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TAX INFORMATION Bulletin

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Inland Revenue
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YOUR OPPORTUNITY TO COMMENT

Inland Revenue regularly 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 a user of that legislation, is highly valued.

You can find a list of the items we are currently inviting submissions on as well as a list of expired items at **www.taxtechnical.ird.govt.nz** (search keywords: public consultation).

Email your submissions to us at **public.consultation@ird.govt.nz** or post them to:

Public Consultation
Tax Counsel Office
Inland Revenue PO Box 2198
Wellington 6140

You can also subscribe at **www.taxtechnical.ird.govt.nz/subscribe** to receive regular email updates when we publish new draft items for comment.

Ref	Draft type	Title	Comment deadline
PUB00305	Interpretation statement	Tax avoidance and the interpretation of the general anti-avoidance provisions sections BG 1 and GA 1 of the Income Tax Act 2007	18 February 2021
PUB00305 QB 1	Question we've been asked	Income tax: scenarios on tax avoidance – reissue of QB 14/11 scenario 1 and QB 15/11 scenario 2	18 February 2021
PUB00305 QB 2	Question we've been asked	Income tax: scenarios on tax avoidance – reissue of QB 15/11 – scenarios 1 and 3	18 February 2021
IRRUIP15	Issues paper	Income tax – trusts and the Australian–New Zealand Double Tax Agreement	1 March 2021

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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 their tax liability based on it.

For full details of how binding rulings work, see *Binding rulings: How to get certainty on the tax position of your transaction (IR715)*. You can download this publication free from our website at **www.ird.govt.nz**

Withdrawal notice BR Pub 19/01 and BR Pub 19/02

Notice of Withdrawal of Public Ruling BR PUB 19/01

1. This is a notice of withdrawal of a public ruling made under section 91DE of the Tax Administration Act 1994.
2. Public Ruling BR Pub 19/01 *Income Tax – salary and wages paid in crypto-assets* applies from 1 September 2019 until 1 September 2022.
3. Public Ruling BR Pub 19/01 is withdrawn on 28 February 2021.

BR Pub 19/01 is being withdrawn because it referred to some situations that may be contrary to New Zealand's employment law. On withdrawal, the Commissioner will continue to be bound by it for arrangements entered into on or before the withdrawal date until 1 September 2022 (see s 91DE(4A) of the Tax Administration Act 1994).

A new replacement public ruling, BR Pub 21/01 *Income Tax – salary and wages paid in crypto-assets* is being published with effect from 1 March 2021. The replacement ruling will apply to any new arrangements entered into on or after 1 March 2021. The Ruling has been updated to ensure that the arrangement ruled on and its commentary are compliant with employment legislation. The tax treatment set out in the replacement ruling remains the same, so no issues with application should arise. However, Taxpayers may choose whether to apply the new ruling to their existing arrangements, but after 1 September 2022 the new ruling will apply to all arrangements regardless of when they were entered into.

This notice is signed on 11 January 2021.

Susan Price
Group Leader
Public Advice and Guidance
Tax Counsel Office

Notice of Withdrawal of Public Ruling BR PUB 19/02

1. This is a notice of withdrawal of a public ruling made under section 91DE of the Tax Administration Act 1994.
2. Public Ruling BR Pub 19/02 *Income Tax – bonuses paid in crypto-assets* applies from 1 September 2019 until 1 September 2022.
3. Public Ruling BR Pub 19/02 is withdrawn on 28 February 2021.

BR Pub 19/02 is being withdrawn because it referred to some situations that may be contrary to New Zealand's employment law. On withdrawal, the Commissioner will continue to be bound by it for arrangements entered into on or before the withdrawal date until 1 September 2022 (see s 91DE(4A) of the Tax Administration Act 1994).

A new replacement public ruling, BR Pub 21/02 *Income Tax – bonuses paid in crypto-assets* is being published with effect from 1 March 2021. The replacement ruling will apply to any new arrangements entered into on or after 1 March 2021. The Ruling has been updated to ensure that the arrangement ruled on and its commentary are compliant with employment legislation. The tax treatment set out in the replacement ruling remains the same, so no issues with application should arise. However, Taxpayers may choose whether to apply the new ruling to their existing arrangements, but after 1 September 2022 the new ruling will apply to all arrangements regardless of when they were entered into.

This notice is signed on 11 January 2021.

Susan Price
Group Leader
Public Advice and Guidance
Tax Counsel Office

BR Prd 20/05: Stride Property Limited and Stride Investment Management Ltd

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

Name of persons who applied for the Ruling

This Ruling has been applied for by:

- Stride Property Limited (IRD No: 085-323-229)
- Stride Investment Management Ltd (IRD No: 118-951-239)

Taxation Laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of s CD 4.

The Arrangement to which this Ruling applies

1) The Arrangement is a share placement to new and existing institutional investors (Share Placement), undertaken in accordance with NZX Listing Rule 4.5, and a share purchase plan (SPP) to all existing New Zealand shareholders in Stride Property Limited (SPL) and Stride Investment Management Limited (SIML), the shares in each company being stapled to the other and traded on the NZX as one security under ticker SPG, as part of a capital raising by each of them.
2) Further details of the Arrangement are set out in the paragraphs below.

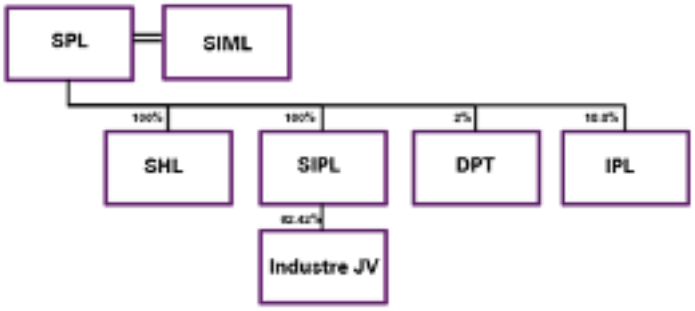
Background

3) SPL is:
   - an NZX-listed property investment company; and
   - a listed PIE for tax purposes.
4) SPL owns office, retail and industrial properties, directly and indirectly through its subsidiaries (discussed below). Its investment property portfolio (both directly held and indirectly held through its interest in its subsidiaries and associates) has a value of $996.1 million as at 31 March 2020.

Current structure

5) SPL owns properties directly and indirectly through its wholly-owned subsidiaries, Stride Holdings Limited (SHL) and Stride Industrial Property Limited (SIPL). SHL is a land investment company. SIPL is an entity that has an approximate 62% interest in a joint venture (Industre JV) which holds industrial properties.
6) SIML is Stride Property Group's real estate investment management business.
7) SPL and SIML are separate legal entities (companies) and are treated as separate taxpayers for New Zealand tax purposes. However, the shares in each are stapled to the other and a share in SPL cannot be issued, sold, or transferred without the issue, sale, or transfer of a share in SIML (and vice versa). For all intents and purposes, the shares can only be traded/transacted as a single security.

8) The current structure is:



Key
SPL: Stride Property Limited
SIML: Stride Investment Management Limited
SHL: Stride Holdings Limited
SIPL: Stride Industrial Property Limited
DPT: Diversified NZ Property Trust
IPL: Investore Property Limited

Proposed capital raising

9) SPL is seeking to acquire a commercial property asset.

10) To fund the acquisition, SPL (and SIML as a stapled entity) will undertake the Share Placement to invited institutional investors, together with a retail offer under the SPP to eligible shareholders. Under the SPP, eligible shareholders will be able to apply for shares up to a maximum value of NZ$50,000 (subject to scaling depending on the number of applications).

11) The quantum of the capital raising is yet to be determined but is likely to total approximately $220 million, comprising approximately $180 million by way of Share Placement and $40 million by way of SPP, although the final split is to be confirmed. The majority of the net proceeds will be raised by SPL and the remainder by SIML.

12) A capital raise undertaken by SPL requires an equal issue of shares in SIML, as the shares are stapled and vice versa (that is, a capital raise undertaken by SIML will necessitate an equal issue of shares in SPL). Accordingly, shares will be issued by the two entities. The majority (approximately 97%) of the funds will be received by SPL.

13) Under the capital raising, shares will be offered to two classes of person:

- Persons who are not existing shareholders in SPL and SIML via the Share Placement; and
- Persons who are existing shareholders in SPL and SIML, via the Share Placement or and/the SPP.

Mechanics of the placement and share offer to existing shareholders

Share Placement

14) The Share Placement will comprise an offer of shares to invited shareholders and new investors located in New Zealand and certain offshore jurisdictions (Invited Investors).

15) The placement price will be set through a bookbuild process during the course of the day of launch, with an underwritten floor price (which is set on the evening before the bookbuild). The floor price will likely represent a discount to the last close, on the day of trading prior to launch and a discount to the volume weighted average price for Stride Property Group's (SPG) shares over the preceding five business days. Any shares not taken up in the placement will be underwritten by Goldman Sachs New Zealand Limited at the underwritten floor price, pursuant to the terms of a placement agreement that will be entered into with Stride Property Group immediately before the Share Placement is announced.

SPP

16) The SPP will be offered to all eligible shareholders. An eligible shareholder is a person who is an existing shareholder in the share register at 5pm on the record date having a registered address in New Zealand, unless that person holds shares on behalf of another person who resides outside New Zealand (Eligible Existing Shareholder). The record date is the cut-off date set by SPL / SIML, in accordance with NZX Listing Rules, to determine which of the existing shareholders are eligible to participate in the SPP.

17) Under the SPP, each Eligible Existing Shareholder has the right to apply for the same dollar amount of new shares in SPL and SIML on the same terms and conditions as each other Eligible Existing Shareholder (Subscription Right).

18) While the total amount that each Existing Eligible Shareholder can apply for has yet to be determined, it is likely to be $50,000 worth of shares for each shareholder. The issue price under the SPP will be the lower of:

- the price paid by investors in the Share Placement; and
- the price that is a 2.5% discount to the volume weighted average price for SPG shares traded on the NZX Main Board over the five business days prior to and including the closing date of the SPP offer.

19) The SPP will be structured to be as fair as possible to all existing shareholders, and will enable the majority of shareholders to participate through either the placement or the SPP (except where restricted due to legal constraints), and should scaling be required, it will be by reference to existing shareholdings.

20) The SPP is not underwritten.

21) The offer made under the SPP to an Eligible Existing Shareholder is personal to the shareholder and the shareholder cannot transfer their right to purchase new shares under the SPP to anyone else.

22) Under the SPP and Subscription Right, an Existing Eligible Shareholder has no right to dispose of the shares issued (under the SPP) to the Existing Eligible Shareholder to SPL / SIML.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

(a) Shares issued by SIML to Invited Investors under the Share Placement will not give rise to a dividend under s CD 4.

(b) Section CD 29B(1) will apply to the issue by SIML of the Subscription Right, under the SPP, to Eligible Existing Shareholders and the issue of that right will not be a dividend.

(c) Section CD 29B(2) will apply to the issue by SIML to Eligible Existing Shareholders, under the SPP, of SIML shares and the issue of the shares will not be a dividend.

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 24 November 2020 and ending on 31 March 2021.

This Ruling is signed by me on the 24th day of November 2020.

Howard Davis
Group Leader, Tax Counsel Office

BR Prd 20/06: Woolworths New Zealand Limited, trading as Countdown

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

Name of person who applied for the Ruling

This Ruling has been applied for by Woolworths New Zealand Limited, trading as Countdown.

Taxation Laws

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of sections LD 1 and LD 3.

The Arrangement to which this Ruling applies

The Arrangement is Countdown's Onecard Donate to Charity Programme.

The Onecard Donate to Charity Programme:

- Is part of Countdown's Onecard Loyalty Programme, under which customers who hold a Onecard (Onecard Holders) are allocated Onecard Points (which are calculated by reference to amounts spent) that can be converted into a Onecard e-voucher when a specified number of Onecard Points have been allocated.
- Allows Onecard Holders to redeem Onecard e-vouchers for money for the sole purpose of enabling Onecard Holders to donate that money to participating charities (Participating Charities) by directing Countdown, as agent for the Onecard Holders, to pay the money to the Participating Charities.
- Requires Countdown, as agent for the Participating Charities, to generate and send donation receipts to Onecard Holders who have made donations to Participating Charities.
- Requires that for a charity to be a Participating Charity it must:
  - be:
    - on the list published by the Commissioner under section 41A(14) to (16) of the Tax Administration Act 1994; or
    - a community housing entity, provided that the entity is eligible to derive exempt income under section CW 42B; or
    - a Board of Trustees that is constituted under Part 9 of the Education Act 1989 and is not carried on for the private pecuniary profit of any individual; or
    - listed in Schedule 32; and
  - have entered into a Donation Agreement with Countdown and be identified on Countdown's website as a Participating Charity.

Further details of the Arrangement are set out in the paragraphs below.

Countdown

1) Woolworths New Zealand Limited owns and operates supermarkets throughout New Zealand. It trades under the name "Countdown".

Onecard Loyalty Programme

2) Countdown operates the Onecard Loyalty Programme.

3) Countdown uses a loyalty management software program to operate the Onecard Loyalty Programme. This program provides for (amongst other functions):
   - establishing Onecard Accounts in the names of Onecard Holders;
   - recording Onecard Points to Onecard Accounts based on the amount spent by Onecard Holders;
   - allocating Onecard e-vouchers, with designated monetary values, to the Onecard Accounts of Onecard Holders;
   - crediting Onecard Accounts with the designated monetary values of Onecard e-vouchers; and
   - crediting the designated monetary value of Onecard e-vouchers against the purchase price of goods and services purchased by Onecard Holders on the redemption of Onecard e-vouchers.

4) Countdown and Onecard Holders are legally bound by the Onecard Terms and Conditions, which are published on Countdown's website – **www.countdown.co.nz** (Website).

5) A Countdown customer becomes a Onecard Holder by collecting a Onecard from a Countdown store and registering the card by completing an online registration form on the Website. On registration, Countdown establishes a Onecard Account in the name of the Onecard Holder and the Onecard, which has a unique identification number, is linked to the Onecard Account. Onecard Holders can manage their Onecard Accounts on the Website. A Countdown Customer must be 18 years of age or older to be registered as a Onecard Holder.

6) Under the Onecard Loyalty Programme, Onecard Holders:

- receive Reward Currencies, in the form of either Onecard Points or AA Smartfuel Discounts; and
- benefit from exclusive Onecard club prices; and
- have the opportunity to enter competitions that are only open to Onecard Holders.

7) Onecard Points are separate to AA Smartfuel Discounts.

8) To be eligible to participate in the full Onecard Loyalty Programme, a Onecard Holder must be an individual (a natural person) resident in New Zealand.

9) An individual who purchases goods and services in trade may earn Reward Currencies, but they are not eligible to earn any additional or bonus Reward Currencies made available as part of any bonus Reward Currencies promotion.

10) Non-residents may apply for and use a limited functionality Onecard, which allows them to only earn AA Smartfuel Discounts.

11) Onecard Holders receive one (1) Onecard Point for every dollar (including GST) spent in a single transaction. Countdown reserves the right to change the minimum spend and / or amend the number of Onecard Points awarded in respect of the minimum spend amount.

12) Onecard Holders may also receive Onecard Points through bonus reward promotions, which may be subject to additional terms and conditions.

13) A Onecard Holder's Onecard Account records the number of Onecard Points that have been allocated to the Onecard Holder.

14) Onecard Points earned prior to 23:59 on 11 October 2020 expire 6 months after they have been recorded to a Onecard Account. Onecard Points earned from 00:01 on 12 October 2020 expire 12 months after they have been recorded to a Onecard Account.

15) Under the Onecard Terms and Conditions, Countdown has the right to terminate the Onecard Loyalty Programme for any reason. In the event of termination, Countdown will endeavour to give Onecard Holders reasonable notice of termination and information on how termination will affect them.

Conversion of Onecard Points to Onecard e-vouchers

16) When a Onecard Holder has received a specified number of Onecard Points, which may change from time to time, the Onecard Holder will (subject to certain exceptions) receive a Onecard e-voucher with a designated monetary value. Each Onecard e-voucher has a unique identification number. For illustrative purposes only, the operative conversion requirements may provide that a Onecard Holder will be allocated one (1) Onecard e-voucher for every 2000 Onecard Points allocated to the Onecard Holder.

17) When a Onecard e-voucher is received by a Onecard Holder, the Onecard loyalty management software program:

- allocates the Onecard e-voucher to the Onecard Holder's Onecard Account; and
- credits the designated monetary value of the Onecard e-voucher to the Onecard Holder's Onecard Account.

18) A Onecard Holder can direct Countdown, via the Website or by phone, to allocate a Onecard e-voucher:

- automatically to a nominated Onecard on receipt of the specified number of Onecard Points; or
- to a nominated Onecard on a specified future date (for example, on 1 December so that the e-voucher is available for use at Christmas); or
- to the Donate to Charity Programme (in accordance with the terms applicable to the programme as set out in the Onecard Terms and Conditions and as described below).

19) Onecard e-vouchers are not transferrable and are valid for 12 months from the date of issue.

20) A Onecard e-voucher allocated to a Onecard:
- does not convert into cash (other than as provided for under the Donate to Charity Programme) or into gift vouchers or Lotto products; and
- cannot be used to pay for certain products where the purchase of those products using a Onecard e-voucher would be unlawful; and
- can be used only once to purchase goods (in-store and on-line) and / or services (in-store only); and
- is credited against the purchase price of goods (purchased in-store or on-line) or services (purchased in-store only).

21) No change is given to a Onecard Holder who uses a Onecard e-voucher to purchase goods and or services where the purchase price is less than the designated monetary value of the Onecard e-voucher.

22) Onecard Holders cannot have more than $4,500 worth of e-vouchers in their Onecard Account. If a Onecard Holder has more than $4,500 worth of e-vouchers, they will be asked by Countdown to redeem e-vouchers (in multiples of $15) against their purchase of goods until their account balance is under $4,500.

Onecard Donate to Charity Programme

23) Under the Onecard Donate to Charity Programme (as provided for by the Onecard Terms and Conditions):
- A Onecard Holder appoints Countdown to act as the Onecard Holder's agent for the purpose of making a payment of money, as a donation, by the Onecard Holder to a Participating Charity selected by the Onecard Holder (Specified Participating Charity).
- The Onecard Holder directs Countdown, as agent for the Onecard Holder, to pay an amount of money equal to the designated monetary value of one or more Onecard e-vouchers credited to the Onecard Holder's Onecard Account, as a donation, to the Specified Participating Charity.
- On receiving a donate to charity direction from a Onecard Holder (such direction being irrevocable), Countdown will:
  - redeem the Onecard e-voucher(s) and convert the voucher(s) to an amount of money, equal to the designated monetary value of the voucher(s), that it holds in its General Distributors Account;
  - pay that amount of money into a non-interest-bearing bank account established by Countdown for the sole purpose of the Donate to Charity Programme (Donate to Charity Account);
  - debit the Onecard Holder's Onecard Account by the designated monetary value of the e-voucher(s);
  - record in the Onecard Holder's Onecard Account that the Onecard Holder has donated an amount equal to the designated monetary value of the e-voucher(s) to the Specified Participating Charity;
  - hold the money in the Donate to Charity Account (together with other money that Countdown holds on behalf of other Onecard Holders who are making a donation to a Participating Charity);
  - pay, as the Onecard Holder's agent, the money to the Specified Participating Charity selected by the Onecard Holder; and
  - following payment to the Specified Participating Charity, create a receipt for the donation, as agent for the Specified Participating Charity, and email the receipt to the Onecard Holder.

24) The Donate to Charity Account:
- Will be used by Countdown solely for the purpose of the Donate to Charity Programme and Countdown will:
  - have no beneficial interest in, nor legal or equitable claim to, the money in the account; and
  - only pay money from the account to Specified Participating Charities in accordance with the directions received from Onecard Holders.
  - Will not be part of the Woolworths New Zealand Group's set-off arrangements with its banker(s).

25) In the event a Onecard Holder has provided a donate to charity direction to Countdown and the Onecard Loyalty Programme is terminated before Countdown, as agent for the Onecard holder, has paid the money to the bank account of the Specified Participating Charity, Countdown will make the payment to the Specified Participating Charity notwithstanding the termination of the Onecard Programme.

Countdown's Donation Agreement with Participating Charities

26) Countdown and Participating Charities enter into an agreement that sets out their respective rights and obligations in relation to the Donate to Charity Programme (Donation Agreement).

27) The Donation Agreement provides that where a Onecard Holder has directed Countdown to convert a Onecard e-voucher to money and pay that money to a Participating Charity, Countdown will:

- pay, as agent for the Onecard Holder, the money to the Participating Charity's designated bank account; and
- following its payment of the money to the Specified Participating Charity:
  - create a receipt for the donation, as agent for the Participating Charity, using the information provided by the Participating Charity; and
  - send that receipt by email to the Onecard Holder.

28) The Donation Agreement also provides (amongst other matters) that:

- If a Specified Participating Charity ceases to:
  - be registered as a charity on the New Zealand Charities Register; or
  - meet the requirements of a "donee organisation" as specified in s LD 3(2) of the Income Tax Act 2007;

  the Specified Participating Charity will immediately notify Countdown and Countdown will immediately suspend or remove the Participating Charity from the Donate to Charity Programme.
- A Participating Charity will not provide any material benefit or advantage to a Onecard Holder, or to anyone related to or associated with the Onecard Holder, in consideration for the donation made by the Onecard Holder to the Participating Charity.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

(a) A Onecard Holder must be:

- a natural person; and
- resident in Zealand, under s YD 1, during any part of the tax year in which the "charitable or other public benefit gift" is made.

(b) The Onecard Holder is not a trustee liable for income tax under subparts HC or HZ.

(c) The Amount must be $5 or more.

(d) A Specified Participating Charity must satisfy the requirements specified in sections LD 3(2) and LD 3(3).

(e) A Specified Participating Charity must not provide any material benefit or advantage to the Onecard Holder, or to anyone associated with or related to the Onecard Holder, in consideration for the Onecard Holder's charitable or other public benefit gift to the Specified Participating Charity.

(f) A Specified Participating Charity cannot be placed under a material obligation by Countdown, or by a Onecard Holder, to do or provide anything in return for the Onecard Holder's charitable or other public benefit gift to the Specified Participating Charity.

How the Taxation Laws apply to the Arrangement

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

(a) The payment of an amount of money (Amount) by Countdown to the Donate to Charity Account that results from Countdown's:

(i) receipt of a donate to charity direction from a Onecard Holder in relation to a Onecard e-voucher allocated to the Onecard Holder; and

(ii) conversion of the Onecard e-voucher into the Amount;

will be, for the purposes of s LD 1 and s LD 3, a "charitable or other public benefit gift" by the Onecard Holder to the Specified Participating Charity specified by the Onecard Holder in the donate to charity direction.

(b) Provided the Onecard Holder meets the requirements specified in s 41A of the Tax Administration Act 1994, the Onecard Holder will have, under s LD 1(2), a tax credit, for the tax year in which the "charitable or other public benefit gift" is paid equal to:

the Amount × 33⅓%

The period or income year for which this Ruling applies

This Ruling will apply for the period beginning on 25 November 2020 and ending on 31 December 2023.

This Ruling is signed by me on 25 November 2020.

Howard Davis
Group Leader, Tax Counsel Office

BR Pub 21/01: Income tax – salary and wages paid in crypto-assets

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

Taxation Law

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of s RD 3.

The Arrangement to which this Ruling applies

The Arrangement is the payment of remuneration to an employee in crypto-assets in circumstances where the crypto-asset payments:

- are for services performed by the employee under an employment agreement;
- are for a fixed amount; and
- are part of the employee's remuneration package.

This Ruling applies only to salary and wage earners, not self-employed taxpayers; and where the crypto-assets being paid:

- are not subject to a "lock-up" period;
- can be converted directly into a fiat currency (on an exchange); and either:
  - a significant purpose of the crypto-asset is to function like a currency; or
  - the value of the crypto-asset is pegged to one or more fiat currencies.

This Ruling does not apply where the crypto-asset provided is a "share" for income tax purposes and is received under an "employee share scheme" as defined in s CE 7.

How the Taxation Law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- The crypto-asset payments are "PAYE income payments" under s RD 3 and are subject to the PAYE rules.

The period or tax year for which this Ruling applies

This Ruling will apply from 1 March 2021 until 1 December 2022.

This Ruling is signed by me on 11th January 2021.

Susan Price
Group Leader
Public Advice and Guidance
Tax Counsel Office

COMMENTARY ON PUBLIC RULING BR PUB 21/01

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 21/01 ("the Ruling").

Legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this commentary.

Summary

1. This Ruling amends and replaces a previous Ruling (BR PUB 19/01) which considered the income tax treatment of crypto-assets received by employees as part of their regular remuneration. The income tax treatment in that Ruling is still correct. However, the Commissioner is aware that some aspects of the arrangement ruled on and its commentary may be inconsistent with employment law (including, relevantly, the Wages Protection Act 1983 and the Minimum Wage Act 1983).
2. The commentary discusses when crypto-assets will be treated as part of an employee's salary or wages (for tax purposes) and, therefore, be subject to PAYE. It also discusses the implications arising from crypto-asset payments being subject to PAYE (such as potentially affecting an employee's student loan repayments, Kiwisaver, and Working for Families entitlements). Payments of crypto-assets not subject to PAYE will be fringe benefits and subject to FBT.

Background

3. The crypto-asset industry is still evolving and there is currently no standard terminology used. The Ruling uses the term "crypto-asset" to cover digital assets that use cryptography and blockchain technology to regulate their generation and verify transfers.[1]
4. It is becoming more common for employees (particularly those working in crypto-asset-related industries) to receive remuneration in crypto-assets. The Commissioner has been asked to provide guidance on how remuneration paid in crypto-assets is taxed. This Ruling sets out the Commissioner's view on the situation where an employee is regularly paid part of their remuneration in crypto-assets.
5. The Commissioner's initial views on this issue were set out in issues paper IRRUIP 11: "Whether remuneration paid to an employee in cryptocurrency is subject to PAYE or FBT", which was released for consultation in June 2018. The submissions received were taken into account in drafting this Ruling and also the related Rulings; BR PUB 19/03: Income Tax – Employer issued crypto-assets provided to an employee, BR PUB 19/04: Income Tax – Application of the employee share scheme rules to employer issued crypto-assets provided to an employee and BR PUB 21/02: Income Tax – Bonuses paid in crypto-assets.

Application of the legislation

Introduction

6. An agreement to pay an employee in crypto-assets could be structured in two ways. The first way is as an agreed deduction from the employee's gross salary or wages (where the employee's after-tax remuneration is, in effect, being traded for a payment of crypto-assets).[2] It is well-settled law that the employee is subject to PAYE on the full amount in this situation.
7. The second way is as a reduction in calculating the employee's gross salary or wages (also known as a salary sacrifice), where the crypto-assets are paid as part of an overall remuneration package. The following analysis considers how the provision of crypto-assets will be treated when a salary sacrifice arrangement is valid, in particular, whether PAYE or FBT applies.

Whether crypto-assets received under a valid salary sacrifice are subject to PAYE or FBT

8. The first step is to consider whether the payment is subject to PAYE. This is because, to the extent that an employment-related benefit is taxable to an employee, it will not be a fringe benefit (s CX 4). Therefore, if the provision of crypto-assets to an employee falls within the PAYE rules, PAYE will apply even if the FBT rules would also otherwise apply.
9. Section CE 1 sets out the "amounts" that are treated as employment income. Relevantly, these include "salary or wages":

> **CE 1 Amounts derived in connection with employment**
>
> *Income*
>
> (1) The following amounts derived by a person in connection with their employment or service are income of the person:
>
> (a) **salary or wages** or an allowance, bonus, extra pay, or gratuity:
>
> (b) expenditure on account of an employee that is expenditure on account of the person:

[1] These are sometimes referred to by other terms including "cryptocurrencies" and "tokens".

[2] The leading case on when a salary sacrifice will be valid is *Heaton v Bell* [1970] AC 728. See also *Watts v MNR* 61 DTC 592, *Co-operative Insurance Society Ltd v Commissioners of Customs and Excise* (1992) VATTR 44, and *Goodfellow v The Commissioners* (1986) VATTR 119.

(bb) the value of accommodation referred to in sections CE 1B to CE 1E:

(c) *[Repealed]*

(d) a benefit received under a share purchase agreement:

(e) directors' fees:

(f) compensation for loss of employment or service:

(g) any other benefit in money.

[Emphasis added]

10. The situation being considered is an employee receiving part of their regular remuneration in crypto-assets. Therefore, the potentially relevant part of s CE 1 is "salary or wages".[3]

11. It could be argued that the reference in paragraph (g) of s CE 1 to "any other benefit in money" supports the view that the paragraphs that come before it were intended to be limited to benefits in money. However, the fact s CE 1(1) includes benefits that are not in money (for example, the value of employer-provided accommodation) could suggest that this is not the case.

12. Also, "amount" "includes an amount in money's worth" (s YA 1). Therefore, s CE 1 is drafted widely enough to include amounts derived that are "money's worth" (but not money). However, for crypto-assets (which are money's worth) to be included, they must also be "salary or wages".

Meaning of "salary" and "wages"

13. "Salary or wages" is defined in s RD 5 for the purposes of the PAYE rules:

RD 5 Salary or wages

Meaning

(1) Salary or wages—

(a) means a payment of salary, wages, or allowances made to a person in connection with their employment; and

(b) includes—

(i) a bonus, commission, gratuity, overtime pay, or other pay of any kind; and

....

14. Neither "salary" nor "wages" is further defined in the Act, so it is necessary to consider their ordinary meanings. "Salary" is relevantly defined in the *Concise Oxford English Dictionary* (Oxford University Press, 12th ed, 2011) as:

> a fixed regular payment made usually on a monthly basis by an employer to an employee, especially a professional or white-collar worker.

15. "Wage" is similarly defined as:

> a fixed regular payment for work, typically paid on a daily or weekly basis.

16. *Deputy Commissioner of Taxation v Applied Design Development Pty Ltd (in liq)* 2002 ATC 4,193 considered the ordinary meaning of "salary" and "wage". Mansfield J defined the terms in the following way (at 4,195):

> Of particular importance in the present application is the absence of statutory definitions of the words "salary" or "wage". In the absence of statutory definitions, meaning should be given to those words according to the ordinary meaning conveyed by the text of the provision, and taking into account their context in the legislative scheme and the objects of the Act. The words "salary" and "wage" denote an amount of money payable, the consideration for which is the performance of work or services. That meaning is reflected in the definitions provided for the terms in the Oxford English Dictionary, 2nd ed:
>
> Salary: fixed payment made periodically to a person as compensation for regular work.
>
> Wage: a payment to a person for services rendered.
>
> I adopt those definitions in the determination of these proceedings.

17. The hallmarks of salary and wages were also discussed in a case on the meaning of "allowance". In *Stagg v IRC* [1959] NZLR 1252 the Supreme Court referred to the ordinary meaning of an allowance as "sums of money". The provision in question read:

> All salaries, wages or allowances (whether in cash or otherwise) including all sums received or receivable by way of bonus, gratuity, extra salary, or emolument of any kind, in respect of or in relation to the employment of the taxpayer.

[3] Inland Revenue's view is that crypto-assets are not "money" (see [21] for further discussion of this). Therefore, s CE 1(1)(g) is not relevant in this case.

18. Hutchison ACJ held that the normal meaning of "allowances" was coloured by the words "salary" and "wages" and was to be read consistently with, or in light of, those words. His Honour considered that the characteristics of salaries that have bearing on the meaning of "allowances" were that they are:
    - for an employment or service;
    - payable under the contract of service and not as a gratuity (although this factor was affected by the later part of the paragraph that included some gratuities within "salaries, wages, or allowances");
    - paid in money (although this factor was affected by the words "whether in cash or otherwise", which meant non-cash allowances could be paid if they were convertible); and
    - paid periodically.
19. In summary, this suggests salary and wages are generally considered to be payments that are:
    - in return for work undertaken;
    - fixed, ie of a predetermined amount or rate (not, for example, a share of profits);
    - regular, ie recurring on a regular basis (usually weekly, fortnightly or monthly); and
    - in money.
20. Where an employee has agreed to receive crypto-assets as part of a remuneration package, most of these requirements would be met (for tax purposes). The payments would be fixed, regular amounts received in return for work undertaken. Crypto-assets can also have many of the characteristics of money; for example, the types of crypto-assets covered by this Ruling are readily transferable mediums of exchange, divisible, fungible, durable and hard to counterfeit.
21. In the Commissioner's view, crypto-assets are property. Crypto-assets are not "money" as commonly understood (at least not at the present time). In particular, because crypto-assets are not issued by any government, they are not legal tender anywhere. Further, although acceptance of certain crypto-assets as payment for goods and services is increasing, they are not "generally accepted" as payment. Given the extreme volatility experienced to date, there are also issues around some crypto-assets' ability to be a store of value.

Interpretation Act 1999

22. Notwithstanding that crypto-assets are not "money" in the technical sense, it remains to be considered whether the terms "salary" and "wages" in s CE 1 are wide enough to include payments in crypto-assets. Clearly, at the time "salary" and "wages" were first referred to in the Income Tax Act, Parliament would not have contemplated payments of crypto-assets being within the scope of salary and wages as crypto-assets did not exist.
23. However, s 6 of the Interpretation Act 1999[4] provides for an ambulatory approach to statutory interpretation:

    > an enactment applies to circumstances as they arise.

24. This requires old legislation to be interpreted as applying to modern circumstances, that is, the:[5]
    - new developments to which the Act is to be applied are within the mischief that the Act was meant to cure; and
    - words of the Act, albeit by liberal interpretation, are capable of covering these new developments.
25. Or, put another way:[6]

    > The Court's task in deciding such cases is to remain faithful to the original Parliamentary intent, yet to produce a result that is workable in the different world of today.

26. This interpretive approach has been used where technological developments or changes in the way society views something have made old legislation outdated. For example, in *R v Walsh* [2007] 1 NZLR 738, the Court of Appeal applied s 6 of the Interpretation Act 1999 to interpret the meaning of "false document" taking into account the digital age.[7] In *R v Misic* [2001] 3 NZLR 1 the Court of Appeal held that a computer program and disk were documents for the purposes of s 229A of the Crimes Act 1961.
27. Originally, the concept of salary and wages would have been limited to payments in physical notes and coins. Later, payment may have been made by cheque. Now payment is likely to be made by direct credit to an employee's bank account. As such, the concept of salary and wages has shifted over time with different payment methods. Crypto-assets and the blockchain on which they are based have been around since 2009. Crypto-assets have become more widely used in recent times.

[4] Section 6 replaced s 5(d) of the Acts Interpretation Act 1924.

[5] J Burrows and J Fogerty (presenters) "Statutory Interpretation" (New Zealand Law Society seminar, 2011).

[6] Bigwood, R (ed) *The Statute Making and Meaning* (LexisNexis, 2004).

[7] The Supreme Court (*R v Walsh* [2007] 2 NZLR 109) later held that such an interpretation was not necessary.

28. The question is whether the ordinary meanings of "salary" and "wages" for tax purposes are now wide enough to encompass payments in crypto-assets. Unlike the moves from physical notes and coins to cheques to direct credit (which are all payments of money), the shift to paying in crypto-assets is a more significant one. However, this does not prevent s 6 of the Interpretation Act applying. There is nothing in the Income Tax Act that limits the interpretation of salary and wages to monetary payments. Rather the ordinary meanings apply, and these can change over time. The Commissioner's view is that the meanings of "salary" and "wages" for tax purposes are capable of including payments in crypto-assets. However, employers should be aware of employment legislation, and in particular the Minimum Wage Act 1983 and the Wages Protection Act 1983.

PAYE generally applies only to monetary benefits

29. The alternative view is "salary" and "wages" should be interpreted narrowly and, consequently, PAYE will not apply. If a payment of crypto-assets was not subject to PAYE, it would be a fringe benefit and subject to FBT[8].

30. The primary argument for FBT applying is that the scheme of the Income Tax Act suggests that payments in money are subject to PAYE and non-monetary payments are subject to FBT (except where specifically provided for). The PAYE rules apply to "PAYE income payments", which for employees is defined as a payment of "salary or wages" or an "extra pay". "Salary or wages" is defined in s RD 5. Most of the items listed are payments that would generally be expected to be made in money. These include salary, wages, allowances, bonuses, commissions, gratuities, and various benefit, grant and compensation payments. However, employer-provided accommodation under s CE 1(1)(bb) is also expressly included.

31. Similarly, "extra pay" is defined in relation to payments that would generally be made in money. However, it also includes a benefit under certain share purchase agreements.

32. It can be seen from this that the Act broadly distinguishes between monetary and non-monetary payments to employees with the former being subject to PAYE and the latter to FBT. The reference in s CE 1(1)(g) to "any other benefit in money" is also consistent with this. However, this distinction is not absolute, with some non-monetary benefits being included in the PAYE rules. It is less clear whether non-monetary benefits that are not expressly included could also be subject to PAYE.

Section RD 6

33. Section RD 6 seems to contemplate other non-monetary benefits being subject to the PAYE rules. It provides timing and valuation rules for non-monetary benefits. Relevantly, it applies to:

> **RD 6 Certain benefits and payments**
>
> *When this section applies*
>
> (1) This section applies when an employee receives—
>
> (a) a benefit treated as income under section CE 1(1)(bb) (Amounts derived in connection with employment); or
>
> **(b) another benefit in kind that is included in their salary or wages; or**
>
> (c) 1 or more of the following payments:
>
> (i) a superannuation payment:
>
> (ii) a pension:
>
> (iii) a retiring or other allowance:
>
> (iv) an annuity; or
>
> (d) a benefit under section CE 2(2) and (4) (Value and timing of benefits under share purchase agreements) in relation to which the employer has made an election under section RD 7B. [Emphasis added]

34. As well as including the specific non-monetary benefits (employer-provided accommodation and benefits under share purchase schemes) s RD 6 also provides for other benefits in kind that are included in an employee's salary or wages. This suggests there may be other situations where non-monetary benefits are included in an employee's salary and wages for PAYE purposes. However, it is not clear when this will be the case.

35. The original predecessor to s RD 6 (s 9 of the Income Tax Assessment Act 1957) was introduced at the same time as the PAYE rules. The wording of the original subsection was:

> **9 Benefits and superannuation and other payments deemed to be salary and wages—**
>
> (1) Where in respect of his employment an employee receives a benefit referred to in section eighty-nine of the principal Act[9], **or any other benefit in kind which is included in his salary or wages**, or receives a payment by way of superannuation, pension, retiring allowance, or other allowance, or annuity which is included in salary or wages as defined in section two of this Act, the

[8] A crypto-asset payment would satisfy the definition of "fringe benefit" in s CX 2 and not fall within any of the exemptions in subpart CX.

[9] Section 89 of the Land and Income Tax Act 1954 included in "assessable income" the value of any employer-provided board, lodging and house allowances.

> value of the benefit (whether in money or otherwise) or, as the case may be, the amount of the payment shall be deemed to accrue from day to day, and accordingly in each case the amount so accrued for any days in a pay period of the employee shall be deemed to be his salary or wages for the pay period, or, as the case may be, part of his salary or wages for the pay period. [Footnote and emphasis added]

"Salary or wages" was relevantly defined as meaning "salary, wages, or allowances (whether in cash or otherwise)". Consistent with the current legislation, the value of accommodation was also included in the definition. The wording has remained broadly similar through to the Income Tax Act 2007.

36. There is limited contemporaneous material discussing what "other benefits in kind" in s 9 of the Income Tax Assessment Act 1957 was intended to cover. During the second reading of the Income Tax Assessment Bill 1957, Hon. Mr Watts explained clause 9 of the Bill as follows (8 October 1958, 314 NZPD 2,894):

> Under clause 9 any benefits in kind, for example, the value of a free house, or free meat, or other benefits of that type, are to be taxed at the end of each pay period. If the employee is paid weekly he will also pay on the value of his benefits for the week. Where superannuation is paid and is treated as salary and wages it will be deemed to have accrued from day to day over the period for which it is paid.

37. Many of the taxable benefits that would have been subject to PAYE when s 9 of the Income Tax Assessment Act 1957 was enacted will now be subject to FBT. However, the fact s RD 6(1)(b) is included in the current legislation suggests some non-monetary benefits (other than those specifically mentioned in other paragraphs of s RD 6(1)) may come within the definition of "salary or wages".

Conclusion

38. It is unclear on the face of the legislation whether an employee who regularly receives crypto-assets as a part of their normal remuneration package is subject to PAYE or whether FBT applies. Both views are arguable.

39. Broadly, the scheme of the Act is that consideration in money is subject to PAYE, whereas non-monetary benefits are subject to FBT. Crypto-assets are not money in the technical sense (although they share some of the characteristics of money). This might suggest that payments in crypto-assets should be subject to FBT. However, the distinction between monetary and non-monetary payments is not hard and fast. Statutory exceptions make some non-monetary benefits (such as employer-provided accommodation) subject to PAYE. Further, the PAYE rules are drafted widely enough to potentially include some other non-monetary payments.

40. Ultimately, the issue turns on whether regular payments in crypto-assets come within the ordinary meaning of "salary or wages" for tax purposes. The answer to this is not certain. While a regular payment received in crypto-assets has many of the hallmarks of salary and wages, historically salary and wages have been payments in money. However, s 6 of the Interpretation Act 1999 requires legislation to be interpreted as applying to modern circumstances. While not free from doubt, on balance, the Commissioner's view is that for tax purposes, the concepts of "salary" and "wages" are wide enough to encompass some regular payments in crypto-assets (although employers will need to be aware of employment legislation). Consequently, these payments are "salary or wages" under s RD 5 for tax purposes. Therefore, they are "PAYE income payments" under s RD 3 and the PAYE rules apply to them.

41. Because the payments are subject to PAYE, the FBT rules will not apply.

Which crypto-assets are subject to PAYE?

42. In the Commissioner's view, not all types of crypto-assets will be subject to PAYE. To be considered "salary or wages" for tax purposes, the crypto-assets need to be sufficiently similar to existing notions of salary and wages. In the Commissioner's view, this will be the case where the crypto-assets have the following features:

- They are not subject to a "lock-up" period;
- They can be converted directly into a fiat currency (on an exchange); and either:
  - a significant purpose of the crypto-asset is to function like a currency; or
  - the value of the crypto-asset is pegged to one or more fiat currencies.

43. Each of these is discussed in more detail below. Taxpayers can contact Inland Revenue if they are having difficulty determining whether a particular crypto-asset satisfies these criteria.

44. For crypto-asset payments that are not subject to PAYE, the FBT rules will apply.

Not subject to a "lock-up" period

45. In the Commissioner's view, crypto-assets that cannot be converted or sold by the employee for a material period of time after payment does not sufficiently resemble a payment of salary or wages.

The crypto-assets can be converted directly into a fiat currency

46. Most mainstream crypto-assets can generally be traded on an exchange directly for fiat currency (for example, New Zealand dollars (NZD) or United States dollars). For other crypto-assets, this may not be available. Instead, the crypto-assets must first be converted into a more mainstream crypto-asset (such as bitcoin (BTC) or ether (ETH)) and then converted into fiat currency. In the current environment where crypto-assets are not readily accepted as payment for goods and services, the Commissioner's view is that crypto-assets that cannot be converted directly into fiat currency on an exchange (that meets the requirements set out in [57] - [59]) are not sufficiently "money-like" to be considered salary or wages for tax purposes.

A significant purpose of the crypto-assets is to function like a currency

47. The range and functions of crypto-assets have evolved in recent times. It is now possible to get crypto-assets that function in a similar way, for example, to vouchers, shares, or debt securities.

48. Some crypto-assets are designed to function as an alternative to fiat currency in the sense they provide a general-purpose peer-to-peer payment system. Examples are bitcoin, bitcoin Cash (BCH), bitcoin Gold (BTG), and Litecoin (LTC). Some crypto-assets are designed with other functions in addition to use as a currency, but the currency purpose is still a significant one. Ether is a common example of this. The Commissioner's view is that payment in these types of crypto-assets (where conversion directly into a fiat currency on an exchange is possible) is sufficiently "money-like" to come within the ordinary meaning of salary or wages.

49. These can be contrasted with crypto-assets that are designed primarily for other purposes (for example, filecoin (FIL), Dentacoin (DCN), and CRYPTO20 (C20)). Common examples are:

    - rights to access, operate, use or control a platform or other property/services (often referred to as "utility tokens");
    - providing rights to underlying tradable assets such as precious metals or real estate (often referred to "asset tokens"); and
    - providing ownership or control of a financial asset (often referred to as "securities tokens").

50. These crypto-assets can also usually be traded peer-to-peer or on an exchange. Therefore, in a sense, they can function in a similar way to currency. However, this can be seen as the equivalent of trading in gold, shares, or gift cards for example. That is, although they share some of the features of currency, they are not intended to operate as such.

The value of the crypto-assets is pegged to one or more fiat currencies

51. This refers to so-called "stablecoins" that have their value pegged to one or more fiat currencies. Common examples are USD Tether (USDT) and Paxos Standard (PAX). Regardless of whether these crypto-assets are designed to function like currencies (in the sense discussed above at [47]–[50]) the Commissioner's view is that payment in a stablecoin (where conversion directly into a fiat currency on an exchange is possible) is sufficiently "money-like" to come within the ordinary meaning of salary or wages for tax purposes.

Implications of conclusion

PAYE is calculated on the gross basis

52. Where an employee's remuneration package includes the provision of crypto-assets, the employer must gross up the net amount of the crypto-assets provided to the employee when calculating PAYE.

53. Where the employee's employment contract sets out the gross amount (ie an amount before tax is deducted) payable in NZD, this will not be an issue. Assume, for example, an employment contract provides for an employee to receive $100 (gross) of crypto-assets per week as part of their remuneration package. If the employee is on a 33% tax rate, $67 worth of crypto-assets would be payable to the employee and $33 (NZD) must be paid to Inland Revenue as PAYE.

54. However, where an employment agreement provides for an employee to receive either a net amount of crypto-assets calculated in NZD, or an amount denominated in crypto-assets, then the amount provided to the employee will need to be grossed up when calculating the PAYE payable. This works in the same way as the provision of employer-provided accommodation, where the value of the accommodation is grossed up before PAYE is calculated and paid.

Converting crypto-asset payments to NZD

55. Generally, arrangements of this type will provide for an employee to be paid an amount of crypto-assets denominated in NZD. In this case, there will be no need to convert the crypto-assets into NZD to calculate the PAYE payable.

56. However, where a crypto-asset payment is not denominated in NZD (for example, if an employee is paid 0.001 bitcoin per fortnight as part of a remuneration package), it is necessary to calculate the NZD value of the crypto-assets on the date it is paid to the employee.

57. Conversion rates may be obtained from any centralised data repository site that may be listed from time-to-time on the Inland Revenue website.

58. Alternatively, conversion rates may be obtained from a public exchange that has comprehensive know-your-customer/anti-money-laundering procedures in place. Which exchange (or exchanges) is appropriate will depend on the circumstances. Using a New Zealand-based exchange listed on the Financial Service Providers Register will be appropriate.

59. If the appropriate valuation cannot be obtained from a New Zealand-based exchange, an overseas-based exchange can be used. For some "alt coins" (crypto-assets other than bitcoin) it may be necessary to convert into US dollars, or another fiat currency, and then convert into NZD.

60. Rates can vary significantly between different exchanges and currencies. Therefore, taxpayers should use a consistent exchange and conversion approach (for example, using a consistent time of day to determine the conversion rates).

Other implications

61. There are various circumstances where obligations, eligibility, or entitlements may be calculated based on an employee's salary or wages (for example Kiwisaver, Working for Families Tax Credits, and student loan repayments). The crypto-asset payments must be taken into account when calculating these.

Example

62. The following example is included to help explain the application of the law.

Example: Employee paid bitcoin as part of salary package

Ken is employed by Cryptowonderland Ltd. His salary is NZ$5,000 per month before tax, which is payable in NZD direct credited to his bank account. Ken's remuneration package also includes payments of NZ$5,000 of bitcoin per month (before tax), payable in bitcoin transferred to Ken's bitcoin wallet.

PAYE should be calculated on the $10,000 gross payment and withheld and paid to the Commissioner (in New Zealand dollars). The net amount is payable to Ken.

If Ken is a Kiwisaver member or is subject to, for example, child support or student loan deductions, the **Employer's Guide - IR335** and the PAYE calculator (both available on the Inland Revenue website **www.ird.govt.nz**) can be used to assist with calculating these.

References

Related rulings

BR PUB 19/03: Income Tax – Employer issued crypto-assets provided to an employee.

BR PUB 19/04: Income Tax – Application of the employee share scheme rules to employer issued crypto-assets provided to an employee.

BR PUB 21/02: Income tax – bonuses paid in crypto-assets.

Subject references

Bitcoin, crypto-asset, cryptocurrency, FBT, PAYE, salary, wages

Legislative references

Income Tax Act 2007 – ss CE 1, CE 7, CX 2, CX 4, RD 3, RD 5, RD 6, YA 1 definitions of "amount" and "salary or wages"

Interpretation Act 1999 – s 6

Case references

Co-operative Insurance Society Ltd v Commissioners of Customs and Excise (1992) VATTR 44

Deputy Commissioner of Taxation v Applied Design Development Pty Ltd (in liq) 2002 ATC 4,193

Goodfellow v The Commissioners (1986) VATTR 119

Heaton v Bell [1970] AC 728

R v Walsh [2007] 1 NZLR 738

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Other references

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Concise Oxford English Dictionary (Oxford University Press, 12th ed, 2011)

Appendix – Legislation

Income Tax Act 2007

1. Section CE 1(1) provides:

> **CE 1 Amounts derived in connection with employment**
>
> *Income*
>
> (1) The following amounts derived by a person in connection with their employment or service are income of the person:
>
> (a) salary or wages or an allowance, bonus, extra pay, or gratuity:
>
> (b) expenditure on account of an employee that is expenditure on account of the person:
>
> (bb) the value of accommodation referred to in sections CE 1B to CE 1E:
>
> (c) [Repealed]
>
> (d) a benefit received under a share purchase agreement:
>
> (e) directors' fees:
>
> (f) compensation for loss of employment or service:
>
> (g) any other benefit in money.

2. Section CE 7 provides:

> **CE 7 Meaning of employee share scheme**
>
> *Employee share scheme means—*
>
> (a) an arrangement with a purpose or effect of issuing or transferring shares in a company (company A) to a person—
>
> (i) who will be, is, or has been an employee of company A or of another company that is a member of the same group of companies as company A, if the arrangement is connected to the person's employment or service:
>
> (ii) who will be, is, or has been a shareholder-employee in relation to company A or in relation to another company that is a member of the same group of companies as company A, if the arrangement is connected to the person's employment or service:
>
> (iii) who is an associate of a person described in subparagraph (i) or (ii) (person A), if the arrangement is connected to person A's employment or service; but

(b) does not include an arrangement that—

(i) is an exempt ESS:

(ii) requires market value consideration to be paid by a person described in paragraph (a) for the transfer of shares in the company on the share scheme taxing date:

(iii) requires a person described in paragraph (a) to put shares, acquired by them for market value consideration, at risk, if the arrangement provides no protection against a fall in the value of the shares and none of the consideration for acquiring the shares is provided to the person under an agreement that it is used for acquiring the shares.

3. Section CX 2 provides:

CX 2 Meaning of fringe benefit

Meaning

(1) A fringe benefit is a benefit that—

(a) is provided by an employer to an employee in connection with their employment; and

(b) either—

(i) arises in a way described in any of sections CX 6, CX 9, CX 10, or CX 12 to CX 16; or

(ii) is an unclassified benefit; and

(c) is not a benefit excluded from being a fringe benefit by any provision of this subpart.

Arrangement to provide benefit

(2) A benefit that is provided to an employee through an arrangement made between their employer and another person for the benefit to be provided is treated as having been provided by the employer.

Past, present, or future employment

(3) It is not necessary to the existence of a fringe benefit that an employment relationship exists when the employee receives the benefit.

Relationship with subpart RD

(4) Sections RD 25 to RD 63 (which relate to fringe benefit tax) deal with the calculation of the taxable value of fringe benefits.

Arrangements

(5) A benefit may be treated for the purposes of the FBT rules as being provided by an employer to an employee under—

(a) section GB 31 (FBT arrangements: general):

(b) section GB 32 (Benefits provided to employee's associates).

4. Section CX 4 provides:

CX 4 Relationship with assessable income

To the extent to which a benefit that an employer provides to an employee in connection with their employment is assessable income, the benefit is not a fringe benefit.

5. Section RD 3(1) provides:

RD 3 PAYE income payments

Meaning generally

(1) The PAYE rules apply to a PAYE income payment which—

(a) means—

(i) a payment of salary or wages, see section RD 5; or

(ii) extra pay, see section RD 7; or

(iii) a schedular payment, see section RD 8:

(b) does not include—

(i) an amount attributed under section GB 29 (Attribution rule: calculation):

(ii) an amount paid to a shareholder-employee in the circumstances set out in section RD 3B or RD 3C:

(iii) an amount paid or benefit provided, by a person (the claimant), who receives a personal service rehabilitation payment from which an amount of tax has been withheld at a rate specified in section RD 10B.

6. Section RD 5(1), (2), (8) and (9) provide:

> **RD 5 Salary or wages**
>
> *Meaning*
>
> (1) Salary or wages—
>
> (a) means a payment of salary, wages, or allowances made to a person in connection with their employment; and
>
> (b) includes—
>
> (i) a bonus, commission, gratuity, overtime pay, or other pay of any kind; and
>
> (ii) a payment described in subsections (2) to (8); and
>
> (iii) an accident compensation earnings-related payment; and
>
> (iiib) a payment of earnings compensation under the Compensation for Live Organ Donors Act 2016; and
>
> (iv) Repealed.
>
> (c) does not include—
>
> (i) an amount of exempt income:
>
> (ii) an extra pay:
>
> (iii) a schedular payment:
>
> (iv) an amount of income described in section RD 3(3) and (4):
>
> (v) an employer's superannuation contribution other than a contribution referred to in subsection (9):
>
> (vi) a payment excluded by regulations made under this Act.
>
> (d) Repealed.
>
> *Employees' expenditure on account*
>
> (2) A payment of expenditure on account of an employee is included in their salary or wages.
>
> …
>
> *Accommodation benefits*
>
> (8) A benefit treated as income under section CE 1(1)(bb) (Amounts derived in connection with employment) is included in salary or wages.
>
> *Cash contributions*
>
> (9) An amount of an employer's superannuation cash contribution that an employee chooses to have treated as salary or wages under section RD 68 is included in salary or wages.

7. Section RD 6(1) provides:

> **RD 6 Certain benefits and payments**
>
> *When this section applies*
>
> (1) This section applies when an employee receives—
>
> (a) a benefit treated as income under section CE 1(1)(bb) (Amounts derived in connection with employment); or
>
> (b) another benefit in kind that is included in their salary or wages; or
>
> (c) 1 or more of the following payments:
>
> (i) a superannuation payment:
>
> (ii) a pension:
>
> (iii) a retiring or other allowance:
>
> (iv) an annuity; or
>
> (d) a benefit under section CE 2(2) and (4) (Value and timing of benefits under share purchase agreements) in relation to which the employer has made an election under section RD 7B.

8. Section YA 1 defines "amount" as follows:

> **amount—**
>
> (a) includes an amount in money's worth:
>
> …

Interpretation Act 1999

9. Section 6 provides:

> an enactment applies to circumstances as they arise.

BR Pub 21/02: Income tax – bonuses paid in crypto-assets

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

Taxation Law

All legislative references are to the Income Tax Act 2007 unless otherwise stated.

This Ruling applies in respect of s RD 3.

The Arrangement to which this Ruling applies

The Arrangement is the payment of an amount of crypto-assets to an employee in connection with their employment as an incentive or bonus.

This Ruling applies only to salary and wage earners, not self-employed taxpayers, and where the crypto-assets being paid are an agreed deduction from a monetary amount.

This Ruling does not apply where the crypto-asset provided is a "share" for income tax purposes that is received under an "employee share scheme" as defined in s CE 7.

How the Taxation Law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- The crypto-asset payment is a "PAYE income payment" under s RD 3 and is subject to the PAYE rules.

The period or tax year for which this Ruling applies

This Ruling will apply from 1 March 2021 until 1 December 2022.

This Ruling is signed by me on 11th January 2021.

Susan Price
Group Leader
Public Advice and Guidance
Tax Counsel Office

COMMENTARY ON PUBLIC RULING BR PUB 21/02

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 21/02 ("the Ruling").

Legislative references are to the Income Tax Act 2007 unless otherwise stated. Relevant legislative provisions are reproduced in the Appendix to this commentary.

Summary

1. This Ruling amends and replaces a previous Ruling (BR Pub 19/02) which considered the income tax treatment of crypto-assets received by employees as a bonus. The income tax treatment in that Ruling is still correct. However, the Commissioner is aware that some aspects of the arrangement ruled on and its commentary may be inconsistent with employment law (including, relevantly, the Wages Protection Act 1983 and the Minimum Wage Act 1983).
2. Under employment law, crypto-assets may be paid to an employee as a bonus where the bonus is a monetary amount and the employee agrees to a deduction from that amount to be paid as crypto-assets. PAYE is payable on the full amount of the bonus (whether received by the employee as money or agreed to be paid as an equivalent amount of crypto-assets).

Background

3. The crypto-asset industry is still evolving and there is currently no standard terminology used. The Ruling uses the term "crypto-asset" to cover digital assets that use cryptography and blockchain technology to regulate their generation and verify transfers.[1]
4. It is becoming more common for employees (particularly those working in crypto-asset-related industries) to receive remuneration in crypto-assets. The Commissioner has been asked to provide guidance on how remuneration paid in crypto-assets is taxed. This Ruling sets out the Commissioner's view on the situation where an employee receives a bonus and agrees for an amount of that bonus to be paid in crypto-assets.

Application of the legislation

Whether crypto-assets received as a bonus are subject to PAYE or FBT

5. The first step is to consider whether the payment is subject to PAYE. This is because, to the extent that an employment-related benefit is taxable to an employee, it will not be a fringe benefit (s CX 4). Therefore, if the provision of crypto-assets to an employee falls within the PAYE rules, PAYE will apply even if the FBT rules would also otherwise apply.
6. Section CE 1 sets out the "amounts" that are treated as employment income. Relevantly, these include bonuses:

> **CE 1 Amounts derived in connection with employment**
>
> *Income*
>
> (1) The following amounts derived by a person in connection with their employment or service are income of the person:
>
> (a) salary or wages or an allowance, **bonus**, extra pay, or gratuity:
>
> (b) expenditure on account of an employee that is expenditure on account of the person:
>
> (bb) the value of accommodation referred to in sections CE 1B to CE 1E:
>
> (c) *[Repealed]*
>
> (d) a benefit received under a share purchase agreement:
>
> (e) directors' fees:
>
> (f) compensation for loss of employment or service:
>
> (g) any other benefit in money.
>
> [Emphasis added]

7. "Amount" "includes an amount in money's worth" (s YA 1). Therefore, s CE 1 is drafted widely enough to include amounts derived that are "money's worth" (but not money). In any event, an amount specifically includes a bonus.

Meaning of "bonus"

8. "Bonus" is not defined in the Act. Therefore, it is necessary to consider its ordinary meaning.
9. The Court of Appeal considered the meaning of "bonus" in *CIR v Smythe* [1981] 1 NZLR 673. Richardson J stated at 676:

> A bonus may be a gratuity or it may be something which an employee is entitled to on the happening of a condition precedent and which is enforceable when the condition is fulfilled *(Sutton v Attorney-General* (1923) 39 LTR 294,297; *Great Western Garment Co v Minister of National Revenue* [1974] Ex CR 458, 467; [1948] 1 DLR 225, 233). In either case it is an addition to regular salary or wages.

[1] These are sometimes referred to by other terms including "cryptocurrencies" and "tokens".

> It is a payment above the normal and it is often, but not always, paid for extraordinary work or service. Its special character is that it is an additional amount, not part of the regular permanent remuneration.

10. McMullin J stated at 678:

> One of the meanings given in the *Oxford English Dictionary* to the word bonus is: "Money or its equivalent, given as a premium, or as an extra or irregular remuneration, in consideration of offices performed, or to encourage their performance". Often enough a bonus will take the form of something for which no entitlement exists. In that sense it will be a favour, a bounty, largess, something over and above what the donee is entitled to expect. And it may be in some cases quite unexpected and a windfall. But I do not think that the word "bonus" is limited to those payments only for which no entitlement can be established. Indeed, it is not infrequently the case in present conditions of employment that a payment is made to an employee by way of a bonus even though it is directly related to his industry and productivity.

11. It can be seen from this that a bonus is a payment to an employee over and above their regular salary or wages. It is generally paid for good performance. A bonus can be something to which an employee is contractually entitled (if certain conditions are met) or a purely voluntary payment.
12. Under employment law, a bonus is part of a person's salary or wages and must be paid in money. However, employees can agree to a deduction being made from the monetary amount, and opt to receive the bonus in crypto-assets (provided that requirements in the Wages Protection Act 1983 and Minimum Wage Act 1983 are satisfied).
13. PAYE will apply regardless of whether the bonus is paid in cash, an equivalent amount of crypto-assets as an agreed deduction, or a combination of both.
14. It is useful, at this point, to consider whether there is anything in the scheme of the Act that suggests that non-monetary payments in crypto-assets (paid as an agreed deduction) should not be treated as employment income.

Scheme of the Act

15. As noted above, the Act first requires determining whether the PAYE rules apply. FBT applies only where a payment is not assessable income (s CX 4).
16. Payments in money are generally subject to PAYE and non-monetary payments are generally subject to FBT. This is because of the types of payments the PAYE rules apply to. The PAYE rules apply to "PAYE income payments", which for employees is defined as a payment of "salary or wages" or an "extra pay". "Salary or wages" is defined in s RD 5. Most of the items listed are payments that would generally be expected to be made in money. These include salary, wages, allowances, bonuses, commissions, gratuities, and various benefit, grant and compensation payments. However, employer-provided accommodation under s CE 1(1)(bb) is also expressly included.
17. Similarly, "extra pay" is defined in relation to payments that would generally be made in money. However, it also includes a benefit under certain share purchase agreements.
18. It can be seen from this that the Act broadly distinguishes between monetary and non-monetary payments to employees with the former being subject to PAYE and the latter to FBT. The reference in s CE 1(1)(g) to "any other benefit in money" is also consistent with this. However, this distinction is not absolute. Some non-monetary benefits are expressly included in the PAYE rules. Also, non-monetary payments are not expressly excluded from items that make up "salary or wages" (which includes bonuses).

Are crypto-assets money or its equivalent?

19. In the Commissioner's view, crypto-assets are property. Crypto-assets are not "money" as commonly understood (at least not at the present time). In particular, because crypto-assets are not currently issued by any government, it is not legal tender anywhere. Further, although acceptance of certain crypto-assets as payment for goods and services is increasing, they are not "generally accepted" as payment. Given the extreme volatility experienced to date, there are also issues around some crypto-assets' ability to be a store of value.
20. Under New Zealand employment law, any payment of crypto-assets as a bonus must be made by way of an agreed deduction from a monetary amount. PAYE is applicable on the monetary amount of the bonus, whether it is paid in money or as an equivalent amount of crypto-assets.

Conclusion

21. An amount of crypto-assets paid to an employee, in connection with their employment, as an agreed deduction from an incentive or bonus payment will be a "bonus" under s CE 1.
22. A "bonus" comes within the meaning of "salary or wages" for the purposes of s RD 5. Therefore, it is a "PAYE income payment" under s RD 3 and the PAYE rules apply to it.

Implications of conclusion

PAYE is calculated on the full amount of the bonus

23. Where payment is provided in crypto-assets (as an agreed deduction from a monetary amount), the employer must account for the gross amount of the bonus being provided to the employee when calculating PAYE.
24. Where the employee's employment contract sets out the gross amount (ie amount before tax is deducted) payable in NZD, this will not be an issue. Assume, for example, an employment contract provides for an employee to be paid a bonus of $100 (gross) and the employee agrees to a deduction of the full amount for a payment in crypto-assets. If the employee is on a 33% tax rate, $67 worth of crypto-assets would be payable to the employee and $33 (NZD) must be paid to Inland Revenue as PAYE.
25. If a crypto-asset payment is not denominated in NZD (for example, if an employee is paid a bonus of 0.001 bitcoin), this may be contrary to employment legislation and you may need to seek advice.
26. There are various circumstances where obligations, eligibility, or entitlements may be calculated based on an employee's salary or wages (for example Kiwisaver, Working for Families Tax Credits, and student loan repayments). The crypto-asset payments must be taken into account when calculating these.

Example

27. The following example is included to help explain the application of the law. For simplicity the example does not consider the potential application of, Kiwisaver, student loan, child support or other deductions. The **Employer's Guide - IR335** (available on the Inland Revenue website **www.ird.govt.nz**) can be used to assist with calculating these.

Example: Calculating PAYE on a bonus

Anaru is employed by Cryptowonderland Ltd. In addition to his $150,000 salary, Anaru's contract provides for a NZ$10,000 (gross) bonus if Cryptowonderland's profit exceeds the previous year's. Anaru requests that this cash bonus be paid out in bitcoin.

Cryptowonderland has an exceptional year and Anaru receives his bonus. The bonus is subject to PAYE. NZ$3,330 ($10,000 × 0.33) must be paid to the Commissioner (in New Zealand dollars). As a result of Anaru's request, the net amount of $6,670 worth of bitcoin will be transferred to Anaru's bitcoin wallet as a deduction from his cash bonus.

References

Related rulings

BR PUB 21/01: Income tax – salary and wages paid in crypto-assets

Subject references

Bitcoin, bonus, crypto-asset, cryptocurrency, FBT, PAYE, salary, wages

Legislative references

Income Tax Act 2007 – ss CE 1, CE 7, CX 2, CX 4, RD 3, RD 5, and the YA 1 definition of "amount"

Case references

CIR v Smythe [1981] 1 NZLR 673

Appendix – Legislation

Income Tax Act 2007

28. Section CE 1(1) provides:

> **CE 1 Amounts derived in connection with employment**
>
> *Income*
>
> (1) The following amounts derived by a person in connection with their employment or service are income of the person:
>
> (a) salary or wages or an allowance, bonus, extra pay, or gratuity:
>
> (b) expenditure on account of an employee that is expenditure on account of the person:
>
> (bb) the value of accommodation referred to in sections CE 1B to CE 1E:
>
> (c) [Repealed]
>
> (d) a benefit received under a share purchase agreement:
>
> (e) directors' fees:
>
> (f) compensation for loss of employment or service:
>
> (g) any other benefit in money.

29. Section CE 7 provides:

> **CE 7 Meaning of employee share scheme**
>
> *Employee share scheme means—*
>
> (a) an arrangement with a purpose or effect of issuing or transferring shares in a company (company A) to a person—
>
> (i) who will be, is, or has been an employee of company A or of another company that is a member of the same group of companies as company A, if the arrangement is connected to the person's employment or service:
>
> (ii) who will be, is, or has been a shareholder-employee in relation to company A or in relation to another company that is a member of the same group of companies as company A, if the arrangement is connected to the person's employment or service:
>
> (iii) who is an associate of a person described in subparagraph (i) or (ii) (person A), if the arrangement is connected to person A's employment or service; but
>
> (b) does not include an arrangement that—
>
> (i) is an exempt ESS:
>
> (ii) requires market value consideration to be paid by a person described in paragraph (a) for the transfer of shares in the company on the share scheme taxing date:
>
> (iii) requires a person described in paragraph (a) to put shares, acquired by them for market value consideration, at risk, if the arrangement provides no protection against a fall in the value of the shares and none of the consideration for acquiring the shares is provided to the person under an agreement that it is used for acquiring the shares.

30. Section CX 2 provides:

> **CX 2 Meaning of fringe benefit**
>
> *Meaning*
>
> (1) A fringe benefit is a benefit that—
>
> (a) is provided by an employer to an employee in connection with their employment; and
>
> (b) either—
>
> (i) arises in a way described in any of sections CX 6, CX 9, CX 10, or CX 12 to CX 16; or
>
> (ii) is an unclassified benefit; and
>
> (c) is not a benefit excluded from being a fringe benefit by any provision of this subpart.
>
> *Arrangement to provide benefit*
>
> (2) A benefit that is provided to an employee through an arrangement made between their employer and another person for the benefit to be provided is treated as having been provided by the employer.
>
> *Past, present, or future employment*
>
> (3) It is not necessary to the existence of a fringe benefit that an employment relationship exists when the employee receives the benefit.
>
> *Relationship with subpart RD*
>
> (4) Sections RD 25 to RD 63 (which relate to fringe benefit tax) deal with the calculation of the taxable value of fringe benefits.

Arrangements

(5) A benefit may be treated for the purposes of the FBT rules as being provided by an employer to an employee under—

(a) section GB 31 (FBT arrangements: general):

(b) section GB 32 (Benefits provided to employee's associates).

31. Section CX 4 provides:

CX 4 Relationship with assessable income

To the extent to which a benefit that an employer provides to an employee in connection with their employment is assessable income, the benefit is not a fringe benefit.

32. Section RD 3 provides:

RD 3 PAYE income payments

Meaning generally

(1) The PAYE rules apply to a PAYE income payment which—

(a) means—

(i) a payment of salary or wages, see section RD 5; or

(ii) extra pay, see section RD 7; or

(iii) a schedular payment, see section RD 8:

(b) does not include—

(i) an amount attributed under section GB 29 (Attribution rule: calculation):

(ii) an amount paid to a shareholder-employee in the circumstances set out in section RD 3B or RD 3C:

(iii) an amount paid or benefit provided, by a person (the claimant), who receives a personal service rehabilitation payment from which an amount of tax has been withheld at a rate specified in section RD 10B.

33. Section RD 5(1), (2), (8) and (9) provide:

RD 5 Salary or wages

Meaning

(1) Salary or wages—

(a) means a payment of salary, wages, or allowances made to a person in connection with their employment; and

(b) includes—

(i) a bonus, commission, gratuity, overtime pay, or other pay of any kind; and

(ii) a payment described in subsections (2) to (8); and

(iii) an accident compensation earnings-related payment; and

(iiib) a payment of earnings compensation under the Compensation for Live Organ Donors Act 2016; and

(iv) Repealed.

(c) does not include—

(i) an amount of exempt income:

(ii) an extra pay:

(iii) a schedular payment:

(iv) an amount of income described in section RD 3(3) and (4):

(v) an employer's superannuation contribution other than a contribution referred to in subsection (9):

(vi) a payment excluded by regulations made under this Act.

(d) Repealed.

Employees' expenditure on account

(2) A payment of expenditure on account of an employee is included in their salary or wages.

...

Accommodation benefits

(8) A benefit treated as income under section CE 1(1)(bb) (Amounts derived in connection with employment) is included in salary or wages.

Cash contributions

(9) An amount of an employer's superannuation cash contribution that an employee chooses to have treated as salary or wages under section RD 68 is included in salary or wages.

34. Section YA 1 defines "amount" as follows:

> **amount—**
>
> (a) includes an amount in money's worth:
>
> ...

LEGISLATION AND DETERMINATIONS

This section of the *TIB* covers items such as recent tax legislation and depreciation determinations, livestock values and changes in FBT and GST interest rates.

Determination FDR 2020/02 – A type of attributing interest in a foreign investment fund for which a person may not use the fair dividend rate method (Institutional Cash Series Plc: BlackRock ICS US Dollar Liquid Environmentally Aware Fund - Premier (Dis) Shares)

Reference

This determination is made under section 91AAO(1)(b) of the Tax Administration Act 1994. This power has been delegated by the Commissioner of Inland Revenue to the position of Technical Specialist under section 7 of the Tax Administration Act 1994.

Discussion (which does not form part of the determination)

Premier (Dis) Shares in the BlackRock ICS US Dollar Liquid Environmentally Aware Fund (the Fund) of Institutional Cash Series Plc to which this determination applies, are an attributing interest in a foreign investment fund (FIF) for New Zealand resident investors.

New Zealand resident investors are required to apply the FIF rules to determine their tax liability in respect of their investment in units in the Fund each year.

The Fund invests in a broad range of High Quality transferable securities such as securities, instruments and obligations that may be available in the relevant markets (both within and outside the US). Instruments denominated in US Dollars may include securities, instruments and obligations issued or guaranteed by the US Government or other sovereign governments or their agencies and securities, instruments and obligations issued or guaranteed by supranational or public international bodies, banks, corporate or other commercial issuers.

For New Zealand resident investors, Premier (Dis) shares in the Fund do not represent an attributing FIF interest that comprises of non-ordinary shares as described in section EX 46(10)(a)-(db) of the Income Tax Act 2007. Consequently, investors would not be prevented from using the FDR method pursuant to section EX 46(8)(a) of the Income Tax Act 2007 in the absence of a determination under section 91AAO of the Tax Administration Act 1994.

However, due to the nature of the overall arrangement it is considered that the application of the FDR method would impose unnecessarily high compliance costs on New Zealand investors, as it would require performing a substantial number of quick sale adjustment calculations and associated foreign exchange calculations every time that the investor withdraws funds from the Fund during the year.

Scope of determination

This determination is issued on the basis of information provided to the Commissioner before the date of this determination and applies to an attributing interest in a FIF held by New Zealand resident investors in a non-resident issuer where:

- This non-resident issuer:
  - is an Irish public limited company that issues multiple classes of shares; and
  - is known at the date of this determination as Institutional Cash Series plc; and
  - is structured as an umbrella fund with segregated liability between sub-funds; and
  - is managed by BlackRock Asset Management Ireland Limited, a company incorporated in Ireland;
- The attributing interest consists of a US dollar denominated class of shares, Premier (Dis) Shares, issued by that non-resident that provide exposure solely to the Fund.

- The Fund:
  - Holds assets that predominantly (80% or more by value at a time in the income year) comprise high-quality short-term money market instruments, which are either USD denominated financial arrangements that are debt securities or instruments that are economically equivalent to USD debt.
  - Has not entered into any arrangements which provide an overall economic return as if the securities were denominated in New Zealand dollars
  - May make distributions of income (if any) to the shareholders in the form of cash or additional shares but does not guarantee that any income will be derived or that a distribution will be made.

Interpretation

In this determination, unless the context otherwise requires-

"Fair dividend rate method" means the fair dividend rate method under section YA 1 of the Income Tax Act 2007;

"Financial arrangement" means financial arrangement under section EW 3 of the Income Tax Act 2007;

"Foreign investment fund" means foreign investment fund under section YA 1 of the Income Tax Act 2007;

"Non-resident" means a person that is not resident in New Zealand for the purposes of the Income Tax Act 2007;

"The Fund" means the BlackRock ICS US Dollar Liquid Environmentally Aware Fund, a sub-fund of Institutional Cash Series Plc.

Determination

An attributing interest in a FIF to which this determination applies is a type of attributing interest for which a person may not use the FDR method to calculate FIF income from the interest.

Application Date

This determination applies for the 2021 income year and subsequent income years.

However, under section 91AAO(3B) of the Tax Administration Act 1994, this determination does not apply for a person and an income year beginning before the date of the determination unless the person chooses that the determination applies for the income year.

Dated on this 7th day of December 2020

Greg Adamson
Technical Specialist

Determination FDR 2020/03 – A type of attributing interest in a foreign investment fund for which a person may not use the fair dividend rate method (Institutional Cash Series Plc: BlackRock ICS US Dollar Liquidity Fund - Core (Dis) Shares)

Reference

This determination is made under section 91AAO(1)(b) of the Tax Administration Act 1994. This power has been delegated by the Commissioner of Inland Revenue to the position of Technical Specialist under section 7 of the Tax Administration Act 1994.

Discussion (which does not form part of the determination)

Core (Dis) Shares in the BlackRock ICS US Dollar Liquidity Fund (the Fund) of Institutional Cash Series Plc to which this determination applies, are an attributing interest in a foreign investment fund (FIF) for New Zealand resident investors.

New Zealand resident investors are required to apply the FIF rules to determine their tax liability in respect of their investment in units in the Fund each year.

The Fund invests in in a broad range of High Quality transferable securities such as securities, instruments and obligations that may be available in the relevant markets (both within and outside the US) for instruments denominated in US Dollars including securities, instruments and obligations issued or guaranteed by the US Government or other sovereign governments or their agencies and securities, instruments and obligations issued or guaranteed by supranational or public international bodies, banks, corporate or other commercial issuers.

For New Zealand resident investors, Core (Dis) shares in the Fund do not represent an attributing FIF interest that comprises of non-ordinary shares as described in section EX 46(10)(a)-(db) of the Income Tax Act 2007. Consequently, investors would not be prevented from using the FDR method pursuant to section EX 46(8)(a) of the Income Tax Act 2007 in the absence of a determination under section 91AAO of the Tax Administration Act 1994.

However, due to the nature of the overall arrangement it is considered that the application of the FDR method would impose unnecessarily high compliance costs on New Zealand investors, as it would require performing a substantial number of quick sale adjustment calculations and associated foreign exchange calculations every time that the investor withdraws funds from the Fund during the year.

Scope of determination

This determination is issued on the basis of information provided to the Commissioner before the date of this determination and applies to an attributing interest in a FIF held by New Zealand resident investors in a non-resident issuer where:

- This non-resident issuer:
  - is an Irish public limited company that issues multiple classes of shares; and
  - is known at the date of this determination as Institutional Cash Series plc; and
  - is structured as an umbrella fund with segregated liability between sub-funds; and
  - is managed by BlackRock Asset Management Ireland Limited, a company incorporated in Ireland;
- The attributing interest consists of a US dollar denominated class of shares, Core (Dis) Shares, issued by that non-resident that provide exposure solely to the Fund.
- The Fund:
  - Holds assets that predominantly (80% or more by value at a time in the income year) comprise high-quality short-term money market instruments, which are either USD denominated financial arrangements that are debt securities or instruments that are economically equivalent to USD debt.
  - Has not entered into any arrangements which provide an overall economic return as if the securities were denominated in New Zealand dollars
  - May make distributions of income (if any) to the shareholders in the form of cash or additional shares but does not guarantee that any income will be derived or that a distribution will be made.

Interpretation

In this determination, unless the context otherwise requires-

"Fair dividend rate method" means the fair dividend rate method under section YA 1 of the Income Tax Act 2007;

"Financial arrangement" means financial arrangement under section EW 3 of the Income Tax Act 2007;

"Foreign investment fund" means foreign investment fund under section YA 1 of the Income Tax Act 2007;

"Non-resident" means a person that is not resident in New Zealand for the purposes of the Income Tax Act 2007;

"The Fund" means the BlackRock ICS US Dollar Liquidity Fund, a sub-fund of Institutional Cash Series Plc.

Determination

An attributing interest in a FIF to which this determination applies is a type of attributing interest for which a person may not use the FDR method to calculate FIF income from the interest.

Application Date

This determination applies for the 2021 income year and subsequent income years.

However, under section 91AAO(3B) of the Tax Administration Act 1994, this determination does not apply for a person and an income year beginning before the date of the determination unless the person chooses that the determination applies for the income year.

Dated on this 7th day of December 2020.

Greg Adamson
Technical Specialist

Determination FDR 2020/04 – A type of attributing interest in a foreign investment fund for which a person may not use the fair dividend rate method (Institutional Cash Series Plc: BlackRock ICS US Treasury Fund - Core (Dis) Shares)

Reference

This determination is made under section 91AAO(1)(b) of the Tax Administration Act 1994. This power has been delegated by the Commissioner of Inland Revenue to the position of Technical Specialist under section 7 of the Tax Administration Act 1994.

Discussion (which does not form part of the determination)

Core (Dis) Shares in the BlackRock ICS US Treasury Fund (the Fund) of Institutional Cash Series Plc to which this determination applies, are an attributing interest in a foreign investment fund (FIF) for New Zealand resident investors.

New Zealand resident investors are required to apply the FIF rules to determine their tax liability in respect of their investment in units in the Fund each year.

The Fund invests in a broad range of High Quality transferable securities provided that 99.5% of its net assets are invested in money market instruments issued or guaranteed by the US Government such as US Treasury Bills, notes, trust receipts and other obligations of the US Treasury or reverse repurchase agreements secured by such securities, instruments and obligations.

For New Zealand resident investors, Core (Dis) shares in the Fund do not represent an attributing FIF interest that comprises of non-ordinary shares as described in section EX 46(10)(a)-(db) of the Income Tax Act 2007. Consequently, investors would not be prevented from using the FDR method pursuant to section EX 46(8)(a) of the Income Tax Act 2007 in the absence of a determination under section 91AAO of the Tax Administration Act 1994.

However, due to the nature of the overall arrangement it is considered that the application of the FDR method would impose unnecessarily high compliance costs on New Zealand investors, as it would require performing a substantial number of quick sale adjustment calculations and associated foreign exchange calculations every time that the investor withdraws funds from the Fund during the year.

Scope of determination

This determination is issued on the basis of information provided to the Commissioner before the date of this determination and applies to an attributing interest in a FIF held by New Zealand resident investors in a non-resident issuer where:

- This non-resident issuer:
  - is an Irish public limited company that issues multiple classes of shares; and
  - is known at the date of this determination as Institutional Cash Series plc; and
  - is structured as an umbrella fund with segregated liability between sub-funds; and
  - is managed by BlackRock Asset Management Ireland Limited, a company incorporated in Ireland;
- The attributing interest consists of a US dollar denominated class of shares, Core (Dis) Shares, issued by that non-resident that provide exposure solely to the Fund.
- The Fund:
  - Holds assets that predominantly (80% or more by value at a time in the income year) comprise high quality US Government issued or guaranteed transferable securities and money market instruments, which are either USD denominated financial arrangements that are debt securities or instruments that are economically equivalent to USD debt.
  - Has not entered into any arrangements which provide an overall economic return as if the securities were denominated in New Zealand dollars
  - May make distributions of income (if any) to the shareholders in the form of cash or additional shares but does not guarantee that any income will be derived or that a distribution will be made.

Interpretation

In this determination, unless the context otherwise requires-

"Fair dividend rate method" means the fair dividend rate method under section YA 1 of the Income Tax Act 2007;

"Financial arrangement" means financial arrangement under section EW 3 of the Income Tax Act 2007;

"Foreign investment fund" means foreign investment fund under section YA 1 of the Income Tax Act 2007;

"Non-resident" means a person that is not resident in New Zealand for the purposes of the Income Tax Act 2007;

"The Fund" means the BlackRock ICS US Treasury Fund, a sub-fund of Institutional Cash Series Plc.

Determination

An attributing interest in a FIF to which this determination applies is a type of attributing interest for which a person may not use the FDR method to calculate FIF income from the interest.

Application Date

This determination applies for the 2021 income year and subsequent income years.

However, under section 91AAO(3B) of the Tax Administration Act 1994, this determination does not apply for a person and an income year beginning before the date of the determination unless the person chooses that the determination applies for the income year.

Dated on this 7th day of December 2020.

Greg Adamson
Technical Specialist

Determination FDR 2020/05 – A type of attributing interest in a foreign investment fund for which a person may not use the fair dividend rate method (HSBC Global Liquidity Funds plc: HSBC US Dollar Liquidity Fund - Class A (Distributing) Shares)

Reference

This determination is made under section 91AAO(1)(b) of the Tax Administration Act 1994. This power has been delegated by the Commissioner of Inland Revenue to the position of Technical Specialist under section 7 of the Tax Administration Act 1994.

Discussion (which does not form part of the determination)

Class A (Distributing) Shares in the HSBC US Dollar Liquidity Fund (the Fund) of HSBC Global Liquidity Funds plc to which this determination applies, are an attributing interest in a foreign investment fund (FIF) for New Zealand resident investors.

New Zealand resident investors are required to apply the FIF rules to determine their tax liability in respect of their investment in units in the Fund each year.

The Fund invests in a range of short-term securities, instruments and obligations such as, but not limited to: certificates of deposit; medium term, variable and floating rate notes; commercial paper; bankers acceptances; government bonds, corporate bonds, Eurobonds and treasury bills; and asset backed securities. It may also invest in reverse repurchase agreements.

For New Zealand resident investors, Class A (Distributing) Shares in the Fund do not represent an attributing FIF interest that comprises of non-ordinary shares as described in section EX 46(10)(a)-(db) of the Income Tax Act 2007. Consequently, investors would not be prevented from using the FDR method pursuant to section EX 46(8)(a) of the Income Tax Act 2007 in the absence of a determination under section 91AAO of the Tax Administration Act 1994.

However, due to the nature of the overall arrangement it is considered that the application of the FDR method would impose unnecessarily high compliance costs on New Zealand investors, as it would require performing a substantial number of quick sale adjustment calculations and associated foreign exchange calculations every time that the investor withdraws funds from the Fund during the year.

Scope of determination

This determination is issued on the basis of information provided to the Commissioner before the date of this determination and applies to an attributing interest in a FIF held by New Zealand resident investors in a non-resident issuer where:

- This non-resident issuer:
  - is an Irish public limited company that issues multiple classes of shares; and
  - is known at the date of this determination as HSBC Global Liquidity Funds plc; and
  - is structured as an umbrella fund with segregated liability between sub-funds.
- The attributing interest consists of a US dollar denominated class of shares, Class A (Distributing) Shares, issued by that non-resident that provide exposure solely to the Fund.
- The Fund:
  - Holds assets that predominantly (80% or more by value at a time in the income year) comprise high-quality short-term money market instruments, which are either USD denominated financial arrangements that are debt securities or instruments that are economically equivalent to USD debt.
  - Has not entered into any arrangements which provide an overall economic return as if the securities were denominated in New Zealand dollars
  - May make distributions of income (if any) to the shareholders in the form of cash or additional shares but does not guarantee that any income will be derived or that a distribution will be made.

Interpretation

In this determination, unless the context otherwise requires-

"Fair dividend rate method" means the fair dividend rate method under section YA 1 of the Income Tax Act 2007;

"Financial arrangement" means financial arrangement under section EW 3 of the Income Tax Act 2007;

"Foreign investment fund" means foreign investment fund under section YA 1 of the Income Tax Act 2007;

"Non-resident" means a person that is not resident in New Zealand for the purposes of the Income Tax Act 2007;

"The Fund" means the HSBC US Dollar Liquidity Fund, a sub-fund of HSBC Global Liquidity Funds plc.

Determination

An attributing interest in a FIF to which this determination applies is a type of attributing interest for which a person may not use the FDR method to calculate FIF income from the interest.

Application Date

This determination applies for the 2021 income year and subsequent income years.

However, under section 91AAO(3B) of the Tax Administration Act 1994, this determination does not apply for a person and an income year beginning before the date of the determination unless the person chooses that the determination applies for the income year.

Dated on this 7th day of December 2020.

Greg Adamson
Technical Specialist

Determination FDR 2020/06– A type of attributing interest in a foreign investment fund for which a person may not use the fair dividend rate method (JPMorgan Liquidity Funds: JPM US Dollar Liquidity LVNAV Fund - Institutional (dist.) Shares)

Reference

This determination is made under section 91AAO(1)(b) of the Tax Administration Act 1994. This power has been delegated by the Commissioner of Inland Revenue to the position of Technical Specialist under section 7 of the Tax Administration Act 1994.

Discussion (which does not form part of the determination)

Institutional (dist.) Shares in the JPM US Dollar Liquidity LVNAV Fund (the Fund) of JPMorgan Liquidity Funds to which this determination applies, are an attributing interest in a foreign investment fund (FIF) for New Zealand resident investors.

New Zealand resident investors are required to apply the FIF rules to determine their tax liability in respect of their investment in units in the Fund each year.

The Fund invests its assets in short-term USD-denominated Debt Securities, deposits with credit institutions and Reverse Repurchase Agreements. In addition to receiving a favourable assessment of their credit quality pursuant to the Management Company's Internal Credit Procedures, Debt Securities with a long-term rating will be rated at least "A" and Debt Securities with a short-term rating will be rated at least "A-1" by Standard & Poor's or otherwise similarly rated by another independent rating agency. The Fund may also invest in unrated Debt Securities of comparable credit quality to those specified above.

For New Zealand resident investors, Institutional (dist.) Shares in the Fund do not represent an attributing FIF interest that comprises of non-ordinary shares as described in section EX 46(10)(a)-(db) of the Income Tax Act 2007. Consequently, investors would not be prevented from using the FDR method pursuant to section EX 46(8)(a) of the Income Tax Act 2007 in the absence of a determination under section 91AAO of the Tax Administration Act 1994.

However due to the nature of the overall arrangement it is considered that the application of the FDR method would impose unnecessarily high compliance costs on New Zealand investors, as it would require performing a substantial number of quick sale adjustment calculations and associated foreign exchange calculations every time that the investor withdraws funds from the Fund during the year.

Scope of determination

This determination is issued on the basis of information provided to the Commissioner before the date of this determination and applies to an attributing interest in a FIF held by New Zealand resident investors in a non-resident issuer where:

- This non-resident issuer:
  - is an open-ended investment company organised as a Société Anonyme under the laws of the Grand-Duchy of Luxembourg that issues multiple classes of shares; and
  - is known at the date of this determination as JPMorgan Liquidity Funds; and
  - is structured as an umbrella fund with segregated liability between sub-funds; and
  - is managed by JP Morgan Asset Management (Europe) S.à r.l.;
- The attributing interest consists of a US dollar denominated class of shares, Institutional (dist.) Shares, issued by that non-resident that provide exposure solely to the Fund.
- The Fund:
  - Holds assets that predominantly (80% or more by value at a time in the income year) comprise high quality short term money market instruments, which are either USD denominated financial arrangements that are debt securities or instruments that are economically equivalent to USD debt.
  - Has not entered into any arrangements which provide an overall economic return as if the securities were denominated in New Zealand dollars
  - May make distributions of income (if any) to the shareholders, either in the form of additional shares of the same class, or by way of a credit to a separate account, but does not guarantee that any income will be derived or that a distribution will be made.

Interpretation

In this determination, unless the context otherwise requires-

"Fair dividend rate method" means the fair dividend rate method under section YA 1 of the Income Tax Act 2007;

"Financial arrangement" means financial arrangement under section EW 3 of the Income Tax Act 2007;

"Foreign investment fund" means foreign investment fund under section YA 1 of the Income Tax Act 2007;

"Non-resident" means a person that is not resident in New Zealand for the purposes of the Income Tax Act 2007;

"The Fund" means the JPMorgan US Dollar Liquidity LVNAV Fund, a sub-fund of JPMorgan Liquidity Funds.

Determination

An attributing interest in a FIF to which this determination applies is a type of attributing interest for which a person may not use the FDR method to calculate FIF income from the interest.

Application Date

This determination applies for the 2021 income year and subsequent income years.

However, under section 91AAO(3B) of the Tax Administration Act 1994, this determination does not apply for a person and an income year beginning before the date of the determination unless the person chooses that the determination applies for the income year.

Dated on this 7th day of December 2020.

Greg Adamson
Technical Specialist

INTERPRETATION STATEMENTS

This section of the *TIB* contains interpretation statements issued by the Commissioner of Inland Revenue.

These statements set out the Commissioner's view on how the law applies to a particular set of circumstances when it is either not possible or not appropriate to issue a binding public ruling.

In most cases Inland Revenue will assess taxpayers in line with the following interpretation statements. However, our statutory duty is to make correct assessments, so we may not necessarily assess taxpayers on the basis of earlier advice if at the time of the assessment we consider that the earlier advice is not consistent with the law.

IS 20/09: GST – unconditional gifts

Summary

1. This Interpretation Statement provides guidance on the meaning of "unconditional gift" in s 2. A payment made to a GST-registered non-profit body that is an "unconditional gift" is not "consideration" for a supply of goods or services and is not subject to GST.
2. Knowing whether payments are unconditional gifts is important for non-profit bodies that are carrying on taxable activities. Non-profit bodies do not have to return GST on payments that are "unconditional gifts". This also means those payments are not taken into account when a non-profit body is determining whether or not the body exceeds the GST registration threshold and needs to register for GST.
3. A payment made to a non-profit body is an "unconditional gift" where:
   - the payment is voluntarily made for the carrying on or carrying out of the non-profit body's purposes, and
   - no "identifiable direct valuable benefit" in the form of a supply of goods and services to the payer (or an associated person) arises or may arise in respect of the payment.
4. Unconditional gifts generally do not include payments made to a non-profit body under a statutory or other legal obligation, including payments made under contractual obligations. This is because those payments are not usually considered to be "voluntarily made" given they are required to be made. They are not made from a person's own free will. However, a payment made under a sense of moral obligation may still be regarded as being voluntarily made.
5. An "identifiable direct valuable benefit" is an advantage or gain in the form of a supply of goods or services to the payer (or an associate of the payer) which is:
   - clearly able to be defined or identified;
   - sufficiently closely connected to the payment;
   - useful, important and of real value;
   - capable of being valued; and
   - not of only nominal worth.
6. The benefit must not be in the form of a supply of goods or services to the payer (or an associated person) "in respect of" the payment. Where the benefit will arise regardless of whether the payment is made, there will not be a sufficient link between the benefit and the payment. An unsolicited "thank you" gift made by a non-profit body to a donor thanking them for making a donation is also an example of a benefit that does not have a sufficient connection with the payment made.
7. However, where there is a sufficient link between the identifiable direct valuable benefit and the payment so that the payment is made "in respect of" the benefit, the payment is not an "unconditional gift". The payment will instead be "consideration" for the supply of the goods or services comprising the benefit and will be subject to GST.
8. On occasions payments may be made to a non-profit body that are not "unconditional gifts" and are not "consideration" for a supply of goods or services. Such payments are not subject to GST.
9. It is sufficient that an identifiable direct valuable benefit "arises or may arise". This means that the benefit need not arise when the payment is made, instead the benefit can arise in the future or be contingent on a future event or action occurring after the payment is made. For such a benefit to negate an "unconditional gift" there needs to be a sufficient link between the benefit and the payment.

10. Amounts donated to a non-profit body for a specified purpose with stipulations as to how the funds are to be used may be unconditional gifts, provided no identifiable direct valuable benefit arises or may arise in the form of a supply of goods and services for the payer (or an associated person).
11. Where a single supply of goods or services is made for an agreed consideration it cannot be split into two parts - with one part being an unconditional gift (and not subject to GST) and the other part being consideration for a supply of goods and services (and subject to GST). The value of a supply is determined by the consideration paid, and there is no ability under the Act for a portion of the agreed consideration to be notionally treated as an unconditional gift.
12. A payment made by the Crown or a public authority to a non-profit body is not an unconditional gift.
13. This Interpretation Statement updates and replaces the Commissioner's guidance on unconditional gifts in:
    - "GST and Unconditional Gifts", *Tax Information Bulletin* Vol 2 No 4 (November 1990, p 3 and Appendix B); and
    - "GST and Unconditional Gifts", *Tax Information Bulletin* Vol 3 No 1 (July 1991, p 11).
14. The Commissioner's guidance on payments to state schools in "GST and Unconditional Gifts", *Tax Information Bulletin* Vol 2 No 4 (November 1990, Appendix B) was previously replaced by BR Pub 03/04 Payments made by parents or guardians of students to state schools – GST treatment (and its successor public rulings). The Commissioner's current guidance on payments to state schools is found in BR Pub 18/06 *Goods and Services Tax - Payments made by parents to state and state integrated schools*.
15. While the issue of whether koha is an unconditional gift is not specifically addressed in this Interpretation Statement some of the analysis may be helpful. Further guidance on the GST treatment of koha can be found on Inland Revenue's website at **www.ird.govt.nz**

Introduction

16. "Unconditional gift" is a defined term in the Act.
17. The specific terms of the "unconditional gift" definition must be applied. The analysis of whether or not a payment falls within the definition is in some respects similar to, but is not the same as, the analysis of whether a payment is a gift:
    - at common law or for income tax purposes (eg, under the donation tax credit provisions); or
    - for other GST purposes (eg, under the "donated goods and services" definition).

    However, when used cautiously and given appropriate weight, case law from other gifting contexts (like income tax, or insolvency) can be helpful in interpreting the definition.
18. The issues which commonly arise in relation to the "unconditional gift" definition and which are addressed in this Interpretation Statement are as follows:
    - What does "voluntarily made" mean?
    - What payments are made for the carrying on or carrying out of the purposes of the relevant non-profit body?
    - What if the payment is made for a specific purpose?
    - What is an "identifiable direct valuable benefit"?
    - What does it mean for a benefit to arise "in respect of a payment"?
    - What does "arises or may arise" mean?
    - Can a single transaction be split into an unconditional gift and consideration for a supply?
19. These issues are discussed in detail in the next part of this Interpretation Statement.

Analysis

20. GST is charged on the supply of goods and services made by a registered person, in the course or furtherance of a taxable activity, by reference to the value of the supply (see s 8). A taxable activity involves the supply of goods and services for a consideration (see s 6(1)(a)). The value of a supply is determined by reference to the consideration for the supply (see s 10). Therefore, for a supply of goods and services to be subject to GST there needs to be "consideration".
21. "Consideration" is defined in s 2 as:

> **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** [Emphasis added]

22. A payment made by any person as an "unconditional gift" to any non-profit body is not "consideration" in relation to any supply of goods and services. Such a payment is not subject to GST whether or not the non-profit body is GST-registered.
23. "Unconditional gift" is defined in s 2 as:

> **unconditional gift** means a payment voluntarily made to any non-profit body for the carrying on or carrying out of the purposes of that non-profit body and in respect of which no identifiable direct valuable benefit arises or may arise in the form of a supply of goods and services to the person making that payment, or any other person where that person and that other person are associated persons; but does not include any payment made by the Crown or a public authority

24. The two definitions have common elements and case law indicates that conclusions on the "consideration" issue and the "unconditional gift" issue ought to be consistent. That is, a payment that is not an "unconditional gift" because it is a payment made in respect of a supply of goods or services will be "consideration" (*Case U37* (2000) 19 NZTC 9,353 (TRA) at [33]). Payments that are consideration are subject to GST.
25. "Consideration" is broadly defined, and whether there is a sufficient connection, link or nexus to a supply of goods or services to be "consideration" for the purposes of the Act can sometimes be a difficult question. On occasions payments may be made to a non-profit body that are not "unconditional gifts" and are not "consideration" for a supply of goods or services. Such payments are not made in relation to a supply of goods or services and so are not subject to GST. (For example, see *New Zealand Refining Co v CIR* (1995) 17 NZTC 12,307 (HC), and *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA)).
26. Another example is state schools where students have a statutory right to free education. Payments by parents to state schools are not "consideration" for the supply of education services that are an integral part of the curriculum. Therefore, in that situation there is no need to consider whether the parents' payments are "unconditional gifts" (see further BR Pub 18/06 *Goods and Services Tax - Payments made by parents to state and state integrated schools*).
27. Practically, for most non-profit bodies, simply confirming a payment is an "unconditional gift" will resolve whether the payment is subject to GST. In circumstances where it is not clear whether a payment is an unconditional gift, it may then be relevant to consider the wider question of whether the payment is, in fact, "consideration" for a supply of goods or services. Where the payment is not an unconditional gift but is paid in respect of a supply of goods or services then the payment will be consideration for that supply and subject to GST
28. It is recognised that the "unconditional gift" definition should be read together as a whole to determine if a payment is an "unconditional gift". However, to assist with understanding the meaning of "unconditional gift", the definition can be broken down into the following elements:
    - a payment;
    - voluntarily made;
    - to any non-profit body;
    - for the carrying on or carrying out of the purposes of the relevant non-profit body;

    and

    - in respect of which no identifiable direct valuable benefit arises or may arise in the form of a supply of goods and services;
    - to the person making that payment or any other person where that person and that other person are "associated persons".
29. As set out in the definition of "unconditional gift", any payments made to a non-profit body by the Crown, or a "public authority" are not unconditional gifts (even if such payments satisfy all of the elements set out above). This Interpretation Statement does not consider the meaning of the term "public authority" as defined in s 2.
30. Similarly, payments are not unconditional gifts where a relevant benefit is supplied to an associated person of the person making the payment. This Interpretation Statement does not consider the meaning of the term "associated person" as set out in s 2A.
31. While the definition of "unconditional gift" refers to benefits arising in the form of supplies of goods and services, that phrase is to be read as also referring to supplies of goods or supplies of services (see s 2(2)).

What does "voluntarily made" mean?

32. The first part of the definition of "unconditional gift" requires the payment to be "voluntarily made". These words (and others used in the definition, discussed later in this Interpretation Statement) are not defined in the Act and so they need to be given an ordinary meaning that is consistent with the purpose of the definition of "unconditional gift" (see s 5 of the Interpretation Act 1999).

33. Dictionary definitions of "voluntarily" and "voluntary" indicate that for a payment to be voluntarily made it must be made by one's own free will and not be required to be made. For example, the *Shorter Oxford English Dictionary on Historical Principles* (6th ed, Vol 2, 2007, Oxford University Press Inc, New York) defines:

    - "voluntarily" as:

      1 Of one's own free will or accord; without compulsion, constraint or undue influence by others; freely, willingly; …

    - "voluntary" as:

      2 Of an action: performed or done of one's own free will, impulse or choice: not constrained, prompted, or suggested by another. Also more widely, left to choice, not required or imposed, optional. … **c** *LAW*. Of a conveyance, a disposition etc; made without money or consideration being given or promised in return.

34. Therefore, an ordinary meaning of "voluntarily made" is that it refers to a payment that is made freely by choice, is not required to be made or is optional.

35. This meaning is consistent with comments made by Judge Sinclair in *Case 8/2018* (2018) 28 NZTC 4,015 (TRA). Judge Sinclair considered that a payment is voluntary if it is not made under a statutory or other legal obligation. In Her Honour's view, such other legal obligation to make a payment can include an obligation under a contract. She considered this to be consistent with the approach taken by the Court of Appeal in *Turakina Maori Girls College Board of Trustees v CIR* (1993) 15 NZTC 10,032 when referring to consideration as being provided either pursuant to contract or voluntarily.

36. *Case 8/2018* concerned whether amounts paid to the taxpayer by the parents of children attending a private school were consideration for a supply of education services or unconditional gifts. Judge Sinclair found that the payments by the parents were made voluntarily and not pursuant to any contractual obligation. However, the payments were not unconditional gifts because they were payments made in return for the supply of education services (discussed further below).

37. In the Commissioner's view a payment is not voluntarily made if it is made under a legal obligation. A legal obligation includes a statutory obligation and in most instances it also includes an obligation under a contract. Occasionally, where the facts support it, a payment made under a contract may still be "voluntarily made", for example where the contract simply records a gratuitous promise to make a payment. However, the absence of a contract does not necessarily mean that a payment is voluntarily made.

38. A payment of money made under a sense of moral obligation does not mean that the payment is not voluntarily made. Similarly, a payment made under a deed of gift that records the terms of a donor's voluntary promise to make a gift is considered to be voluntarily made.

39. Whether a payment is "voluntarily made" depends on the circumstances. Each situation depends on its facts but as a general rule the Commissioner considers, unless there is evidence to the contrary, payments required to be made pursuant to some legal obligation (statutory or contractual) are not voluntarily made in the sense required by the definition of "unconditional gift".

40. Payments are voluntarily made even where they are solicited by a non-profit body or the non-profit body recommends a certain level of donation. In *Rumney Rugby Football Club v HM Commissioners for Revenue & Customs* [2006] UKVAT V19480, a United Kingdom value-added tax case, a rugby club had a non-exclusive licence to use a ground owned by the council for rugby matches. Notices at the gate suggested recommended levels of donations, but there was no means of enforcing payment and, as the club did not issue tickets for matches, there was no means of determining whether a particular individual had or had not paid. It was held that the gate receipts were voluntary even though there was a recommended level of donation. Accordingly, the payments were donations and not consideration for a supply.

41. Therefore, in summary, for the purposes of the definition of "unconditional gift" the Commissioner considers:

    - a payment is voluntarily made if it is made freely by choice, is not required to be made or is optional;
    - a payment is not voluntarily made if it is made under a legal obligation. A legal obligation includes a statutory obligation and in most instances it also includes an obligation under a contract;
    - a payment made under a sense of moral obligation does not mean that the payment is not voluntarily made; and
    - a non-profit body soliciting donations or recommending the amount of a donation does not prevent a payment from being voluntarily made.

42. Establishing if a payment is voluntarily made is a question of fact, and every case falls to be determined by considering all the relevant circumstances.

What payments are made for the carrying on or carrying out of the purposes of the relevant non-profit body?

43. For a payment to be an unconditional gift it must be made to a non-profit body "for the carrying on or carrying out of the purposes of that non-profit body". "Non-profit body" is defined in s 2:

> **non-profit body** means any society, association, or organisation, whether incorporated or not,—
>
> (a) which is carried on other than for the purposes of profit or gain to any proprietor, member, or shareholder; and
>
> (b) which is, by the terms of its constitution, rules, or other document constituting or governing the activities of that society, association, or organisation, prohibited from making any distribution whether by way of money, property, or otherwise howsoever, to any such proprietor, member, or shareholder

44. *Case X19* (2006) 22 NZTC 12,255 (TRA) suggests that if the recipient is a "non-profit body", then an amount can only ever be used for the carrying out of the purposes of that non-profit body. The Court noted that this was because, to come within the definition of a "non-profit body", the body must not be permitted to distribute any of its property or money to any proprietor, member or shareholder. The Court went on to say that if the body's constitution does not provide this, then it cannot be a non-profit body for the purposes of the Act.

45. Therefore, in practice, the requirement for a payment to be made to a body "for the carrying on or carrying out of the purposes" of that body will necessarily be met if the body is a "non-profit body". Not-for-profit entities, including charitable entities registered under the Charities Act 2005, will generally meet the requirements of the "non-profit body" definition.

What if the payment is made for a specified purpose?

46. A question that has been asked is whether the phrase "for the carrying on or carrying out of the purposes of that non-profit body" limits "unconditional gifts" to payments made for the general purposes of a non-profit body, or also includes payments made to a non-profit body for a specified purpose.

47. The courts have recognised that payments made with a direction or condition as to how the funds are to be used may still fall within the definition of "unconditional gift". In *Case U37*, the payment was conditional on its use for renovations and repairs of leased premises. Although the payment was found not to be an unconditional gift (because it was "consideration") Judge Barber commented that the condition attached to the payment would not have disqualified it from being an "unconditional gift" (see Example 5 - Donation to school with conditions at [96]).

48. The word "unconditional" in the context of the defined term "unconditional gift" refers to whether any benefit supplied to the payer (or an associated person of the payer) is conditional on them making the payment. It does not refer to any conditions or stipulations that the payer may attach to the payment. Amounts paid to a non-profit body for a specified purpose can still meet the definition of "unconditional gift" in s 2, so long as there is no identifiable direct valuable benefit in respect of the payment in the form of a supply of goods or services to the payer (or an associated person of the payer).

49. An unconditional gift is made when the payment is made to the non-profit body. At common law if there is a condition to be satisfied before a gift can be made, that is referred to as a condition precedent. In that case the gift is not made until the condition is satisfied. When a payer makes a gift of money with a stipulation as to how that money is to be spent then that is a condition subsequent. In that case the gift is made when the payment is made, not when the condition is satisfied. (See *Broadbent v Chief Executive of The Ministry of Social Development* [2017] NZHC 1499 from [41].)

50. Actions undertaken by a payee to satisfy a condition attached to a payment will not prevent the payment from being an unconditional gift so long as no identifiable direct valuable benefit arises in the form of a supply of goods and services to the payer (or an associated person) in respect of the payment.

51. Sometimes circumstances can arise where money is loaned to a non-profit body or placed on trust before it is "given" outright to the non-profit body. Sometimes this might occur while a condition precedent is being satisfied. A loan is not an "unconditional gift". Similarly, funds held in trust for a non-profit body have not been transferred to the non-profit body, and so no payment has been made to the non-profit body. Understanding when an unconditional gift is made will depend on the facts and a careful consideration of the legal arrangements actually entered into and carried out.

What is an "identifiable direct valuable benefit"?

52. A payment will not be an unconditional gift where an "identifiable direct valuable benefit" arises or may arise in respect of the payment, in the form of a supply of goods or services to the payer (or an associated person of the payer).

53. To disqualify a payment from being an unconditional gift the "identifiable direct valuable benefit" must arise in the form of a supply of goods or services. "Goods" and "services" are defined in s 2. A supply of money is not a supply of goods or services for GST purposes.

54. The phrase "identifiable direct valuable benefit" is a composite phrase and must be considered as a whole, and in light of the words following it. Even so, it is helpful to consider each of the words that make up the phrase in turn, as each word has its own meaning.

Identifiable

55. The Commissioner considers that, for the purposes of the definition of unconditional gift, an "identifiable" benefit is a benefit in the form of a supply of goods or services that is clearly able to be defined or identified. (See, for example in a different context, *Estate of Simpson v Accident Compensation Corporation* [2007] NZCA 247 where the Court considered that for compensation to be paid for loss or an expense for the provision of care by a person (the carer) to an injured person, that loss or expense had to be defined or identifiable. This required the carer to be able to prove the number of hours spent caring for the injured person and to provide evidence of how the loss of time caused financial detriment.)

Direct

56. While the meaning of "direct" has not been discussed in any detail by the New Zealand courts in a GST context, the phrase "directly in connection with" as used in the zero-rating provisions of the Act has been considered. In *Malololailai Interval Holidays New Zealand Ltd v CIR* (1997) 18 NZTC 13,137 (HC) and other New Zealand cases considering the words "directly in connection with", the word "directly" is seen as specifying the strength or degree of connection required.

57. Judge Barber considered the meaning of the word "direct" in *Case H48* (1986) 8 NZTC 384 (TRA), in the context of the deductibility of expenditure incurred in obtaining an academic qualification. His Honour accepted that a nexus or link existed between the education expenditure and an increase in income; but did not find that link to be sufficiently close that it could be regarded "as a direct result of the obtaining of that degree". Again, although in an income tax context, this is an example of the word "direct" being used to specify the degree of nexus required between two things.

58. In the Commissioner's view, for a payment to be disqualified from being an unconditional gift a close connection is required between the benefit in the form of a supply of goods or services and the payment. The use of the word "direct" shows that Parliament recognised that sometimes indirect benefits are obtained when a gift is made but those indirect benefits should not disqualify the payment from being a gift. An example of an indirect benefit might be when a parent donates $50 to their children's school for library books that their children may read.

59. A stronger connection exists where a payment gives rise to a benefit in the form of a supply of goods or services for the payer alone, as opposed to the payment being one that benefits a whole class of people, one of whom is the payer. Also, where the benefit obtained would be available irrespective of whether the payment is made, it will not be a direct benefit as an insufficient connection exists between the payment and the benefit for it to be described as "direct". And the benefit will also not arise "in respect of" the payment. This aspect is discussed further below and is linked to the idea of reciprocity.

60. A payment that directly relates to a benefit in the form of a supply of goods or services but passes through an intermediary or is provided by another party could still be a direct benefit. The Commissioner considers that whether such a benefit is a direct benefit will depend on the facts. The important question to be answered is whether and to what extent the payer or an associate has benefitted from the payment, and whether they would have gained the benefit irrespective of whether the payment was made.

Valuable

61. The ordinary meaning of "valuable" is something worth a great deal of money or very useful or important. Sometimes it also means something that is of material or monetary value and able to be valued. For example, the *Shorter Oxford English Dictionary on Historical Principles* defines "valuable" as:

> 1 Of material or monetary value; capable of commanding a high price; precious
>
> 2 Able to be valued
>
> 3 Having considerable importance or worth; of great use or benefit; having qualities which confer value.

62. Therefore, the Commissioner considers that a reasonable interpretation of the word "valuable" in the context of a benefit and the definition of "unconditional gift", is that the benefit must be something useful or important and of real value. The benefit must be capable of being valued and be of material value and, it follows, should not include benefits of only nominal worth.

63. Judicial support for this interpretation can be found in comments made by Gallen J (delivering the judgment of the Court of Appeal in *Welch v Official Assignee* [1998] 2 NZLR 8 at 12) on the meaning of "valuable consideration" in the context of gifting for insolvency law purposes:

> The term "valuable consideration" has been the subject of some disagreement in the decisions but as the Judge noted, the consensus of authority is that the term means more than a nominal consideration which would be sufficient to support a contract, but falls short of a consideration which equates with the value of the property under consideration. In *Meo v Official Assignee* [1987] 3 NZCLC 100,280 Greig J referred to it as being a "real value" and there are similar comments in *Re Abbott (A Bankrupt), ex parte Trustee of the Property of the Bankrupt v Abbott (P M)* [1983] Ch 45, see also *Re Windle (a bankrupt), ex parte the trustee of the bankrupt v Windle* [1975] 3 All ER 987.

64. While not a GST decision, Gallen J found "valuable" in the context of gifts and consideration to mean something that was more than nominal and had a "real value". This decision supports the Commissioner's view that when deciding if a benefit is "valuable" for the purposes of the "unconditional gift" definition, benefits which cannot be valued or supplies of goods or services with only nominal worth may be overlooked. In keeping with these de minimis principles, a benefit will be of nominal worth when the value of the supply of goods or services is minimal or trivial (see Example 4 – Donation to street appeal at [94]).

65. The question of whether a benefit is "valuable" does not arise where a non-profit body supplies goods or services as an unsolicited "thank you" for a donation and it can be determined the supply is not made in return for the donation.

Benefit

66. The ordinary meaning of "benefit" is an advantage or profit gained from something (see *Concise Oxford English Dictionary* (12th ed, 2011, Oxford University Press Inc, New York) and also *Shorter Oxford English Dictionary on Historical Principles*).

67. The meaning of "benefit" is coloured by the adjectives that precede it and by the words that follow it. As a result, any advantage or gain to the payer (or a person associated with the payer) must be identifiable, direct and valuable and must be in the form of a supply of goods or services.

Summary

68. Bringing together all the elements of the phrase "identifiable direct valuable benefit", the Commissioner considers that the phrase means an advantage or gain to the payer (or a person associated with the payer) in the form of a supply of goods or services that is:

- clearly able to be defined or identified;
- sufficiently closely connected to the payment;
- useful, important and of real value;
- capable of being valued; and
- not of only nominal worth.

69. Three examples where New Zealand courts have found there to be identifiable direct valuable benefits in the form of a supply of goods and services are:

- the benefit to the payer of the recipient entering into a lease with them and improving the payer's property (*Case U37*);
- the benefit to the payer of the recipient providing education/tuition services to the payer's children (*Case 8/2018*); and
- the benefit to the payer of being entitled to use the recipient's sports courts and to receive coaching services (*Case 6/2019* (2019) 29 NZTC 5,005 (TRA)).

In these cases, the payments were found to be consideration for the supply of the goods or services, and not unconditional gifts.

What does it mean for a benefit to arise "in respect of" a payment?

70. To disqualify a payment from being an unconditional gift, the identifiable direct valuable benefit (in the form of a supply of goods or services) must arise "in respect of" the payment made. Receipt of a benefit by the payer (or an associated person) is not by itself enough to take the payment out of the definition of unconditional gift. For a payment to be disqualified from being an "unconditional gift", a sufficient link must exist between the payment and the benefit arising in the form of a supply of goods or services.

71. The Commissioner considers that where the benefit would arise irrespective of the payment being made, then an insufficient link exists to negate the payment from being an unconditional gift. The courts have found that for a payment to be an "unconditional gift" any benefit arising must not be conditional or dependent on the payment being made.

72. This approach was applied by Judge Barber in *Case U37* and *Case 6/2019*, and further clarified in *Case 8/2018* by Judge Sinclair. Judge Barber set out the criteria for an unconditional gift in *Case U37* at [42]:

> To qualify as an unconditional gift, several criteria must be met under the definition of "unconditional gift" in s 2 of the Act:
>
> (1) The payment must be voluntarily made to a non-profit body.
>
> (2) No direct valuable benefit may arise in the form of goods or services to the person making that payment, or if such a benefit does arise, **that benefit must not be conditional or dependant [sic] upon the payment**. [Emphasis added]

73. *Case U37* concerned a non-profit body that had agreed to take a lease of premises on the basis that it would receive a payment of $20,000 from the landlord. Receipts and correspondence between the parties indicated that the money was to be used for refurbishing the premises. Judge Barber concluded that the payment was not an unconditional gift because it was sufficiently connected to the benefit (ie, the lease and the property improvements):

- the payment was conditional on the non-profit body entering into a lease and the payment being used for renovations and repairs of the leased premises; and
- the landlord had received two direct valuable benefits from the payment (the entering into the lease and, if the payment was used for its intended purpose, the renovation and repair of the premises).

74. In *Case 6/2019* Judge Barber similarly concluded that a relevant benefit (namely the payer's entitlement to use the recipient's sport courts and receive coaching services) was conditional upon payment being made.

75. In *Case 8/2018* counsel for the taxpayer argued that "conditional" and "dependent" were essentially two ways of saying the same thing. Judge Sinclair disagreed, stating at [51]:

> In my view, on a careful reading of the decision, it is clear that **His Honour contemplated two different situations when he set out the criteria, namely that the benefit must not be conditional (contingent) or dependent (reliant) on the payment**. Furthermore, by way of observation, if Judge Barber had intended to use these words interchangeably, it would be reasonable to expect that his Honour would have done so in his decision or, at least, have continued to use the words together. Instead, in his analysis of the facts he only used the word "conditional". [Emphasis added]

76. Judge Sinclair found on the facts that children were not excluded from attending the private school if their parents were unable to pay, so their attendance at the school was not "conditional" on parents making the requested financial contributions. However, the supply of education services by the disputant was "dependent" on parents' contributions. This was because it was evident from the background facts preceding the payments, including the related documentation and correspondence between the school and the parents, that if the contributions had not been made the school would not be able to operate. Therefore, Judge Sinclair found that in the circumstances a sufficient nexus could be established between the contributions made by parents and the supply of education services, so that the contributions were not unconditional gifts, but consideration for the supply of education services.

77. In other circumstances, the fact that a benefit is arguably "dependent", in the sense of reliant on a payment to a non-profit body (for example, because the non-profit body wholly or partly relies on such payments to carry on or carry out its purposes), may not prevent the payment from being an unconditional gift. Establishing if a benefit is "dependent" is a question of fact, and every case falls to be determined by considering all the relevant circumstances.

Summary

78. An identifiable direct valuable benefit arises "in respect of" a payment where a sufficient link exists between the payment and the benefit. Where the benefit will arise regardless of whether or not the payment is made, there will not be a sufficient link between the benefit and the payment to prevent the payment from being an unconditional gift. The strength of the link can be affected by situations like that in:
    - *Case U37* where the improvement payment was conditional on the non-profit body entering into the lease; or
    - *Case 8/2018* where the background facts preceding the payments being made, including the related documentation and correspondence between the parents and the private school, meant the court could establish that the private school was dependent on the payments to be able to make the supply of education services and that those services were a relevant benefit arising "in respect of" the parents' payments.

What does "arises or may arise" mean?

79. An "unconditional gift" exists only where no identifiable direct valuable benefit "arises or may arise" in the form of a supply of goods and services in respect of the payment. The words "arises or may arise" refer to an actual, future or contingent benefit in the form of a supply of goods or services made in respect of the payment.

80. Sometimes a benefit in the form of a supply of goods or services will be made in the future after the payment is made or might be contingent on some other event occurring. Where that benefit is still supplied "in respect of" the payment made then the payment is not an "unconditional gift". For example, a future benefit might arise where a private school offers a 15% discount off next year's tuition fees for all donations to the school's building fund in excess of $5,000. Alternatively, a contingent benefit may arise where a non-profit body promises all its donors that they will be supplied with free rugby tickets if it reaches a certain fundraising milestone.

81. Just like a benefit in the form of a supply of goods or services that occurs when a payment is made, a future or contingent identifiable direct valuable benefit will also not be an unconditional gift if it is "in respect of" the payment. That is, where there is a sufficient nexus between the future or contingent benefit and the payment made, the payment is not an "unconditional gift". In determining whether a sufficient nexus exists the courts will take into account all the circumstances surrounding the payment.

82. In circumstances where a non-profit body chooses to make a supply of goods or services to a donor as a "thank you" to acknowledge a donor's generosity, there will not usually be a sufficient nexus between the donor's payment and the supply of goods or services for the supply to be "in respect of" the donor's payment (see Example 8 - Donation to charity concert in return for free tickets at [101]). In that situation the payment is not subject to GST.

Can a single transaction be split into an unconditional gift and consideration for a supply?

83. Another question often asked about GST and "unconditional gifts" is whether a single transaction can be split into two parts – with one part being an unconditional gift (and not subject to GST) and the other part being consideration for a supply of goods and services (and subject to GST). This situation may arise where goods or services are purchased from a non-profit body for an amount in excess of their usual market value, so that the non-profit body is advantaged by the excess.

84. In the Commissioner's view the GST rules do not allow a single supply (eg, a purchase of goods at a charity auction) to be notionally split into two parts (see Example 11 - Charity auction at [109]). Where a single supply of goods or services is made for an agreed consideration there can be no apportionment. The value of the supply is determined by the consideration paid, and there is no ability under the Act for a portion of the agreed consideration to be treated as an unconditional gift. There is no apportionment language in the definitions of "consideration" or "unconditional gift", and the Commissioner cannot interfere in the commercial pricing of a transaction.

85. However, if on the facts it can be shown that a single payment made to a non-profit body actually relates to two separate transactions – a supply of goods or services for an agreed consideration and a separate donation, then that single payment can be split between the two separate transactions with one transaction being taxable and one not being subject to GST (see Example 10 - Purchase of tickets to charity dinner at [108]).

Examples

86. The following examples are included to assist in the application of the "unconditional gift" definition.

Example 1 – Non-profit body not GST registered

87. A design company makes a donation of $1,000 to a local dance group that performs at a corporate function. The dance group is a non-profit body but it is not registered for GST, and the dance group's turnover level is below the threshold to register even if the payment was consideration for a supply.

88. The payment is not subject to GST, whether or not the payment is consideration for a supply or an unconditional gift, because the dance group is not GST-registered and not liable to be GST-registered.

Example 2 – Round of golf conditional on donation

89. South Beach Golf Club is a GST-registered non-profit body. The club decides it will no longer advertise casual green fee charges for non-members to play a round of golf. Instead non-members are asked for a $30 donation to the club before entering the course.

90. Kate is a non-member and is asked to make a $30 donation before she is permitted to play a round of golf. The round of golf is conditional on the donation being made.

91. Kate's $30 payment is not an unconditional gift, it is consideration for a supply of services. Kate receives an identifiable direct valuable benefit (the supply of a round of golf) that is conditional on the payment. A sufficient connection exists between the payment and the round of golf. Also, the fact the golf club now refers to the casual green fee charges as "donations" does not change their character for GST purposes.

Example 3 – Recommended donation requested by museum

92. The Museum of Art is a GST-registered non-profit body. The museum charges $20 admission for visitors from outside the area and recommends local visitors pay a donation of $10.

93. The recommended donations paid by local visitors are unconditional gifts and are not subject to GST. These donations are voluntarily made, and while an identifiable direct valuable benefit arises in respect of the payment (ie, the enjoyment of visiting the gallery) there is not a sufficient link between that benefit and any payment made. This is because the local visitor is free to enter the museum whether or not they pay the recommended donation. Entry to the museum is not conditional on payment. The $20 admission fee paid by visitors from outside the area is subject to GST.

Example 4 – Donation to street appeal

94. Joseph makes a small donation to a street appeal being run by a national charity. After making the donation the volunteer thanks Joseph for his generosity and offers him a flower to wear to show his support for the charity. The donation is not subject to GST. This is because there is an insufficient nexus between Joseph's donation and the flower offered by the volunteer so Joseph's payment is not made "in respect of" the flower. In addition, if there was a sufficient nexus the donation would be an unconditional gift as the payment is made voluntarily and the flower is only a token of nominal worth and so in the circumstances it is not a valuable benefit.

Example 5 – Donation to school with conditions

95. Jack is a businessperson, who has two children at the local primary school. Jack's company donates $4,000 to the school for the installation of sunshades over the school playground.

96. The company's $4,000 donation is an unconditional gift. The donation is made for the carrying on or carrying out of the purposes of the school (a non-profit body) even though the funds are for a specified purpose. Jack's company (or Jack and his children) do not receive an identifiable direct valuable benefit as a result of the company's payment. Any benefit arising from Jack's children using the sunshades is not an identifiable, direct valuable benefit in the form of a supply of goods or services to an associate of the company. The sunshades are for the benefit of the school community as a whole.

Example 6 – Donation to concert for charity with public acknowledgement

97. Jack's company donates $2,000 to a GST-registered non-profit charity organising a concert to raise money for the local children's hospital. The event programme lists Jack's business and the names of 20 other local businesses, acknowledging their support. The company's donation was not conditional on the public acknowledgement.

98. The company's $2,000 donation is an unconditional gift. The company has not received an identifiable direct valuable benefit in the form of a supply of goods or services in respect of the payment. While Jack's company is acknowledged in the event programme, a mere acknowledgement is not a "valuable" benefit, as it has no real value and is not capable of being valued.

Example 7 – Use of charity's logo in return for donation

99. The facts are the same as in Example 6, except in return for the donation Jack's company is granted the right to use the charity's logo on the company's website and letterhead to "promote" Jack's company as a supporter of the charity. This is a valuable benefit to Jack's company.

100. The company's $2,000 donation is not an unconditional gift. In these circumstances the right to use the charity's logo is a direct identifiable benefit of more than a nominal worth. The right to use the logo has a direct nexus with the donation, is of real value, and is capable of being valued. The payment is consideration for a supply and is subject to GST. The fact that the payment is referred to as a "donation" does not determine its character for GST purposes.

Example 8 – Donation to charity concert in return for free tickets

101. The facts are the same as in Example 6, except Jack receives four $60 tickets to the concert for himself and his family in return for his donation. The charity promised free tickets in return for all donations of $2,000 or more.

102. Jack (an associated person of his company) has received an identifiable direct valuable benefit in the form of the supply of concert tickets in respect of the company's payment. The tickets have a direct nexus with the donation, are of real value, and are capable of being valued. The company's $2,000 donation is consideration for the supply of the tickets and is not an unconditional gift.

103. The value of a ticket ($60) is not trifling or minimal and so it is a valuable benefit. Further, the fact the charity refers to the payment as a "donation" does not determine the payment's character for GST purposes.

104. If instead of promising free tickets in return for all donations of $2,000 or more, the charity had simply chosen to later give away free tickets to some donors as a way of thanking them for their generosity, the company's payment of $2,000 would not have been subject to GST. In that case, there would not be a sufficient link between the company's donation and the benefit of the free tickets, so the payment would not be consideration for a supply.

Example 9 – Donation to charity concert with donor as major sponsor

105. The facts are the same as in Example 6, except Jack's company donates $10,000 to the organisers of the concert on the condition that the concert is promoted with Jack's business as the major sponsor. Jack's business is named as the major sponsor in the marketing of the concert, on the front page of the programme, and at the concert.

106. The company's $10,000 payment is consideration for the supply of advertising and not an unconditional gift. Jack has received an identifiable direct valuable benefit in return for the payment in the form of advertising. Advertising is a supply of a service that is of real value and is capable of being valued. Further, the fact the charity refers to the payment as a "donation" does not determine the payment's character for GST purposes.

Example 10 – Purchase of tickets to charity dinner

107. Tasneem purchases a ticket to attend a dinner for a GST-registered charity. The ticket costs $100. The value of the dinner is only $45 and so the charity benefits from the additional $55 included in each ticket's price. The charity must charge GST on the full ticket price of $100 and cannot treat $55 as an unconditional gift. This is because the ticket sale is a single supply made for an agreed consideration of $100.

108. If the charity had sold its dinner tickets for $45 and then asked ticket buyers if they would like to make a donation of $55, GST would only be charged on the ticket sale and not on the donation. This is because there are 2 separate transactions – a single supply of the dinner ticket for an agreed consideration of $45 and then a separate donation of $55. The donation will not be subject to GST because it is not made in respect of the supply of the dinner. Attendance at the dinner is not conditional on the donation being made.

Example 11 – Charity auction

109. While attending the charity dinner in Example 10, Tasneem participates in a charity auction. The charity has purchased various sporting equipment that it has had signed by famous New Zealand sportspeople. She purchases a signed netball in the auction for $500. This is more than the signed netball is worth but she is happy with her purchase as she feels it is for a good cause.

110. The charity must charge GST on the full amount Tasneem pays for the signed netball, even though a significant proportion of the purchase price was, in Tasneem's mind, a donation to the charity. This is because the purchase is a single supply made for an agreed consideration of $500.

Example 12 – Donation to surf lifesaving club

111. Wiremu makes a $5,000 donation to his local surf lifesaving club, which is a GST-registered non-profit body.

112. Although a benefit may possibly arise for Wiremu in the form of a future supply of life saving services should Wiremu (or a person associated with Wiremu) get into difficulty at the beach, no identifiable direct valuable benefit arises to Wiremu or a person associated with Wiremu in respect of his payment to the surf lifesaving club. This is because any possible future supply of services to Wiremu (or an associate) does not have a sufficient nexus to Wiremu's payment. Wiremu's donation is not subject to GST.

Example 13 – Plaque to recognise funding body's donation

113. ABC Trust, a private philanthropic trust, makes a substantial distribution to a GST-registered non-profit body for its project to build a new hall. The non-profit body builds a new hall with those funds and in gratitude affixes a plaque which states that the hall was funded by the generous donation of ABC Trust. ABC Trust has not received an "identifiable direct valuable benefit" in the form of a supply of goods or services in respect of the distribution. The distribution is an unconditional gift for GST purposes. While the plaque acknowledges ABC Trust, a mere acknowledgement is not a "valuable" benefit and so it would not prevent the payment from being an "unconditional gift".

Example 14 – Advertisement of donor's logo in return for donation

114. A company makes a significant contribution to a GST-registered non-profit body for that body to purchase a vehicle. The vehicle is sign-written with the company's name and logo on it. The company's contribution is consideration for the supply of advertising services by the non-profit body. The company receives an "identifiable direct valuable benefit" in the form of a supply of advertising services in respect of its contribution. That is, the company is receiving advertising in return for its payment. The payment is consideration for a supply and is subject to GST.

Example 15 – Gift subject to a condition

115. Arthur pledges to make a gift of $100,000 to the Municipal Opera House on the condition that the money is used to improve disabled access to the theatre's auditorium. Arthur's wife uses a wheelchair and will benefit from the improved access. While the gift to the Municipal Opera House has a condition attached to it, that does not mean the gift is not an "unconditional gift". A person can make an unconditional gift with conditions attached.

116. The fact a benefit will arise to Arthur's wife in the form of improved access to the opera house will not prevent the gift being an "unconditional gift". This is because the benefit is not a "direct" benefit in the form of a supply of goods or services to Arthur's wife. The improved disabled access is for the benefit of the community as a whole.

Example 16 – Payments to a local football club

117. Jill's two children are junior members of the local football club. It is a GST-registered non-profit body. Jill pays membership fees to the club for her two children, with membership allowing her children to train and participate in their respective age-group football teams. The club has also recently been fundraising for five new sets of goals for the club's 30 junior teams, and Jill makes a $100 payment to the club as part of this fundraising.

118. The membership fees paid by Jill are consideration for the right to participate in the club's activities and their payment is a condition of participation. The membership fees are subject to GST.

119. However, Jill's separate $100 payment towards the club's fundraising for the new goals is an unconditional gift. The fact that Jill's children, as junior members of the club, may benefit from the new goals does not disqualify her payment from being an unconditional gift. This is because any benefit in this context is too remote and therefore the benefit obtained is not in respect of Jill's $100 payment towards the club's fundraising.

120. Although Jill paid the subscriptions and the donation together in one online banking transaction, that payment relates to two separate transactions and can be split between the two transactions.

References

Related rulings/statements

BR Pub 18/06 Goods and Services Tax - Payments made by parents to state and state integrated schools, *Tax Information Bulletin* Vol 30, No 7 (August 2018): 3.

"GST and Unconditional Gifts", *Tax Information Bulletin* Vol 2, No 4 (November 1990): 3.

"GST and Unconditional Gifts", *Tax Information Bulletin* Vol 2, No 4 (November 1990): Appendix B.

"GST and Unconditional Gifts", *Tax Information Bulletin* Vol 3, No 1 (July 1991): 11.

Subject references

consideration
gift
GST
identifiable direct valuable benefit
unconditional gift
voluntary

Legislative references

Goods and Tax Act 1985, ss 2 ("consideration", "non-profit body", "unconditional gift")

Case references

Broadbent v Chief Executive of The Ministry of Social Development [2017] NZHC 1499
Case 6/2019 (2019) 29 NZTC 5,005 (TRA)
Case 8/2018 (2018) 28 NZTC 4,015 (TRA)
Case H48 (1986) 8 NZTC 384 (TRA)
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Malololailai Interval Holidays New Zealand Ltd v CIR (1997) 18 NZTC 13,137 (HC)
New Zealand Refining Co v CIR (1995) 17 NZTC 12,307 (HC)
Rumney Rugby Football Club v HM Commissioners for Revenue & Customs [2006] UKVAT V19480
Turakina Maori Girls College Board of Trustees v CIR (1993) 15 NZTC 10,032 (CA)
Welch v Official Assignee [1998] 2 NZLR 8

Appendix – Legislation

Goods and Services Tax Act 1985

2 Interpretation

(1) In this Act, other than in section 12, unless the context otherwise requires,—

...

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

...

non-profit body means any society, association, or organisation, whether incorporated or not,—

(a) which is carried on other than for the purposes of profit or gain to any proprietor, member, or shareholder; and

(b) which is, by the terms of its constitution, rules, or other document constituting or governing the activities of that society, association, or organisation, prohibited from making any distribution whether by way of money, property, or otherwise howsoever, to any such proprietor, member, or shareholder

...

public authority means all instruments of the Crown in respect of the Government of New Zealand, whether departments, Crown entities, State enterprises, or other instruments; and includes offices of Parliament, the Parliamentary Service, the Office of the Clerk of the House of Representatives, public purpose Crown-controlled companies, and the New Zealand Lottery Grants Board; but does not include the Governor-General, members of the Executive Council, Ministers of the Crown, or members of Parliament

...

unconditional gift means a payment voluntarily made to any non-profit body for the carrying on or carrying out of the purposes of that non-profit body and in respect of which no identifiable direct valuable benefit arises or may arise in the form of a supply of goods and services to the person making that payment, or any other person where that person and that other person are associated persons; but does not include any payment made by the Crown or a public authority.

...

(2) For the purposes of this Act, a reference to goods and services includes a reference to goods or services.

2A Meaning of associated persons

(1) In this Act, **associated persons** or persons associated with each other are—

(a) two companies if a group of persons—

(i) has voting interests in each of those companies of 50% or more when added together; or

(ii) has market value interests in each of those companies of 50% or more when added together and a market value circumstance exists in respect of either company; or

(iii) has control of each of those companies by any other means whatsoever:

(b) a company and a person other than a company if the person has—

(i) a voting interest in the company of 25% or more; or

(ii) a market value interest in the company of 25% or more and a market value circumstance exists in respect of the company:

(bb) a person, or a branch or division of the person that is treated as a separate person under section 56B, and another branch or division of the person that is treated as a separate person under section 56B:

(c) two persons who are—

(i) connected by blood relationship:

(ii) connected by marriage, civil union or de facto relationship:

(iii) connected by adoption:

(iv) [Repealed]

(cb) a trustee of a trust and another person (person A), if—

(i) person A is associated with another person (the relative) under paragraph (c); and

(ii) the relative is associated with the trustee under paragraph (f):

(d) a partnership and a partner in the partnership:

(e) [Repealed]

(f) a trustee of a trust and a person who has benefited or is eligible to benefit under the trust, except if, in relation to a supply of goods and services,—

(i) the trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic, or cultural purposes and the supply is made in carrying out these purposes; or

(ii) the person is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic, or cultural purposes and the supply enables them to carry out these purposes:

(g) a trustee of a trust and a settlor of the trust, except if the trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic or cultural purposes:

(h) a trustee of a trust and a trustee of another trust if the same person is a settlor of both trusts, except if, in relation to a supply of goods and services,—

(i) either trustee is a charitable or non-profit body with wholly or principally charitable, benevolent, philanthropic, or cultural purposes; and

(ii) the supply is made in, or enables, the carrying out of the charitable, benevolent, philanthropic, or cultural purposes:

(hb) A trustee of a trust and a person who has a power of appointment or of removal of the trustee, except if the person—

(i) holds the power as a provider of professional services; and

(ii) is subject to a professional code of conduct, and disciplinary process intended to enforce compliance with the code, of an approved organisation as that term is defined in section 3(1) of the Tax Administration Act 1994, for such providers of professional services; and

(iii) has not benefited from the trust; and

(iv) is not eligible to benefit from the trust:

(i) a person (person A) and another person (person B) if—

(i) person B is associated with a third person (person C) under any one of paragraphs (a) to (hb); and

(ii) person C is associated with person A under any one of paragraphs (a) to (hb).

(2) For the purpose of subsection (1)(a), group of persons has the meaning set out in section YA 1 of the Income Tax Act 2007.

(3) For the purpose of subsection (1)(a) and (1)(b)—

(a) market value circumstance has the meaning set out in section YA 1 of the Income Tax Act 2007, as if the reference to "this Act" in paragraph (e) of the definition were to "the Goods and Services Tax Act 1985":

(b) market value interest has the meaning set out in paragraph (a) of the definition of market value interest in section YA 1 of the Income Tax Act 2007:

(c) voting interest has the meaning set out in paragraph (a) of the definition of voting interest in section YA 1 of the Income Tax Act 2007.

(4) For the purpose of subsection (1)(a) and (1)(b), if a person (person A) and another person (person B) are associated persons under any of subsection (1)(bb) to (1)(i), person A is treated as holding anything held by person B.

(5) [Repealed]

(6) For the purpose of subsection (1)(c)—

(a) persons are connected by blood relationship if they are within the second degree of relationship:

(b) persons are connected by marriage, civil union or de facto relationship if one is in a marriage, civil union or de facto relationship with the other or with a person who is connected by blood relationship to the other:

(c) persons are connected by adoption if one has been adopted as the child of the other or as a child of a person who is within the first degree of relationship to the other.

(7) For the purpose of subsection (1)(g) and (1)(h), settlor has the meaning set out in section YA 1 of the Income Tax Act 2007.

(8) Subsection (1)(i) does not apply if 2 persons (persons A and B) are both associated with a third person (person C) under subsection (1)(c).

10 Value of supply of goods and services

...

(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.

OPERATIONAL POSITION

The purpose of an Operational Position is to outline the legal position that the Commissioner considers is correct for an issue identified and the approach the Commissioner will be taking to applying that position in practice.

OS 19/04: (KM 2020): Kilometre rates for the business use of vehicles for the 2020 income year

In accordance with s DE 12(4) the Commissioner is required to set and publish kilometre rates. These rates can be used to calculate expenditure claims for the business use of a motor vehicle. They may also be used by employers as a reasonable estimate for reimbursement of expenditure incurred by employees for the use of a private motor vehicle for business purposes. More information is available on the Inland Revenue website www.ird.govt.nz/ (search keywords "claiming vehicle expenses").

In Operational Statement OS 19/04 Kilometre rates for the business use of vehicles for the 2020 income year (OS 19/04) the Commissioner set interim rates for the 2019/2020 income year. At the time that OS 19/04 was published it was only possible to set interim rates because the Commissioner relies on third-party information to set the kilometre rates and that information was not then available to due to COVID-19. OS 19/04 advised that the 2019 kilometre rates would continue to apply until the required third-party information was available and a full review could be undertaken.

That review has now been completed. The rates set out below apply for the 2019/2020 income year for business motor vehicle expenditure claims. The tier one rates reflect a slight increase in vehicle ownership costs (such as insurance and registration charges). However, the tier two rates reflect a decrease in overall vehicle operating costs largely a reduction in the cost of fuel. Taxpayer's that have filed their 2020 income tax returns using the interim rates that were released in OS 19/04, are able to request their return be reassessed to take into account these finalised kilometre rates, in terms of s 113 of the Tax Administration Act 1994.

The table of rates for the 2020 income year:

The Tier Two rate is for running costs only. Use the Tier Two rate for the business portion of any travel over 14,000 kms in a year.

Vehicle Type	Tier One Rate	Tier Two Rate
Petrol or Diesel	82 cents	28 cents
Petrol Hybrid	82 cents	17 cents
Electric	82 cents	9 cents

Operational Statements OS 19/04A: *Commissioner's statement on using a kilometre rate for business running of a motor vehicle - deductions* and OS 19/04B: *Commissioner's statement on using a kilometre rate for employee reimbursement of a motor vehicle* provide further information on the use of the kilometre rates.

QUESTIONS WE'VE BEEN ASKED

This section of the *TIB* sets out the answers to some day-to-day questions people have asked. They are published here as they may be of general interest to readers.

QB 20/03: First step legally necessary to achieve liquidation when a liquidator is appointed

Question

Is the first step legally necessary to achieve liquidation when a liquidator is appointed (a long-form liquidation) the same as the first step legally necessary in a short-form liquidation?

Answer

No – The first step legally necessary to achieve a short-form liquidation is a resolution by the shareholders or board of directors or, where applicable, another overt decision-making act provided for in a company's constitution to adopt a course of action that will end in removal from the register.

The first step legally necessary to achieve a long-form liquidation is a shareholders' resolution appointing a named liquidator as required by the Companies Act 1993.

Key terms

Long-form liquidation means a liquidation carried out under the process set out in part 16 of the Companies Act 1993 where a liquidator is appointed to wind up a company. For ease of reference, this Question We've Been Asked refers to the most likely scenario for a solvent liquidation where the shareholders of a company appoint a named liquidator by way of a special resolution under s 241(2)(a) of the Companies Act 1993. It does not consider insolvent liquidations.

Short-form liquidation means the removal of a company from the register under ss 317 and 318 of the Companies Act 1993 as a process on its own without the formal appointment of a liquidator. For ease of reference, this Question We've Been Asked refers to the most likely scenario for a solvent company where a request for removal from the register is made by a shareholder authorised by special resolution, or the board of directors, under s 318(1)(d) of the Companies Act 1993.

Explanation

1. Under the Income Tax Act 2007, the term "liquidation" includes, in references to anything occurring "on liquidation", anything occurring during the period that starts with a step that is legally necessary to achieve liquidation.
2. This definition is important because it describes when the period of "liquidation" begins for tax purposes. Among other things, this is important because the Income Tax Act allows a company to make tax-free distributions of capital gains to its shareholders "on liquidation".
3. The Commissioner set out her views on how this definition of "liquidation" should be interpreted in "Public Ruling BR Pub 14/09: Income Tax – Meaning of 'Anything Occurring on Liquidation' When a Company Requests Removal from the Register of Companies", *Tax Information Bulletin* Vol 27, No 1 (February 2015): 3. BR Pub 14/09 applies to short-form liquidations.
4. In summary, the commentary to BR Pub 14/09 explains that "liquidation" is a process, and that the period of liquidation starts with a "step", which requires an overt action that is:
   - "legally necessary" or legally required; and
   - made "to achieve liquidation", rather than for any other purpose.

Short-form liquidations

5. The Companies Act 1993 requires decisions regarding the management of a company to be made by the company's board of directors, by way of resolution. Therefore, it is the Commissioner's view that any decision to adopt a course of action that will end in removal of the company from the register will ordinarily be recorded in a director's resolution. However, a company's constitution may require another course of action for making such a decision, such as a shareholders' resolution or other overt decision-making act.

6. In the commentary to BR Pub 14/09, the Commissioner accepts that the first step legally necessary to achieve a short-form liquidation could be a resolution to:
   - cease business;
   - pay all creditors;
   - distribute surplus assets; and then
   - request removal from the register of companies.
7. The Commissioner also accepts that, depending on the facts, other steps may be taken that could be the first step that is legally necessary to achieve a short-form liquidation.
8. This item is intended to supplement the commentary provided in BR Pub 14/09.

Long-form liquidations

9. The Commissioner's view is that the first step legally necessary to achieve a long-form liquidation is not the same as for a short-form liquidation.
10. The Companies Act 1993 contains detailed rules describing the process for a long-form liquidation. Under those rules, a long-form liquidation of a solvent company generally commences when the shareholders pass a special resolution to appoint a named liquidator. The Commissioner considers that this is the first step legally necessary to commence a long-form liquidation for tax purposes.
11. When a liquidator is appointed by a shareholders' resolution, it will be necessary to take some steps before appointing the liquidator. These steps include calling a special meeting of the shareholders and ensuring that the named liquidator has validly consented in writing to be appointed prior to the shareholders passing the resolution (see *CIR v Service Equipment Limited* (2000) 19 NZTC 15,832). However, the Commissioner's view is that these are merely preparatory steps. Neither of these steps guarantees that the liquidation will actually commence. For example, a liquidator could agree to be appointed but the shareholders' resolution may not pass. Therefore, while obtaining written consent from the liquidator is a "legally necessary" step, it is not necessarily one that will "achieve liquidation".

Changing processes

12. Sometimes, a company that has embarked on a short-form liquidation may find it necessary due to unforeseen circumstances to appoint a liquidator. This could occur, for example, where a dispute arises in the course of winding-up the business that would be better to have a third-party liquidator resolve. The Commissioner considers that the period known as "on liquidation" began when a valid resolution was passed commencing the short-form liquidation process.

Time delays

13. In some cases, there may be an extended period between the first step legally necessary to achieve liquidation and the removal of the company from the register. The period may even span different tax years, so that a distribution is made in a period preceding the removal of the company from the register. The Commissioner will assume that any distributions are made pursuant to a genuine intention to liquidate. However, if the liquidation is not completed or, in the case of a short-form liquidation, the company does not cease to trade after a resolution to cease to trade is passed, then such a distribution will not have occurred "on liquidation" and the distributions will be taxable.

Examples

Example 1 – Short-form liquidation

The directors of Oak Tree Enterprises Limited decide to wind-up the company. They pass a resolution to cease business, pay all creditors, distribute surplus assets and then request removal from the register of companies. After passing the resolution, the directors resolve to pay a dividend to the shareholders consisting of capital gains derived from selling a building. Two years later, after winding up the business, paying all creditors and distributing the last of the assets, the company is removed from the register.

The period of liquidation began when the directors made their resolution to carry out a course of action that would end with the company being removed from the register. Therefore, the distribution of capital gains was made "on liquidation".

Example 2 – Long-form liquidation

The directors of Sequoia Industries Limited decide that the company is ready to be wound up. They arrange a special meeting of shareholders and obtain the written consent of a liquidator to act. At the meeting, the shareholders pass a special resolution to appoint the liquidator. During the course of the liquidation, past capital gains are distributed to the shareholders.

The period of liquidation began when the shareholders passed the resolution to appoint the liquidator. Therefore, the distribution of capital gains was made "on liquidation".

Example 3 – Not "on liquidation" – Short-form liquidation

The directors of Spruce Sales Limited pass a resolution to cease business, pay all creditors, distribute surplus assets and then request removal from the register of companies. The directors then make a distribution of past capital gains to the shareholders. However, over the next year, Spruce Sales Limited continues to trade, including purchasing new trading stock.

In this situation, the Commissioner would not consider that the directors made a genuine resolution to adopt a course of action that would end in the company being removed from the register. Therefore, the distribution of past capital gains would not be made "on liquidation" and will be taxable as a dividend. The dividend cannot be imputed because imputation credits can only be attached at the time a dividend is paid.

Example 4 – Not "on liquidation" – Long-form liquidation

The directors of Totara Trades Limited decide to wind up the company. They talk to a liquidator about acting and obtain their oral consent. However, they pass a resolution of shareholders prior to obtaining written consent of the liquidator. The directors then make a distribution of past capital gains to the shareholders.

In this situation, the liquidators have not been validly appointed because they did not accept the appointment in writing before the shareholders resolution. Therefore, the distribution of past capital gains would not be made "on liquidation" and will be taxable as a dividend. The dividend cannot be imputed because imputation credits can only be attached at the time a dividend is paid.

References

Legislative references

Companies Act 1993 – ss 241, 317, 318

Income Tax Act 2007 – s YA 1 ("liquidation").

Other references

"Public Ruling BR Pub 14/09: Income Tax – Meaning of 'Anything Occurring on Liquidation' When a Company Requests Removal from the Register of Companies", *Tax Information Bulletin* Vol 27, No 1 (February 2015): 3

QB 20/04: Do certain supplies wholly or partly consist of land for the compulsory zero-rating (CZR) rules?

Key provisions

Section 11(1)(mb) of the Goods and Services Tax Act 1985 requires a supply that wholly or partly consists of land (and which satisfies certain other requirements) to be zero rated for GST purposes.

The definition of land in s 2 includes an estate or interest in land and a right that gives rise to an interest in land.

Question

Do the following supplies wholly or partly consist of land for the compulsory zero rating (CZR) rules:

- the sale of transferable development rights?
- the sale by way of assignment of a purchaser's interest in a sale and purchase agreement for land?
- the grant of an easement?

Answer

Supplies that wholly or partly consist of land for the CZR rules include:

- the sale by way of assignment of a purchaser's interest in a sale and purchase agreement for land where that agreement gives rise to an equitable interest in land; and
- the grant of an easement.

Supplies that do not wholly or partly consist of land for the CZR rules are:

- the sale of transferable development rights;
- the sale by way of assignment of a purchaser's interest in a sale and purchase agreement for land where that agreement does not give rise to an equitable interest in land.

Key terms

Transferable development rights are created by various district councils throughout New Zealand. They are a market-based mechanism that encourages the voluntary transfer of development potential from locations where a council supports restrictions on land use to places where a council would like to see development enabled.

Equitable interest in a sale and purchase agreement for land (for this QWBA) means that the purchaser can obtain relief by way of specific performance or injunction.

Easement is an interest in land that is essentially a right to use the land of another person in a particular way, or a right which prevents a landowner from using their land in a particular way.

Explanation

1. All legislative references are to the Goods and Services Tax Act 1985 (GST Act), unless otherwise stated.
2. This Question We've Been Asked follows up "Interpretation Statement: IS 17/08 – Goods and services tax – Compulsory zero-rating of land rules (general application)".

What land is for compulsory zero-rating purposes

3. A supply that wholly or partly consists of land (and that satisfies certain other requirements) must be zero-rated for GST purposes under s 11(1)(mb).
4. Section 11(1)(mb) is intended to prevent "phoenix" fraud schemes. These schemes involve Inland Revenue refunding GST to a purchaser of land with no corresponding payments being made by the vendor because the supplying company deliberately winds up before making payment (Commentary on the Taxation (GST and Remedial Matters) Bill 2010, Policy Advice, Inland Revenue, August 2010).
5. Section 2 provides:

> **land**, in the zero-rating of land rules,—
>
> (a) includes—
>
> (i) an estate or interest in land:
>
> (ii) a right that gives rise to an interest in land:
>
> …

6. A wide definition of land was included in the CZR rules to ensure broad application of the CZR rules and to prevent avoidance opportunities.

Estate or interest in land

7. The GST Act does not define the words estate, interest and interest in land. Accordingly, for the CZR rules, those words take their ordinary meaning.
8. An estate is an interest or "bundle of rights" in land. An interest in land includes both legal and equitable estates. Estates and interests in land vary from fee simple, the largest estate in land, to smaller estates and interests such as rent charges. The estates and interests most relevant to this QWBA are:
    - equitable estates or interests; and
    - easements.

Right that gives rise to an interest in land

9. In addition, the definition of land in the GST Act includes "a right that gives rise to an interest in land". This element is not present in the definition of land under the Income Tax Act 2007 (s YA 1).
10. Paragraph (a)(ii) of the definition of land in the GST Act contains the following elements:
    - a right;
    - that gives rise to;
    - an interest in land.
11. The first two elements are considered next. Interest in land was discussed in [8].

A right

12. A right is a legal entitlement to have or do something (*Concise Oxford English Dictionary*, 12th ed, Oxford University Press, 2011).

Gives rise to

13. If something gives rise to an event or situation, it causes that event or situation to happen (*Concise Oxford English Dictionary*).
14. However, the extent of the causative link between the right and the interest in land is not clear from the ordinary meaning of the words used in the definition of land. In keeping with the policy intent of preventing avoidance opportunities, the phrase should be interpreted broadly, although there will be a point where the causative link is too remote.

Do the specified supplies wholly or partly consist of land?

Sale of transferable development rights

15. Transferable development rights (TDRs) are not defined in the GST Act, Income Tax Act 2007 or Resource Management Act 1991.
16. TDRs are created by various district councils throughout New Zealand. The rules governing such rights are contained in each council's district plan. The specific rights granted differ between districts depending on the council's objectives and may be described differently, for example, transferable rural lot, transferable title right, and transferable subdivision entitlements.
17. TDRs are a market-based mechanism that encourages the voluntary transfer of development potential from locations where a council supports restrictions on land use (referred to as donor areas) to places where a council would like to see development enabled (referred to as receiving areas).
18. Donor areas may be environmentally sensitive properties, open space, wildlife habitats, historic landmarks, or any other places that have value to a community (but that are typically not a market commodity). Receiving areas are considered appropriate for extra development due to their proximity to jobs, shops, schools, transport, and other urban services.
19. Some TDRs arise from the amalgamation of existing titles, the donor property landowner covenanting not to subdivide a lot that meets the requirements for subdivision, or the setting aside of land for conservation purposes.
20. The following analysis considers whether TDRs fall within the definition of land for CZR purposes.

Whether a transferable development right is an estate or interest in land

21. A TDR is merely a right that entitles the owner of a receiving site to obtain subdivision consent. It is not an estate or interest in land (whether it is a right that gives rise to an interest in land is considered from [24]). While the subdivision itself will give rise to an interest in land (that is, the owner's interest in the newly subdivided section), the TDR relates only to the consent process.

22. Case law on TDRs is sparse. However, TDRs are referred to in the Land Valuation Tribunal decision in *Taheke Paengaroa Trust v Western Bay of Plenty District Council* (LVP 2/2005, 26 February 2008). The tribunal in that case considered the affairs of a trust that had land covered in native vegetation that met the council's specific criteria for designation and preservation in a natural state. In relation to the nature of TDRs, the tribunal said:
    - no estate or interest in land was being transferred on the sale of TDRs;
    - TDRs are purely a creature of the Resource Management Act 1991; and
    - as consents, TDRs are not an estate or interest in land.
23. For completeness, s 122 of the Resource Management Act 1991 specifies that a resource consent is neither real nor personal property. While a TDR forms part of the process in applying for a resource consent, it is not a resource consent in itself. It is a right that enables the owner of a receiving site to obtain subdivision consent. Accordingly, s 122 of the Resource Management Act 1991 does not assist in determining whether a TDR is an estate or interest in land.

Whether a transferable development right is a right that gives rise to an interest in land

24. Based on analysis of various district plans it appears that a TDR is a form of right that the owner of donor land can generate that enables the owner of a receiving site to obtain subdivision consent. It seems likely that legal action could be taken against a district council that refused to grant subdivision consent where a TDR complies with the requirements of the relevant district plan.
25. Further, the exercise of the rights conferred by the TDR may ultimately give rise to an interest in land, being the receiving owner's estate in the newly subdivided section (notwithstanding that the owner already owns the undivided land).
26. The issue, as it relates to TDRs, is whether a sufficient causative link exists between the right and the interest in land. As already noted, in keeping with the policy intent of preventing avoidance opportunities, the phrase should be interpreted broadly, but there will be a point where the causative link is too remote.
27. The generation and transfer of a TDR is a step in the process that enables the creation of the newly subdivided section at the receiver site (an interest in land). However, there is insufficient causative link between the creation and transfer of the TDR and the newly subdivided land to conclude that the TDR "gives rise to" that interest in land.
28. A TDR merely enables a landowner to subdivide in circumstances where they would not otherwise be able to – ie, the TDR merely removes a restriction under a regulatory regime. While a TDR may allow the receiver site to be subdivided, it does not cause the receiver site to be subdivided, nor does it require any subdivision to proceed. It follows that the TDR merely puts the owner of the receiver site in a position to be able to subdivide the land and, therefore, is one step too far removed from being a right that gives rise to an interest in land.

Conclusion

29. A TDR is neither an estate or interest in land, nor a right that gives rise to an interest in land. Accordingly, the CZR rules will not apply to the supply of a TDR. This is illustrated in example 1.

Example 1: Transferable development right

James is GST-registered and owns farmland in a coastal area as part of his taxable activity. Along the shoreline is a large wetland area that has become a significant wildlife habitat. James hears about transferable development rights (TDRs) when reading a newspaper article. He approaches his local council to ask whether he could generate a TDR in exchange for agreeing to fence off the wetland area and not use it for general farming purposes. The council agrees.

Martyn (who is also GST-registered) is a property developer whose niche market is in lifestyle blocks. The local council has minimum size restrictions on the sections that Martyn is developing but they are in an identified receiver zone for TDRs. James is aware of Martyn's development and approaches Martyn to see whether he would be interested in purchasing the TDR. If Martyn purchases the TDR from James he will be able to subdivide his current development into more lots than would otherwise be the case.

Martyn and James reach an agreement, and Martyn purchases the TDR from James for $30,000. This is a supply that must be standard-rated under s 8(1) because the TDR is not an estate or interest in land, nor does it give rise to an interest in land. The TDR merely puts Martyn in a position to be able to subdivide his land and, therefore, is one step too far removed from being a right that gives rise to an interest in land.

Assignment of a purchaser's interest in a sale and purchase agreement (SPA) for land

30. A purchaser who has entered into a SPA for land may wish to sell their rights or interests under that SPA for land to a third person. This could be done by way of an assignment of the purchaser's contractual rights.[1] A question that arises is whether a sale by way of assignment of a purchaser's interest in a SPA for land is a supply that the CZR rules could apply to.

31. A purchaser's interest in a SPA for land will be "land" for the CZR rules if it is an equitable interest in land or a right that gives rise to an interest in land.

32. A purchaser's interest in a SPA for land will give rise to an equitable interest in the land when equitable remedies are available to protect the purchaser's rights under the contract, even if specific performance in the strict sense (that is, for the transfer of title) would not yet be available (*Foreman v Hazard* [1984] 1 NZLR 586 (CA); *Bevin v Smith* [1994] 3 NZLR 648 (CA); *McDonald v Isaac Construction Co Ltd* [1995] 3 NZLR 612 (HC)). This will be the case where a SPA for land is unconditional. It will also be the case where the conditions in a conditional SPA for land do not prevent there being a binding contract.

33. There is further discussion in QB 17/02: *Income tax – date of acquisition of land, and start date for 2-year bright-line test* on when a person has an equitable interest in a SPA for land. While QB 17/02 concerns income tax, the same issue of whether there is an equitable interest in land arises for GST purposes, and the same considerations are relevant.

34. As stated in QB 17/02, the most common conditions in SPAs for land (such as finance, a building report or LIM conditions) would not prevent there being a binding contract. But sometimes conditions will mean that there is not yet a binding contract, so it is necessary to consider the terms of the particular SPA for land to determine whether there is an equitable interest in the land that the original purchaser has passed to the buyer (see, for example, *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA); *Willetts v Ryan* [1968] NZLR 863 (CA); *Barrett v IBC International Ltd* [1995] 3 NZLR 170 (CA)).

35. Where there is not yet a binding contract, the purchaser will not have an equitable interest in the land. Nor will they have a right that gives rise to an interest in land. Until there is a binding contract, the purchaser has no enforceable rights.

36. The application of the CZR rules is assessed at the time of settlement of the relevant transaction relating to the supply (in this case, being the assignment of the purchaser's interest in the SPA, not the underlying sale of the land) under s 11(8B).

Summary

37. In summary, a purchaser's interest in a SPA for land will be "land" for the CZR rules where the SPA gives rise to an equitable interest in land. Accordingly, where a person sells by way of assignment their interest in a SPA for land to another person, and the SPA is one which gives rise to an equitable interest in land, this will be the supply of land under the CZR rules. Such a supply may be subject to the CZR rules.

38. This is illustrated in example 2.

Example 2: Sale by way of assignment of a purchaser's interest in a SPA for land

James (from example 1) enters into an unconditional agreement to sell a portion of his farmland to Development Ltd. Development Ltd carries on a taxable activity of commercial property development and is acquiring the farmland to either develop or sell for profit, depending on the opportunities that arise.

TA Ltd carries on a taxable activity. It would like to purchase the farmland and build a workshop and retail shop to operate from. TA Ltd enters into an agreement with Development Ltd, under which it agrees to pay Development Ltd a fee to acquire by way of assignment Development Ltd's interest as purchaser of the land under the agreement it has entered into with James.

This transaction must be zero-rated under s 11(1)(mb) because it wholly or partly consists of land (assuming the other CZR requirements are satisfied).

Easements

39. An easement is an interest in land. A positive easement is essentially the right to use the land of another person in a particular way without any right to occupation of the land, or to take any part of the soil or its produce, or to prevent a landowner from using his or her land in a particular way. A negative easement is a right which does prevent a landowner from using his or her land in a particular way.[2]

[1] It may be that a document that is described as a nomination in fact amounts to an assignment of the contractual rights. For more details see QB 17/02: *Income tax – date of acquisition of land, and start date for 2-year bright-line test* at [52].

[2] Hinde McMorland and Sim *Land Law in New Zealand* (online ed, LexisNexis, July 2020) at [16.002] and [16.009].

Example 3: Easement over land

A lines company wants to put power lines across James's (from example 1) farmland. The lines company approaches James and offers to pay $20,000 for the grant of an easement to enable them to install and maintain the lines.

If James grants the easement, the CZR rules will apply to the transaction because he will be granting the lines company an interest in land (assuming the other CZR requirements are satisfied).

References

Legislative References

Goods and Services Tax Act 1985, ss 2 ("land"), 5(1), 11(1)(mb), s 11(8B)
Income Tax Act 2007, s YA 1 ("land")
Resource Management Act 1991, s 122

Case References

Barrett v IBC International Ltd [1995] 3 NZLR 170 (CA).
Bevin v Smith [1994] 3 NZLR 648 (CA).
Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd [2002] 2 NZLR 433 (CA).
Foreman v Hazard [1984] 1 NZLR 586 (CA).
McDonald v Isaac Construction Co Ltd [1995] 3 NZLR 612 (HC).
Taheke Paengaroa Trust v Western Bay of Plenty District Council (LVP 2/2005, 26 February 2008).
Willetts v Ryan [1968] NZLR 863 (CA).

Other References

Concise Oxford English Dictionary, 12th ed, Oxford University Press, 2011.
Dictionary of New Zealand Law, LexisNexis, originally published as the New Zealand Law Dictionary, 9th ed.
Hinde McMorland and Sim *Land Law in New Zealand* (online ed, LexisNexis, July 2020).
Interpretation Statement: IS 17/08 – *Goods and services tax – Compulsory zero-rating of land rules (general application)*.
QB 17/02: *Income tax – date of acquisition of land, and start date for 2-year bright-line test*.
Taxation (GST and Remedial Matters) Bill; Commentary on the Bill (Policy Advice, Inland Revenue, August 2010).

LEGAL DECISIONS – CASE SUMMARIES

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

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.

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.

CSUM 21/01: Supreme Court dismisses Mr Hampton's application for leave to appeal

Case	*Hampton v MinterEllisonRuddWatts* [2020] NZSC 123
Decision date	13 November 2020
Legislative References	Insolvency Act 2006, ss 67(1), 101(1), 173-181, 290, 292, 295 and 309 High Court Rules 2016, rr 17.2 and 17.29 Court of Appeal (Civil) Rules 2005, r 12 Senior Courts Act 2016, s 74(2)(a) and (b) Supreme Court Rules 2004, r 20
Legal terms	application for leave to appeal, general or public importance, miscarriage in relation to civil appeals

Summary

This was an unsuccessful attempt by Mr Hampton for leave to appeal the Court of Appeal's decision dismissing two appeals; the first seeking to stay the enforcement of his bankruptcy, and the second challenging a High Court order imposing conditions on his discharge from bankruptcy.

Impact

Rule 17.29 does not apply to bankruptcy adjudications.

Conditions imposed on bankrupt upon discharge do not raise issued of general or public importance not any risk of miscarriage of justice.

Facts

Mr Hampton has been engaged in litigation with IR since the 1990s. In 2008 he commenced proceedings against the Commissioner of Inland Revenue ("the Commissioner"), the Attorney-General, a solicitor and 20 departmental officers claiming damages for misfeasance in public office (the misfeasance claim). In March 2013, the Court of Appeal stayed that proceeding pending the filing of a statement of claim settled by a lawyer who had reviewed the available evidence.

In 2013 he was bankrupted by Minter Ellison for not paying his legal bills. In 2014 he filed his statement of affairs (about one year later) and was to be discharged from bankruptcy in 2017.

The Official Assignee objected to his discharge from bankruptcy. The Commissioner sought conditions be imposed on Mr Hampton's discharge in the public interest. This meant a public examination was held. In a judgment in 2018 Venning J discharged Mr Hampton from bankruptcy subject to conditions. Mr Hampton appealed. He sought an unconditional discharge but applied for a further order that the discharge be suspended pending the redrafting of the misfeasance claim.

Before the appeal was heard, Mr Hampton instructed senior counsel to finalise his statement of claim. That pleading was completed in 2019. Mr Hampton considered he could then re-enliven his misfeasance claim. But since he was a bankrupt, his interest in that claim had vested in the Office Assignee. There was no question that discharge from bankruptcy does not re-vest in the bankrupt their former property. The misfeasance claim was thus no longer Mr Hampton's to bring and he could not apply for the stay to be lifted.

Mr Hampton applied to the High Court for interlocutory orders under r 17.29 of the High Court Rules 2016 to stay both his original adjudication of bankruptcy and Venning J's discharge order. He hoped this procedure would have the effect of unravelling, with retrospective effect, the divestment of the misfeasance claim. This would then give him standing to apply for the Court of Appeal's stay to be lifted.

Osborne J heard this application in July 2019 and found there was no jurisdiction to entertain a stay of the original adjudication order and that r 17.29 did not provide a basis for staying Venning J's discharge order. In August 2019, Mr Hampton filed an appeal against Osborne J's decision.

The Court of Appeal decision that Mr Hampton seeks leave to appeal addresses both the discharge appeal and the interlocutory stay of adjudication appeal.

Court of Appeal Decision

The Court of Appeal held there was no jurisdiction under r 17.29 to stay the bankruptcy adjudication:

> The rule provides that a "liable party" may apply for a stay of enforcement or other relief against a judgment on the ground that a substantial miscarriage of justice will likely result if the judgment were enforced. The Court considered that Mr Hampton was not a "liable party" under a judgment, as bankruptcy is a status, not a liability.

Nor could the bankruptcy be "enforced".

Furthermore, the Court held that Mr Hampton was effectively seeking a temporary annulment so that his assets in bankruptcy would revert to his ownership and control. The Court of Appeal considered this is not contemplated by the Insolvency Act and would cut across the bankruptcy regime entirely.

Issues

The issue raised by Mr Hampton was that he is in fact a "liable party" under r 17.29 because he continues to be a judgment debtor and a liable party in relation to creditors until discharged from bankruptcy.

Whether the relationship between r 17.29 and the insolvency regime is a matter of general or public importance.

Decision

The Supreme Court dismissed Mr Hampton's application for leave to appeal.

The Supreme Court was satisfied that Mr Hampton's prospects of succeeding in his arguments were insufficient either to give rise to any issue for general or public importance, or to meet the heightened standard or risk of miscarriage in relation to civil appeals.

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CSUM 21/02: Whether expenditure is of a capital or revenue nature is not to be found by any rigid test or description but upon consideration of all the circumstances; if capital in nature, it is not deductible for income tax purposes

Case	*TRA 015/19* [2020] NZTRA 2
Decision date	02 December 2020
Legislative References	Income Tax Act 2007, ss DA1(1), DA2(1), DA2(7). Tax Administration Act 1994, ss 3(1), 141(2), 141B, 141B(1), 141B(7), 141FB.
Legal terms	Repair and maintenance, capital in nature, non-deductible capital expenditure, shortfall penalty, unacceptable tax position.

Summary

The Tax Review Authority (the "TRA") held that the Commissioner's decision to disallow as repair and maintenance the sum of $332,071.90 for the 2012, 2013 and 2014 income tax years pursuant to s DA2(1) of the ITA 2007, was correct.

The TRA disagreed with the Disputant's assertion that the work undertaken on the Property and 6 Green Street were not related projects but were separate and independent of each other. The TRA agreed with the Commissioner that the Disputant was engaged in one overall project to undertake capital works on the Property and no portion of the disputed expenditure can be treated as deductible repair costs. The TRA also found that when viewed objectively, the Disputant's 2012 tax position was about as likely as not to be correct and therefore the UTP shortfall penalty was correctly imposed.

Impact

The decision is an orthodox application of the law to the facts and reiterates the established legal principle that whether expenditure is of a capital or revenue nature is not to be found by any rigid test or description but upon consideration of all the circumstances.

Facts

The Disputant owns the Property and 6 Green Street; they are adjacent to each other. The Property contained a single story building and in October 2010 after the Disputant had taken vacant possession of the Property, the Disputant decided to undertake a programme of work on the Property. The work started in October 2010.

Various building consent applications which referenced both the Property and 6 Green Street were filed between October 2010 and January 2013. The proposed work included an internal refurbishment, the addition of a covered veranda/extension of a covered deck, additional toilets and the fitout of a container.

Issues

The broad issues for determination by the TRA were:

- Whether the expenditure disallowed by the Commissioner in the disputed tax years is of a capital nature and therefore subject to the capital limitation in s DA2(1) of the ITA 2007?
- As a sub-issue, whether there is one overall project or multiple distinct projects for the purposes of ascertaining whether any apportionment is available to the Disputant?
- Whether the Disputant is liable for the UTP shortfall penalty assessed by the Commissioner?

Decision

One overall project

The Commissioner considered that the physical object of the work done was the building on the Property both inside and outside and also 6 Green Street. The Disputant disagreed. The Disputant asserted that the object was the existing building on the Property only and did not include the outside works which extended onto 6 Green Street, claiming that these were "mutually exclusive".

The TRA held that there was one overall project and dismissed the Disputant's assertion that there was a 'disjoint' between the work being done to the Property due to its past use for rental purposes, and that done on 6 Green Street to increase the rental revenue.

Judge Sinclair concluded: "I do not accept that there is any such 'disjoint' in the work, or that it can be divided in the manner asserted by the disputant. The work done on the Property and on 6 Green Street could not "sensibly have been the subject of two independent, unrelated projects". Rather it was a single project… *TRA 015-19* [2020] NZTRA 2 at [57]

It was apparent from the existing and proposed plans that the works to the inside of the Property and extension onto 6 Green Street were planned at least by 27 October 2011 and that the physical object of the work was the existing building on the Property, including the external areas and amenities that extended onto 6 Green Street.

In reaching her conclusion, Judge Sinclair considered the following:

- The floor area of the building had increased from 250m² to 420m², necessarily including the area from 6 Green Street as the Property had a land area of 295m².
- The maximum occupancy load of the building had increased from 160 people to 247 people.
- The inability to obtain a Certificate of Public Use on the basis that the Council considered that the application related to the whole development, including the extension onto 6 Green Street.
- There was no separate functionality following completion of the work as the extension onto 6 Green Street became part of the building on the Property.
- The expenditure was not accounted for separately.

Expenditure subject to the capital limitation of s DA2(1) of the ITA 2007

The TRA held that "having found that the work was undertaken as one overall project, it follows that the cost of the total work cannot be apportioned into deductible revenue costs and capital costs. Rather, the total cost will either be capital or revenue in nature depending on the character of the project". *TRA 015-19* [2020] NZTRA 2 at [58]

The TRA concluded that the work undertaken constituted a substantial reconstruction and improvement of the original premises. At [61]. Overall, the works extended and modernised the building and went beyond repairs and replacement.

Judge Sinclair found that the character of the project work was capital in nature and as a consequence, the character of the disputed expenditure is also capital in nature and is not deductible for income tax purposes.

Liability for the UTP shortfall penalty

The TRA held that the UTP shortfall penalty was correctly imposed. Existing case law at the time the Disputant took its 2012 tax position was clear that the total work was required to be taken into account in determining the nature of the disputed expenditure. The case law was also clear that the nature of work done as part of one overall project was to be taken from the character of the project work. At [76].

Judge Sinclair concluded: "I do not consider that it is a situation where the capital nature of the disputed expenditure was a matter on which reasonable minds could differ. I am satisfied…that the position taken by the disputant lacked any particular merit". At [77].

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CSUM 21/03: Extension of time to appeal to Court of Appeal denied where obvious lack of merit

Case	*Dowden v Commissioner of Inland Revenue* [2002] NZCA 630
Decision date	08 December 2020
Legislative References	Court of Appeal (Civil) Rules 2005, r 43(2)
Legal terms	Extension of time; interests of justice; length and reasons for delay; conduct of applicant; prejudice to respondent; merits of appeal.

Summary

The taxpayer's appeal was treated as having been abandoned after he failed to pay the scheduling fee by the required date and failed to consult with the Commissioner when preparing the case on appeal as required by the rules of the Court of Appeal.

The taxpayer applied for an extension of time under r 43(2) of the Court of Appeal (Civil) Rules 2005 for the allocation of a hearing date and to file the case on appeal.

The Court of Appeal accepted that various delays were attributable to the taxpayer's ill health, which was exacerbated by the untimely death of his son but considered that the lace of merit of the proposed appeal meant the requested extension of time was not justified. The application was declined.

Impact

There is no impact beyond that to the taxpayer in this matter.

Facts

The taxpayer filed a notice of appeal on 29 November 2019.

He was granted a number of extensions by the Deputy Registrar. However, the taxpayer filed to pay the scheduling fee by 13 July 2020 (when it was due) and he also failed to consult with the Commissioner when preparing the case on appeal (as required).

As a consequence, the taxpayer was precluded from seeking a hearing date and the appeal was treated as having been abandoned. The taxpayer then filed an application for an extension of time under r 43(2) of the Court of Appeal (Civil) Rules 2005.

Issues

Whether the Court of Appeal should grant the application for an extension of time for the allocation of a hearing date and to file a case on appeal.

Decision

The Court of Appeal found that the ultimate question when considering the exercise of its discretion to extend time is what the interests of justice require. Factors that influence that determination include: the length of and reasons for the delay; the conduct of the parties, particularly the application; any prejudice or hardship to the respondent; and the significance of the issues raised by the proposed appeal, both to the parties and more generally.

The Court noted that the Supreme Court has accepted that the merits of a proposed appeal may be relevant to the exercise of the discretion to extend time, *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [35]-[40] however it also recognised three qualifications to this principle:

(1) on occasion the merits or otherwise of a proposed appeal will be overwhelmed by other factors (such as the length of delay or prejudice) and therefore will not require consideration;

(2) the merits will not generally be relevant in a case where there has been an insignificant delay as a result of a legal advisor's error and the proposed respondents have suffered no prejudice (beyond the fact of an appeal); and

(3) a decision to refuse an extension of time based substantially on the lack of merit of a proposed appeal should be made only where the lack of merit is readily apparent, and the appeal is clearly hopeless.

The Court found the numerous delays could be attributed mostly to the taxpayer's ill health, which was exacerbated by the untimely death of his son. Therefore, the real issue for determination was whether the proposed appeal had merit.

The Court noted that the Taxation Review Authority (TRA) did not accept the taxpayer's evidence, having heard the taxpayer give evidence and being cross-examined, rather the TRA did not find the taxpayer to be reliable or credible. The TRA considered the contemporaneous evidence showed the taxpayer was liable for the taxes alleged. The Court further noted that the High Court rejected the taxpayer's submission that the TRA did not give proper weight to certain items of evidence. The Court found no apparent error in the High Court decision. For these reasons, the Court found the proposed appeal lacked merit. It found the interests of justice weighed against the granting of the extension.

The application for an extension of time under r 43(2) of the Court of Appeal (Civil) Rules 2005 was declined.

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CSUM 21/04: Supreme Court dismisses the Commissioner's application for leave to appeal determination of "gift" for donation tax credit purposes

Case	*Commissioner of Inland Revenue v Church of Jesus Christ of Latter-Day Saints Trust Board and Coward* [2020] NZSC 102
Decision date	30 September 2020
Legislative References	Senior Court Act 2016, s 74(1) and (2)(a) and (c)
Legal terms	Application for leave to appeal - General or public importance – General commercial significance

Summary

The Commissioner applied to the Supreme Court for leave to appeal the decision of the Court of Appeal that payments made by missionaries, their parents, grandparents, legal guardians, friends and members of the church community/ward to the Church of Jesus Christ of Latter-day Saints Trust Board ("the Board") to support overseas missionaries were all gifts entitling the taxpayers to donation tax credits pursuant to section LD 1 of the Income Tax Act 2007.

The Supreme Court declined to grant the Commissioner's leave application.

Impact

The Supreme Court has noted that whether a benefit to a donor, consequent of a payment made, will disqualify that payment from being a "charitable or other public benefit gift" is an intensely fact-specific question. Following this decision, payments made in a factual scenario that is the same or sufficiently similar to that surrounding the Church members' payments to the Board will qualify the donor for donation tax credits.

The Commissioner intends to review her position on how she determines when a payment qualifies as a "gift" for donation tax credit purposes, including review of OS 06/02 – *Interaction of tax and charities rules, covering tax exemption and donee status* and QB 16/05 – *Income tax – donee organisations and gifts*. If it is considered necessary, the Commissioner will issue revised statements following public consultation.

At this time, the Commissioner does not envision proposing legislative amendment to the provisions at issue in this matter.

Facts

The Church sends missionaries to proselytise overseas on missions lasting 18-24 months. The Church expects the missionaries and their families to make sacrifices to support these missions including making donations to the Board. The Board sets a recommended donation for New Zealand Church members wishing to go on a mission. The recommended amount does not reflect the actual cost and is currently set at NZ$385 per month but fluctuates from time to time.

Donations are applied at the Board's discretion towards New Zealand activities of the Church. The overseas missionary has basic travel and living expenses paid by the Church organisation of the country where they are serving (or, if the Church in the host country is unable to meet those costs, then by the Church in Salt Lake City, Utah).

The High Court found that the requirements of s LD 1 for a gift were met in relation to payments by some but not by others, *Church of Jesus Christ of Latter-Day Saints Trust Board and Coward v Commissioner of Inland Revenue* [2019] NZHC 52, (2019) 29 NZTC 24-000 (Hinton J) at [127]-[128]. The High Court found payments by missionaries, their parents and legal guardians and by their grandparents were not gifts because a material benefit was received by the missionary undertaking the missionary service, at [113]-[114] and [117]. The Court also held there was a clear link between the payments and this benefit, at [103] and a strong understanding between the Board and the donor that the payment would enable the missionary to go on the mission and have their expenses met while on the mission, at [105]-[106].

The Court of Appeal reversed the findings of the High Court, applying "well settled" principles as set out by Richardson J in *Mills v Dowdall* [1983] NZLR 154 (CA). It found donations by missionaries, their parents, grandparents, legal guardians, friends and members of the church community/ward were all gifts because these donors receive "no more than a spiritual or moral benefit," *Church of Jesus Christ of Latter-Day Saints Trust Board and Coward v Commissioner of Inland Revenue* [2020] NZCA 143, (2020) 29 NZTC 24-066 at [53]-[54] and [59]-[63]. and there was no "sufficient connection between the payments and any material benefit received," at [64]-[69] meaning these donors were all entitled to tax credits pursuant to section LD 1 of the Income Tax Act 2007, at [74]-[75].

Issues

The issue raised by the Commissioner in seeking leave was whether the Court of Appeal applied an appropriate purposive interpretation of "charitable or other public benefit gift" in s LD 1 of the Income Tax Act 2007 or whether it restricted itself in an inappropriate manner.

Decision

The Supreme Court dismissed the Commissioner's application for leave to appeal.

The Supreme Court accepted that the correct approach to tax statutes was a matter of public importance and commercial significance, however the Court did not consider this was an appropriate case for that issue to be considered for two reasons:

- First, it was not convinced that the Court of Appeal did, in fact, apply the Duke of Westminster (legal form) doctrine *The Commissioners of Inland Revenue v The Duke of Westminster* [1936] AC 1 (HL) at 19-20 per Lord Tomlin to fetter purposive statutory interpretation of the meaning of "gift"; and
- Second the question in the case (whether the alleged benefit derived by donors was such that it meant the payments would not be categorised as gifts) is an intensely fact-specific question and the facts in the case are relatively unusual.

The Supreme Court found with regard to the meaning of "gift", the difference between the approaches of the High Court and the Court of Appeal in this matter were matters relating to the interpretation of the facts of the case, rather than matters of legal significance, and therefore the criteria for granting leave to appeal was not met.

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GENERAL ARTICLE

Inland Revenue technical decision summaries

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Each TDS will:

- contain the relevant reasons for the Commissioner's decision, including arguments considered in reaching the decision;
- preserve customer identity and protect sensitive information; and
- include a disclaimer that the TDS is not binding and cannot be relied on and is published as information only.

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Further information and contacts

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If you have any queries about TDS or the new process, please email **Technical.decision.summaries@ird.govt.nz**

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Legal Services

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