

TAX INFORMATION BULLETIN

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July 2003

CONTENTS

| | |
|--|----|
| Get your TIB sooner on the internet | 3 |
| This month's opportunity to comment | 5 |
| Binding rulings | |
| Product Ruling – BR PRD 03/14 | 6 |
| Public Ruling – BR PUB 03/04 | 10 |
| New legislation | |
| War Pensions Amendment Act 2003 – minor amendments to Income Tax Act 1994 and Child Support Act 1991 | 20 |
| Legal decisions – case notes | |
| CIR loses CFC case TRA Dec 17/2003 | 21 |
| Standard practice statements | |
| Withdrawal of Standard Practice Statement INV-570 | 22 |
| Withdrawal of Standard Practice Statement RDC-5 | 22 |
| Questions we've been asked | |
| Goods and Services Tax Act 1985 Trophies and animal products derived from the tourist, hunting and safari industry: zero-rating under GST | 23 |
| Regular features | |
| Due dates reminder | 24 |
| Your chance to comment on draft taxation items before they are finalised | 26 |

This TIB has no appendix

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This *Tax Information Bulletin* is also available on the internet in PDF format. Our website is at:

www.ird.govt.nz

It has other Inland Revenue information that you may find useful, including any draft binding rulings and interpretation statements that are available.

If you find that you prefer to get the *TIB* from our website and no longer need a paper copy, please let us know so we can take you off our mailing list. You can do this by completing the form at the back of this *TIB*, or by emailing us at **IRDTIB@datamail.co.nz** with your name and details.

THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

Inland Revenue produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents.

Because we are keen to produce items that accurately and fairly reflect taxation legislation, and are useful in practical situations, your input into the process—as perhaps a user of that legislation—is highly valued.

The following draft items are available for review/comment this month, having a deadline of 29 August 2003.

| Ref. | Draft type | Description |
|-------------|-----------------------------|--|
| ED0028 | Standard practice statement | Tax payments – when received in time |
| QB0023 | Question we've been asked | Disputing or challenging a PAYE determination made under section NC1(2) of the Income Tax Act 1994 |

Please see page 26 for details on how to obtain copies.

BINDING RULINGS

This section of the *TIB* contains binding rulings that the Commissioner of Inland Revenue has issued recently.

The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates tax liability based on it.

For full details of how binding rulings work, see our booklet *Adjudication & Rulings, a guide to binding rulings (IR 715)* or the article on page 1 of *Tax Information Bulletin* Vol 6, No 12 (May 1995) or Vol 7, No 2 (August 1995).

You can download these publications from our website at www.ird.govt.nz

Note: Product Ruling BR Prd 01/09 was withdrawn, effective from 16 August 2003, to allow for a replacement ruling to be issued to reflect the Commissioner's change of view in relation to the withholding tax treatment for payments made in relation to the delivery of newspapers, leaflets, brochures, catalogues and other such advertising material (to the extent that the carriage of those items does not require registration under the Postal Services Act 1998).

The replacement ruling, BR Prd 03/14, is set out below.

PRODUCT RULING – BR PRD 03/14

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by Deltarg Distribution Systems Limited ("Deltarg").

Taxation Laws

All legislative references are to the Income Tax Act 1994 ("the ITA") unless otherwise stated.

This Ruling applies in respect of sections BD 2(2)(c) and DE 1; the definitions of "extra emolument", "income from employment", "salary or wages", "specified office holder" and "withholding payment" in section OB 1; the definition of "source deduction payment" in section OB 2(1); the definition of "PAYE rules" in section OZ 1(1); and section 6(3)(b) of the Goods and Services Tax Act 1985 ("the GST Act").

The Arrangement to which this Ruling applies

The Arrangement is the engagement of persons ("the Contractors") by Deltarg pursuant to a standard form contract ("the Contract"), for the delivery of newspapers, leaflets, brochures, catalogues, advertising material, samples and other similar items to households and other premises throughout New Zealand. Further details of the Arrangement are set out in the paragraphs following.

1. Deltarg carries on the business of distributing newspapers, leaflets, brochures, catalogues, advertising material, samples and other similar items to households and other premises throughout New Zealand.
2. Deltarg engages the Contractors pursuant to the Contract, to deliver particular items within a specified period, to each house, flat or other premises located within a designated area, by placing one of each item in each letterbox (or other specified location).
3. The Contract contains both general terms and conditions (the text of which is appended to this Ruling as Appendix I) and a schedule (a copy of which is appended to this Ruling as Appendix II) setting out the terms specific to the particular delivery for which the Contractor is engaged.
4. The items delivered by the Contractors pursuant to the Contract are not items the carriage of which requires Deltarg to be registered as a postal operator under the Postal Services Act 1998.

Condition stipulated by the Commissioner

This Ruling is subject to the following condition:

- a) The relationship between Deltarg and the Contractors is, and during the period of this Ruling will continue to be, entirely in accordance with the Contract provided in the application and affixed to the ruling as appendixes I and II, and that there are no other collateral contracts, agreements, terms or conditions, written or otherwise, relating to the engagement of any of the Contractors.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any condition stated above, the Taxation Laws apply to the Arrangement as follows:

- For the purposes of the PAYE rules, any payment made to a Contractor by Deltarg pursuant to the Contract will not be “salary or wages”, an “extra emolument”, a “withholding payment” or a payment made to a “specified office holder” in respect of the activities of a specified office, within the meaning of those terms as defined in section OB 1. Any such payment will therefore not be a “source deduction payment” as defined in section OB 2(1), for the purposes of the PAYE rules.
- For the purposes of sections BD 2(2)(c) and DE 1, any payment made to a Contractor by Deltarg pursuant to the Contract will not be “income from employment” as that term is defined in section OB 1.
- For the purposes of the GST Act, the provision of services by any Contractor to Deltarg under the Contract will not be excluded from the definition of “taxable activity” in section 6 of that Act by section 6(3)(b) of that Act.

The period or income year for which this Ruling applies

This Ruling will apply for the period 16 August 2003 to 16 August 2006.

This Ruling is signed by me on the 4th day of July 2003.

Martin Smith

General Manager (Adjudication & Rulings)

Appendix I

BY THIS AGREEMENT made the date specified in paragraph four (4) of the schedule Deltarg Distribution Systems Ltd whose address is set out in paragraph two (2) of the schedule (“Deltarg”) hereby engages the person, firm or company whose name and address is specified in paragraph three (3) of the schedule (“the Contractor”) on the terms and conditions hereinafter set out, to distribute, within the period specified in paragraph four (4) of the schedule, the newspapers, leaflets, brochures, catalogues, samples or other items specified in paragraph five (5) of the schedule (“the item”) to each house, flat and other premises located within the area designated in paragraph six (6) of the schedule by placing one (1) of such items in each letterbox (“the services”) or other location as specified.

TERMS AND CONDITIONS

1. (a) Within thirty (30) days after duly performing and completing the services (as to which Deltarg may require a filled in map of the streets or sides of streets serviced, or such other evidence as Deltarg may reasonably require to satisfy itself that the Contractor has duly performed and completed the services in accordance with the terms of this Agreement), Deltarg shall pay to the Contractor the fee specified in paragraph seven (7) of the schedule.

(b) From time to time, due to circumstances beyond the control of Deltarg, there may be late changes, cancellations or additions to distributions (the item or part thereof) necessitating recalculation of the fee specified in paragraph seven (7) of the schedule. The final payment of the fee will then be paid at the recalculated amount which may vary from the fee specified in paragraph seven (7) of the schedule.
2. The Contractor shall not place any item in any letterbox displaying “No Junk Mail”, “No Advertising Material” or similar sign (community newspapers excepted unless specifically referred to by signage, for example “No Newspapers Please” or similar specific signs), shall not in any way litter or commit a breach of any relevant Act, bylaw or regulation and shall also comply with such other special instructions (if any) as may be specified in paragraph five (5) of the schedule.
3. The Contractor may subcontract the services, or otherwise engage or obtain assistance from others for the performance of the services but shall at all times remain personally responsible to Deltarg under the terms of this agreement and is the only person to whom Deltarg will pay the fee for the services.
4. The Contractor shall if necessary, having regard to the bulk, weight or volume of the items to be delivered, and may at the Contractor’s discretion, provide and use (but in all respects at the Contractor’s cost, expense and risk) a car, trailer, trolley or other carrying equipment in connection with the delivery of the items.
5. The Contractor is an independent Contractor and as such is free (in addition to the Contractor’s freedom to engage subcontractors and others to use carrying equipment, as recognised by clauses three (3) and four (4) of this agreement) to select the Contractor’s own means and methods of performing the services and, subject to the requirements of paragraph four (4) of the schedule, the hours during which the Contractor will perform those services. The Contractor in connection with the performance of the services shall indemnify and keep Deltarg indemnified against all actions, proceedings, liabilities, claims, damages, costs and expenses arising out of or in any way relating to the Contractor’s activities hereunder.
6. The Contractor shall not deliver any material with the item other than those specified in paragraph five (5) of the schedule and will not use maps, materials or other information supplied by Deltarg, for any purpose other than in connection with the distribution of the item.
7. This document constitutes the entire agreement between the Company and the Contractor.

Signature of Parties

Date / /

Deltarg (by its duly authorised representative)

Date / /

Contractor

(If the Contractor is a firm or a company the person signing the warrants that he/she has authority to sign on behalf of the Contractor)

Appendix II

**DELTARG DISTRIBUTION
SYSTEMS LTD.**

SCHEDULE 1

CONTRACT

| | | | | | | | |
|--------------------------------|-------------|--------------------------------------|---------|------------------|-------------------------|----------|----------|
| | | RUN NO. | MAP REF | DISTRIBUTOR CODE | CONTRACT No. | | |
| | | CONTACT YOUR AREA REPRESENTATIVE ON: | | | | | |
| SPECIAL DELIVERY INSTRUCTIONS: | | POSTZONE | | | CHANGE CODE | | |
| START DATE | FINISH DATE | HOUSES | UNITS | COMMERCIAL | NO ADVERTISING MATERIAL | QUANTITY | COMMENTS |
| JOB DESCRIPTION & INSTRUCTIONS | | | | | | | |

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TOTAL AMOUNT DUE

OFFICE COPY PLEASE RETURN THIS COPY TO YOUR AREA REPRESENTATIVE WITHIN 7 DAYS

**DELTARG DISTRIBUTION
SYSTEMS LTD.**

SCHEDULE 1

CONTRACT

| | | | | | | | |
|--------------------------------|-------------|--------------------------------------|---------|------------------|-------------------------|----------|----------|
| | | RUN NO. | MAP REF | DISTRIBUTOR CODE | CONTRACT No. | | |
| | | CONTACT YOUR AREA REPRESENTATIVE ON: | | | | | |
| SPECIAL DELIVERY INSTRUCTIONS: | | POSTZONE | | | CHANGE CODE | | |
| START DATE | FINISH DATE | HOUSES | UNITS | COMMERCIAL | NO ADVERTISING MATERIAL | QUANTITY | COMMENTS |
| JOB DESCRIPTION & INSTRUCTIONS | | | | | | | |

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

PUBLIC RULING – BR PUB 03/04

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

Taxation Laws

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

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

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 a Board of Trustees of such a school.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

A payment which is consideration for the supply of goods or services by a registered person, in New Zealand, in the course or furtherance of a taxable activity, is subject to GST.

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 upon 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 from 20 June 2003 to 20 June 2006.

This Ruling is signed by me on the 20th day of June 2003.

Martin Smith

General Manager (Adjudication & Rulings)

COMMENTARY ON PUBLIC RULING BR PUB 03/04

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 03/04 (“the Ruling”).

The subject matter of the Ruling was previously considered in Appendix B of *TIB* Vol 2, No 4 (November 1990) at page 1. The Ruling replaces that earlier item.

Background

State primary and secondary schools are controlled and managed by their Boards of Trustees: section 75 of the Education Act 1989 (“the Education Act”). Under that section, 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. Under section 93 of the Education Act, every state school is required to have a Board of Trustees. 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 (“the 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. Under section 7 of the PSCI Act, integration is effected by the proprietors of a private school entering into an integration agreement with the Minister of Education. Upon integration, an integrated school becomes part of the state system of education and is subject to the legislation governing other state schools, but subject to the PSCI Act: section 4 of the PSCI Act.

Under section 40(2) of the PSCI Act, the proprietors of integrated schools own, hold on trust, or lease the land and buildings of the schools and are liable for all mortgages, liens, and other charges in respect of the land and buildings. They are also responsible for the maintenance and preservation of the special character of the school: section 3(3) of the PSCI Act. As with other state schools, the controlling authority of an integrated school is its Board of Trustees: section 25(5) of the PSCI Act.

Under section 70 of the Education Act, the Secretary of Education may specify the terms and conditions applying to land and buildings occupied by Boards of Trustees, whether or not the land and buildings are owned by the Crown. The terms and conditions specified may include standards of maintenance of capital works and minimum safety and health requirements.

Every Board is to 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. A copy of the school's first charter and every updated charter must be provided to the Secretary of Education: section 62. The effect of a school charter is that it is an undertaking by the Board to the Minister to take all reasonable steps to ensure that 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 of Education determines that it is inconsistent with the Education Act or the national administration guidelines: section 63A Education Act. The Secretary of Education may direct a Board to get specialist support if the Secretary considers that the Board is not meeting or is not likely to meet its statutory obligations (including the aims, purposes and objectives of its charter): section 64A of the Education Act.

The national education guidelines are defined in section 2 of the Education Act as the national education goals, foundation curriculum policy statements, national curriculum statements, and national administration guidelines, for the time being in force under section 60A of that Act. Section 60A(1) permits the Minister to publish by notice in the *Gazette* all or any of the following:

- (a) National education goals (that is to say statements of desirable achievements by the school system, or by an element of the school system):
- (aa) Foundation curriculum policy statements, which are statements of policy concerning teaching, learning, and assessment that are made for the purposes of underpinning and giving direction to—
 - (i) The way in which curriculum and assessment responsibilities are to be managed in schools:
 - (ii) National curriculum statements and locally developed curriculum:
- (b) National curriculum statements (that is to say statements of—
 - (i) The areas of knowledge and understanding to be covered by students; and
 - (ii) The skills to be developed by students; and

- (iii) Desirable levels of knowledge, understanding, and skill, to be achieved by students,—

during the years of schooling):

- (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 purposes 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.

Regulations providing for the control, management, organisation, conduct, and administration of schools may be made: section 78 of the Education Act. Regulations made under section 78 prescribing a course of study are not to restrict the method by or manner in which any subject forming part of the course is to be taught, except to the extent necessary to ensure that the teaching of the subject is consistent with the general aims of the course.

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 1st 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 only be used 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 pursuant to 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 payments to secure the enrolment of a pupil in a school for which the proprietors provide the buildings and ensure the special character, and are subject to GST. See *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 for payment of a nominated amount to assist with meeting school costs. These payments are commonly referred to by schools as “fees”. In the case of integrated schools such fees are in addition to attendance dues payable to the proprietors. A Ministry of Education Circular (Circular 1998/25), however, 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, the cost of swimming lessons, fees for performances by visiting drama groups etc. 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 (“the 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). Section 10(2) states:

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 Act reads as follows:

“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 Act

Under section 8(1), 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 consideration and non-monetary consideration): section 10(2). GST is not payable on payments which are not “consideration” as defined in the Act. “Consideration” is widely defined.

Consideration

The statutory definition of “consideration” is wider than the contract law meaning of “consideration”. In *The Trustee, Executors and Agency Co New Zealand Ltd v CIR* (1997) 18 NZTC 13,076 Chisholm J commented in respect of the definition of “consideration” as follows:

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. (p.13,085)

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 Maori Girls’ College Board of Trustees v CIR* (1993) 15 NZTC 10,032. In the *Turakina* case McKay J, referring to the definition, said:

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 *Trustees & Executors* Chisholm J said:

... 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. (p.13,086)

- Although the statutory definition of “consideration” is wider than the contract law meaning, not every payment received by a registered person 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; *Trustees & Executors*. In the *NZ Refining* case Blanchard J said:

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: *C of IR v Databank Systems Ltd*. It is therefore necessary, as Mr Green submitted, to distinguish between supplies and the taxable activity (as defined in section 6) in the course of which they are made. The definition in section 6 itself requires a nexus between a supply and consideration, as does section 10.

The tax itself is levied by section 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 (p.13,193). [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 which 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 made by the Crown to a charitable trust established by the Crown to promote the economic development and well-being of the Chatham Islands and to

promote 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 Enterprise Trust v CIR* (1999) 19 NZTC 15,075.

- The expressions “in respect of, in response to, or for the inducement of” in the definition involve an element of reciprocity: *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147; *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075.
- There can be two separate supplies for GST purposes where performance of services under a contract with one person, is also performance under a separate contract with another person. In *Suzuki New Zealand Ltd v CIR* (2001) 20 NZTC 17,096 the Court of Appeal said:

[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 *Suzuki*, the taxpayer had an obligation to repair defective vehicles under a warranty given by the taxpayer 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 [para 24].

Existing statutory obligation

There have been two GST cases relating to a situation where the parties had statutory rights or obligations outside any contractual relationship there might have been between the parties. These are: *Television New Zealand Ltd v CIR* (1994) 16 NZTC 11,295 and *Case UI* (1999) 19 NZTC 9,001.

The *TVNZ* case concerned payments made by the Maori Affairs Department to the Broadcasting Council (whose assets and liabilities were later vested in TVNZ) for the purpose of a training scheme operated by the

Broadcasting Council (and later TVNZ) for Maori trainees. The taxpayer's argument was that a supply had not been made for the payment because in collaborating with the Maori Affairs Department 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 the Maori people, the employment requirements of the Maori people, and the need for greater involvement of the Maori people 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 that 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: see *Ward v Byham* [1956] 2 All ER 318; *Williams v Williams* [1957] 1 All ER 305. The *TVNZ* case is consistent with that principle. There was reciprocity between the Broadcasting Council and the Maori Affairs Department. Payment would not have been made if the services had not been provided. The Broadcasting Council had discretion as to how it would carry out its statutory obligation to be a good employer. The provision of training services under the agreement with the Maori Affairs Department 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 UI* the taxpayer had granted a lease which provided that the tenant had an obligation to pay rates (in addition to rental). The tenant in *Case UI* 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 has primary liability to pay rates. The issue in *Case UI* was whether the payment of rates formed part of the consideration for the lease. (Hence, the issue considered in *Case UI* was slightly different from the issue considered in the *TVNZ* 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) and 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 upon 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 payment of rates and the lessee had accepted an obligation under the lease to meet the lessor's liability.)

In both cases, the essential issue was whether there was a sufficient relationship between the payment and a supply. The fact that one of the parties has an existing statutory duty is to be considered in that context.

Role of School Boards

In *Maddever v Umawera School Board* [1993] 2 NZLR 478 Williams J discussed the role of school Boards as follows:

The 1989 Act 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 section 75 broad powers to manage schools and the idea of a school charter....

Williams J then referred to section 61 of the Education Act. Williams J went on to say:

It is thus clear that the Act 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 section 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. (p.505)

Williams J noted that the accountability of school Boards was achieved in a number of 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 a number of ways of achieving accountability of Boards, including the obligation to adhere to their school charters (which must incorporate guidelines specified by the Minister for the education services to be provided).

What are education services?

The term “education” is defined in the *Concise Oxford Dictionary* as:

- 1 the act or process of education or being educated; systematic instruction.
- 2 A particular kind of or stage in education (*further education, a classical education*)
- 3
 - a. development of character or mental powers.
 - b. a stage in or aspect of this (*travel will be an education for you*).

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 specify:

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

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

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. Although the Board itself has a significant role (through the preparation of the school’s charter) in determining the aims and objectives of the school and how these are to be achieved, the charter will not take effect if the Secretary of Education determines that it is inconsistent with the Education Act or the national administration guidelines: section 63A. The effect of a school charter is that it is an undertaking by the Board to the Minister to take all reasonable steps to ensure that 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.

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 Education Act 1989.

The Ministry of Education (which is responsible for developing the national education guidelines and the review of school charters) has issued a circular to Boards of Trustees and principals of state and integrated schools on the rights of Boards, parents and students regarding the rights of Boards of Trustees, parents and students regarding requests for donations and other forms of payments in schools: Circular 1998/25.

The Ministry’s views are that:

- No charge can be required for materials used in delivering the curriculum such as photocopying charges, use of musical instruments, use of computer facilities, as 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. Also, 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 can be made for attendance at a school camp which is a compulsory part of the school’s curriculum or which is part of the content of a particular course at the school. The Ministry has stated in the circular that it considers that:

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, biology and outdoor education programmes). The Ministry says:

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 the purchase of a workbook which accompanies a course and in which answers are written, but the circular indicates that where a student chooses to purchase a workbook, a charge may be made. 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 can be made for programmes such as Reading Recovery, English for Speakers of Other Languages, special education services (speech therapy, behaviour or learning difficulties) or music tuition. The circular says 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 made where secondary schools purchase tertiary level courses which they offer to senior students as part of the school programme. However, where the school merely facilitates enrolment in a tertiary course for students, the student would be enrolled only part-time at the school and would be required to pay the fees associated with the tertiary course.
- A charge can be made for in-school activities such as performances by visiting drama groups at which attendance is voluntary.
- Boards are required by the national education guidelines to report on student progress and they are also subject to the Official Information Act 1982 and the Privacy Act 1993. Therefore, Boards are not entitled to withhold items such as reports or leaving certificates to encourage parents to pay school donations or to resolve unpaid debts for services provided by the school.

The Commissioner accepts the views expressed in the circular. The supply of services which 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. Examples of services that are necessary to the supply of education services are as follows:

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

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

There is a distinction between such supplies 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 such as:

- Goods are supplied where there is a take-home component (for example, the supply of stationery or the supply of materials where a student is entitled to ownership of the finished product from practical classes such as woodwork). In such circumstances a school may not insist that the student take ownership of the goods supplied; or
- Attendance at or participation in activities is voluntary; or
- Transport to and from school activities (such as a camp) or food at the camp are supplied.

Whether sufficient relationship between payment and a supply

Grants paid to school Boards by the Crown are deemed to be consideration for a supply. Under section 5(6) of the Goods and Services Tax Act, payments in the nature of a subsidy or grant made by the Crown or any public authority to a person in relation to or in respect of that person's taxable activity are deemed to be consideration for a supply. The Commissioner considers that school Boards also make an actual supply of education services for which the grant received from the Crown is consideration. The definition of "consideration" does not require the supply to be made to the person providing the consideration: *Turakina*.

The supply of education services in terms of the undertaking given to the Minister may be taxed only once, but GST would be chargeable on any separate supply of education services made by the Board to parents: *Case R34* (1994) 16 NZTC 6,190; *Suzuki New Zealand Ltd v CIR* (2001) 20 NZTC 17,096. Payments made by parents or guardians may supplement the grant received from the Government. 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 Enterprise Trust*. The *Turakina* case also confirms that how payments are used does not determine the nature of the supply for the payments. In *Turakina* the court rejected the argument of the taxpayers 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(a) and 3(1)(ka)): see p.10,037.

There is an expectation that amounts paid will be used for the purposes of the school. However, when the supply of education services is not conditional upon payment being made, the payments are not made for any particular purpose and the school Boards do not undertake any obligations in return for payment, the Commissioner considers that there would not be a sufficient relationship between the payment and the supply of education services (or any other services). Refer *Chatham Islands Enterprise Trust*.

Some school Boards may attempt to collect amounts unpaid by withholding items, eg reports, leaving certificates, school magazines, until payment is made. It is possible to argue that although school Boards have an obligation to the Minister 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.

However, the cases emphasise that for a payment to be consideration for a supply, there must be a sufficient relationship between the payment and the supply.

The relationship between the pupils and the school Board is based at least partly on the Education Act: refer *Grant v Victoria University of Wellington* (CP312/96; 13 November 1997; High Court, Wellington). There is a statutory right to free education. School Boards have a corresponding statutory obligation to provide education in state schools free of charge. The Boards are responsible for providing free education in state schools. They cannot contract out of that statutory obligation.

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 is obliged to supply education services free of charge. In the *Chatham Islands* case Tipping J commented:

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: see *Bowmaker Ltd v Tabor* [1941] 2 All ER 72; *Reckitt & Colman (New Zealand) 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: see *Johnson v Moreton* [1978] 3 All ER 37; *Lieberman v Morris* 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 the provision of education free of charge to their pupils.

Parents have the choice of having 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 statutory entitlement is to free enrolment and education in state schools. 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 education access. 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. However, 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 that the transaction is invalid because parties do not have power to enter into a transaction, does not mean that the transaction would not be recognised for GST purposes. In *C & E Commrs v Oliver* [1980] 1 All ER 353 it was held that a taxpayer who dealt in stolen cars had made a supply for VAT purposes, and the fact that the contracts of sale might subsequently become void was not relevant. However, the statutory entitlement to education could not be altered by a representation that education services are conditional on the payment of "fees".

Amounts paid to the Board of Trustees of a state school would not be consideration for the supply of education services even if there was 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 upon payment being made, the payment would be consideration for that supply. If a separate charge is not made for an item such as a school magazine, there will be a case 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

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

- The GST definition of consideration 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 Enterprise Trust*; *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 Enterprise Trust*; *NZ Refining*. The fact that 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 Enterprise Trust*.
- 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 Enterprise Trust*. 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 upon 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 v TBR*; *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, incorporated in every school charter, and by the school's charter. The supply of reports and other information relating to the assessment of students is integral to the supply of education services, and are to 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 which 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 upon payment being made, the payment will be consideration for that supply. Where a separate charge is not made for such an item, apportionment may apply: section 10(18).

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 which the schools must supply in terms of their charters. The issue requires determining which payments made to schools are made for a supply other than the supply of education services (to which there is a statutory entitlement free of charge).

Examples

[It is assumed for the purposes of these 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.

Such payments are not consideration for a supply made 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.

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

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. 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 incidental to the supply of education services. GST is not chargeable on the payment.

However, if a student chooses to purchase a photocopy of an entire item (such as a workbook or a magazine produced by students) which may be retained by students, 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 which are part of the geography curriculum. Students are asked for payment of 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. 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 total 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. GST is chargeable on the payment.

Example 6

A state school asks for payment for stationery and a workbook which students are entitled to retain. The payment is made for the supply of the stationery and the work book and is consideration. 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. GST is chargeable on the payment.

NEW LEGISLATION

WAR PENSIONS AMENDMENT ACT 2003 – MINOR AMENDMENTS TO INCOME TAX ACT 1994 AND CHILD SUPPORT ACT 1991

From 15 April 2003, the War Pensions Amendment Act 2003, enacted on 14 April 2003, transfers the veterans' entitlements provisions from the Social Welfare (Transitional Provisions) Act 1990 to the War Pensions Act 1954. This consolidates the legislation governing veterans' entitlements.

The definitions of "employer", "living alone payment", "portable veteran's pension" and "veteran's pension" in section OB 1 of the Income Tax Act 1994 have been consequentially amended. The new Act has also made consequential amendments to the Child Support Act 1991 to reflect this consolidation and the new office of "Secretary for War Pensions".

LEGAL DECISIONS – CASE NOTES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, the Court of Appeal and the Privy Council.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision. Where possible, we have indicated if an appeal will be forthcoming.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

CIR LOSES CFC CASE

Case: TRA Dec 17/2003
Decision date: 26 June 2003
Act: Income Tax Act 1994
Keywords: Controlled foreign company, bare trust, agency, shares transactions

Summary

The Commissioner was unsuccessful in assessing the taxpayers for gains on share transactions by an agent acting through a holding company ultimately owned by the taxpayers.

Facts

The taxpayers were a husband, wife and daughter. The husband is now dead and the wife suffers Alzheimer's disease.

The taxpayers had interests in an overseas company: AMCE. Through this company, a stockbroker managed three investment portfolios for AMCE (and ultimately the taxpayers). The only instruction to the stockbroker was to generate £600 per month for each taxpayer from the portfolios (£1,800 per month).

The Commissioner assessed the taxpayers for the proceeds of the share activity on the basis it was foreign income (CG1 or section 65(2)(ea) and (eb)), business profits (now section CD3 or section 65(2)(a)) and income from personal property (section CD 4 or section 65(2)(e)).

The taxpayers denied that the income was assessable to them.

Decision

Judge Willy determined there was no taxable income to the taxpayers.

All parties accepted that the taxpayers were not directly within the relevant statutory provisions and Judge Willy describes the issue as "whether the actions of Mr Cloake

[the stockbroker] in transacting the sale and purchase of the family investments in the way he did renders each of them liable as principals for income tax on any gains made on the sale of investments in the years in question." [par 40].

His Honour accepted that AMCE was a bare trustee of the funds for the taxpayers and thus it was correct to treat the taxpayers as the stockbroker's principals [par 74 and 76]. He also accepted that the stockbroker would be the taxpayers' agent in the dealings and thus "it does not assist the objectors to say and prove, as they have, that they had no intention or ability to engage in share trading or to buy investments with a view to resale if that was, in fact, what Mr Cloake was doing within their instructions on their behalf." [par 79]

He considered there was no business activity as "I have found for a fact that none of the objectors was in the business of buying and selling the investments which yield the assessed income tax" [par 88] He noted the only instruction was to earn £600 each which was not characteristic of a business activity. On the facts Judge Willy considered the stockbroker did no more than "maintain the capital of the funds at a level which yielded this sum" [par 93] and the transactions were intended to maintain the capital base.

Judge Willy considered this finding also addressed the issue of whether the taxpayers' were in the business of dealing in shares [par 109].

His Honour also dismissed the Commissioner's reliance on the disposal of personal property acquired by resale. While recognising this test was subjective and it was the stockbroker's mind that was relevant, His Honour concluded that for him to for the purpose of resale on acquisition was outside the scope of his agency [par 119-120]. His Honour dismissed the 118 purchases and 109 sales in the relevant period as irrelevant when each individual transaction had not been examined by the Commissioner [par 125]:

"It may be acceptable to view the portfolios as a whole for the purpose of enquiring whether of share trading existed, or whether the gains were trading profits. It is not acceptable to treat the buying and selling globally for the purposes of the second limb." [par 126]

STANDARD PRACTICE STATEMENTS

These statements describe how the Commissioner will, in practice, exercise a statutory discretion or deal with practical issues arising out of the administration of the Inland Revenue Acts.

WITHDRAWAL OF STANDARD PRACTICE STATEMENT INV-570

Standard Practice Statement IR-SPS INV-570, Shortfall penalties – application where returns are amended before due date, which expired 31 March 2001, is formally withdrawn from 1 August 2003.

Margaret Cotton
National Manager

Technical Standards

WITHDRAWAL OF STANDARD PRACTICE STATEMENT RDC-5

Standard Practice Statement IR-SPS RDC 5 Late Filing Penalty – as published in *Tax Information Bulletin* Volume 11, No 6 (July 1999)

Standard Practice Statement (IR-SPS) RDC 5 is withdrawn from 1 August 2003.

This is due to the length of time this SPS has been in force and that fact that PAYE and ACC reconciliation statements, ACC employer premium statements and ACC residual claims levy statements are no longer required to be filed by taxpayers. This SPS is currently being reviewed and a replacement SPS will be issued in due course.

Margaret Cotton
National Manager

Technical Standards

QUESTIONS WE'VE BEEN ASKED

This section of the *TIB* sets out answers to some inquiries we've received. We publish these as they may be of general interest to readers. A general similarity to items published here will not necessarily lead to the same tax result. Each case should be considered on its own facts.

GOODS AND SERVICES TAX ACT 1985

Trophies and animal products derived from the tourist, hunting and safari industry: zero-rating under GST

Section 11A – Zero-rating of services

Background

Previously the status of some services performed by the taxidermy industry had been considered in a *TIB* article Vol 9, No. 6 (June 1997) titled "Trophies and animal products derived from the tourist, hunting and safari industry: zero-rating under GST". Currently, the article, in regard to the taxidermy industry, states:

INTERPRETATION

Taxidermy fee

The taxidermy fees are chargeable with GST at the standard rate as they do not fall within the zero-rating provisions of the GST Act. While the services are supplied to someone who is outside New Zealand at the time the services are carried out, they are in connection with "moveable personal property situated inside New Zealand at the time the services are performed" and are clearly excluded by section 11(2)(e)(ii).

Section 11 of the Goods and Services Tax Act 1985 has been substituted by sections 11, 11A, and 11B pursuant to section 90(1) of the Taxation (GST and Miscellaneous Provisions) Act 2000 with application on and after 10 October 2000. In particular, section 11A(1)(m) of the Goods and Services Tax Act 1985 has now been inserted into the Act.

Question

We have received a query regarding whether the *TIB* article, as far as the taxidermy industry is concerned, is still correct given the amendments to the GST legislation enacted on 10 October 2000.

The *TIB* article is stated to apply to taxidermists performing the service of processing animal carcasses before they are exported to tourists. We have also been asked whether the *TIB* article applies to all taxidermy arrangements in the taxidermy, hunting, and safari industries.

Legislation

Section 11A(1)(m) of the Goods and Services Tax Act 1985 applies to zero-rate services that are provided directly in connection with goods to which section 11(1)(a) to (e) apply. Section 11A(1)(m) provides:

11A Zero-rated services

(1) A supply of services that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:

...

(m) the services are supplied directly in connection with goods to which any one of section 11(1)(a) to 11(1)(e) applies if supplied to a person who is not resident in New Zealand and who is outside New Zealand at the time the services are performed; of

...

Conclusion

Taxidermy fees are chargeable with GST at a zero rate where they are consistent with the requirements of section 11A(1)(m). That is, the service must be supplied directly in connection with goods to which any one of section 11(1)(a) to 11(1)(e) applies (that is, goods exported, or goods entered or deemed to be entered for export), and the supply must be to a person not resident and outside New Zealand at the time the services are performed. Thus, in respect of the provision of taxidermy services, the *TIB* article is no longer correct due to the change in the legislation.

In relation to non-taxidermy services considered by the *TIB* article, it may also be noted that the title and drafting of the *TIB* article may be considered misleading in that it may suggest to some readers that it applies to all participants in those industries discussed in the item. However the *TIB* article, in respect of these other matters, is only intended to explain the factual scenarios described. Therefore, where a taxpayer's particular facts differ from those described in the *TIB* article different tax consequences may follow.

REGULAR FEATURES

DUE DATES REMINDER

August 2003

5 Employer deductions and employer monthly schedule

Large employers (\$100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*
- *Employer monthly schedule (IR 348) due*

20 Employer deductions

Large employers (\$100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*

Employer deductions and employer monthly schedule

Small employers (less than \$100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*
- *Employer monthly schedule (IR 348) due*

29 GST return and payment due

September 2003

5 Employer deductions and employer monthly schedule

Large employers (\$100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*
- *Employer monthly schedule (IR 348) due*

22 Employer deductions

Large employers (\$100,000 or more PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*

Employer deductions and employer monthly schedule

Small employers (less than \$100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345) or (IR 346) form and payment due*
- *Employer monthly schedule (IR 348) due*

30 GST return and payment due

These dates are taken from Inland Revenue's Smart business tax due date calendar 2003 - 2004

YOUR CHANCE TO COMMENT ON DRAFT TAXATION ITEMS BEFORE THEY ARE FINALISED

This page shows the draft binding rulings, interpretation statements, standard practice statements and other items that we now have available for your review. You can get a copy and give us your comments in these ways.

By post: Tick the drafts you want below, fill in your name and address, and return this page to the address below. We'll send you the drafts by return post. Please send any comments in writing, to the address below. We don't have facilities to deal with your comments by phone or at our other offices.

By internet: Visit www.ird.govt.nz
On the homepage, click on "The Rulings Unit welcomes your comment on drafts of public rulings/interpretation statements before they are finalised . . ." Below the heading "Think about the issues", click on the drafts that interest you. You can return your comments by internet.

Name _____
Address _____

Draft interpretation statement

ED0028: Tax payments – when received in time

Comment deadline

29 August 2003

Draft question we've been asked

QB0023: Disputing or challenging a PAYE determination made under section NC 1(2) of the Income Tax Act 1994

Comment deadline

29 August 2003

Items are not generally available once the comment deadline has passed

No envelope needed—simply fold, tape shut, stamp and post.

**The Manager (Field Liaison)
Adjudication & Rulings
National Office
Inland Revenue Department
PO Box 2198
Wellington**

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