, 25, 60, 60A, 61, 63, 63A, 79, 93, 440, 441, 447, 456(2)(d), Schedule 6

Goods and Services Tax Act 1985, ss 2 ("consideration", "public authority"), 3(1)(ka), 5(6), 6(1)(b), 8, 10(2) and (18), 14(a), 14(1)(a)

Official Information Act 1982

Privacy Act 1993

Rating Powers Act 1988

Tax Administration Act 1994, s 91D

### Case references

*A-G v Daniels* [2003] 2 NZLR 742 (CA)

*Bowmaker Ltd v Tabor* [1941] 2 All ER 72 (CA)

*C & E Commrs v Oliver* [1980] 1 All ER 353 (QBD)

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"Statement of national education goals" New Zealand Gazette No 58, 29 April 1993

"Question 70" *Public Information Bulletin* No 158 (November 1986)

## Appendix – legislation

### Goods and Services Tax Act 1985

1. Section 8(1) provides:

**8 Imposition of goods and services tax on supply**

(1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 15% on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after 1 October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

2. The value of the supply is determined under s 10(2), 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, —

(i) the open market value of that consideration, if subparagraph (ii) does not apply; or

(ii) the value of the consideration agreed by the supplier and the recipient, if subsection (2B) applies.

3. The definition of “consideration” in s 2 is:

**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: