

# TAX INFORMATION

## *Bulletin*

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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 [taxtechnical.ird.govt.nz](https://taxtechnical.ird.govt.nz) (search keywords: public consultation).

Email your submissions to us at [public.consultation@ird.govt.nz](mailto: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 [taxtechnical.ird.govt.nz/subscribe](https://taxtechnical.ird.govt.nz/subscribe) to receive regular email updates when we publish new draft items for comment.

### Your opportunity to comment

| Ref      | Draft type               | Title   | Comment deadline |
|----------|--------------------------|---|------------------|
| PUB00426 | Interpretation statement | GST – Section 58: Specified agents of incapacitated persons, and mortgagees in possession | 8 November 2022  |

# IN SUMMARY

## Ruling

### **BR Prd 22/10: Silver Fern Farms Limited**

The Arrangement is the supply to Silver Fern Farms Limited of units representing the removal of greenhouse gas from the atmosphere by owners of land containing permanent mapped and identified woody vegetation, where that vegetation is not already registered under the New Zealand Emissions Trading Scheme.

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## Operational statements

### **OS 22/04: Charities and Donee Organisations – Part 1 Charities**

This statement outlines the tax treatment and obligations that apply to charities and donee organisations and how the Commissioner will apply the relevant legislation. Part 1 applies to charities.

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### **OS 22/04: Charities and Donee Organisations – Part 2 Donee Organisations**

This statement outlines the tax treatment and obligations that apply to charities and donee organisations and how the Commissioner will apply the relevant legislation. Part 2 applies to donee organisations.

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## Technical decision summary

### **TDS 22/17: Deemed acceptance of shortfall penalties and liability to evasion shortfall penalty**

Technical decision summary of an adjudication. Deemed acceptance of shortfall penalties; Liability to evasion shortfall penalty.

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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](http://www.ird.govt.nz)

### BR Prd 22/10: Silver Fern Farms Limited

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 Silver Fern Farms Limited.

#### Taxation Laws

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

This Ruling applies in respect of s 11A(1)(w).

#### The Arrangement to which this Ruling applies

The Arrangement is the supply to Silver Fern Farms Limited of units representing the removal of greenhouse gas from the atmosphere by owners of land containing permanent mapped and identified woody vegetation, where that vegetation is not already registered under the New Zealand Emissions Trading Scheme.

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

#### Background

1. Silver Fern Farms is a processor, marketer and exporter of premium quality lamb, beef and venison. Silver Fern Farms is 50% owned by Silver Fern Farms Co-Operative Limited, a co-operative company representing the interests of its members, and 50% owned by Shanghai Maling (Hong Kong) Limited.

#### Carbon reduction programme

2. Silver Fern Farms has entered into an agreement with Toitū Envirocare (Toitū) dated 30 June 2020 (the Toitū Agreement) to achieve "Toitū carbonzero Certification" in accordance with PAS 2050:2011 Specification for the assessment of the life cycle greenhouse gas emissions of goods and services (British Standard) for a cradle to grave assessment of emissions in relation to "100% Grass Feed Beef for Export to the USA".
3. Toitū is a wholly-owned subsidiary of Manaaki Whenua – Landcare Research, a Government-owned Crown Research Institute. Toitū Envirocare's offerings currently serve over 400 clients worldwide. Toitū is a member of the International Emissions Trading Association and has been accredited by the International Carbon Reduction and Offset Alliance. Both organisations require compliance with international standards and best practice. Toitū also verifies compliance with the following internationally recognised carbon credit standards: Gold Standard, Fairtrade Gold Standard, Clean Development Mechanism and Permanent Forest Sinks Initiative.
4. The "Toitū carbonzero Certification" accurately measures an entity's greenhouse gas emissions, and puts in place strategies to manage, reduce and offset impacts. Compliance with the programme is independently verified annually to maintain certification.
5. Toitū issued a certificate, valid until 30 April 2023, confirming that Silver Fern Farms' "100% Grass Feed Beef for Export to the USA" has met the requirements to achieve the Toitū carbonzero Certification. In relation to compensating for annual emissions, the certificate states:

Ongoing compensation of emissions will be performed using a rolling 3 month forecast and actual sales cycle. Compensation is achieved by using non-credited removals[FN3] from farm suppliers, to reduce the net emissions balance to 0.

The first compensation period is from 1st January 2022 to 31st March 2022, and will be repeated hereafter.

[FN3 - Measured and verified removals within the reporting organisations measurement boundary that are not registered as a carbon credit. The non-credited removals used are also accounted within the national inventory of the host country, New Zealand.]

6. To achieve these non-credited removals, Silver Fern Farms will enter into agreements with its farmers (the Suppliers) for the supply of units representing the removal of carbon dioxide from the atmosphere by way of sequestration through permanent vegetation (the Services Agreement).

## The Services Agreements

7. Under the Services Agreement, the Suppliers agree to provide, and Silver Fern Farms agrees to buy, the "Services". Clause 11 of Appendix 1 of the Services Agreement defines the "Services" as follows:

### 11. Services Definition

11.1 The Service You will provide Us [Silver Fern Farms] is the supply of carbon Removals, namely, the supply of units representing the removal of carbon dioxide from the atmosphere where one unit = one tonne of carbon dioxide that would otherwise have been emitted into the atmosphere. Your end to end Service includes:

11.2 Cooperating in the identification, measurement, and classification of Vegetation on Your Property;

11.3 Providing information and cooperation to support this Service including:

- (a) making available the legal titles that make up the Property that may be used for this Service;
- (b) providing information relating to any ETS [New Zealand Emissions Trading Scheme] registered forest and the Vegetation on the Property that may be used for this Service;
- (c) permitting the mapping of the Service through processing by Our suppliers, for example, remote satellite mapping of the Property based on the legal titles You provide to Us;
- (d) permitting Our suppliers and or authorised auditors to enter Your Property upon reasonable notice when it is necessary for them to measure, audit and verify that the Removals on Your Property do physically exist and its value aligns with how We have classified it; and
- (e) checking whether Vegetation mapped does physically exist and aligns with how We have classified it, including accessing satellite maps of the Property to verify the Vegetation providing the Service annually.

together (the "Service").

8. Clause 1.1 of the Services Agreement defines "Removals" as follows:

"Removals" means up to 80% of Vegetation occurring on Your Property that may be used by You upon request by Us to provide a Service to reduce the net greenhouse gas (GHG) emissions from the lifecycle of a certified net carbon zero meat product provided or supplied to Us.

9. Clause 1.1 of the Services Agreement defines "Vegetation" as follows:

**Vegetation:** mapped and identified woody vegetation occurring on your Property that is:

- (a) permanent vegetation;
- (b) made up of woody species;
- (c) an average of at least 15 metres in width;
- (d) at least 0.25 hectares in area;
- (e) not registered in the ETS;
- (f) not registered as vegetation on any voluntary carbon market; and
- (g) not claimed as removals within any other product lifecycle.

10. Clause 1.1 of the Services Agreement defines "Permanent" as "the Vegetation will never be cut down or removed".

11. The Services Agreement provides that the Supplier will be paid at a rate of \$10 per tonne of carbon dioxide equivalent (CO<sub>2</sub>e) or as otherwise expressly agreed by the parties in writing.

12. Under cl 3.1 of the Services Agreement, the Supplier agrees to sell and provide the Services to Silver Fern Farms on an exclusive basis. The Supplier also warrants that they will not apply for any other recognition of the Removals and that the Removals will not be traded, sold, registered or otherwise in the New Zealand Emissions Trading Scheme or any other carbon market (cl 4.6).
13. The finalised and executed Services Agreements will not be materially different to the draft document emailed to Inland Revenue's Tax Counsel Office on 10 December 2021.
14. Silver Fern Farms have engaged Lynker Analytics Limited to map the Suppliers' properties and identify the area of each type of vegetation. It has also engaged Carbon Forest Services Limited to validate the mapping information as correct and calculate the amount of carbon sequestered in accordance with the Field Measurement Approach. This data is then verified by Toitū under the Toitū Agreement in accordance with the standards required by JASANZ ISO 14065 Greenhouse gases – Requirements for greenhouse gas validation and verification bodies for use in accreditation or other forms of recognition.

## How the Taxation Law applies to the Arrangement

The Taxation Law applies to the Arrangement as follows:

- (a) The Services that the Suppliers provide to Silver Fern Farms under each Services Agreement are zero-rated supplies for GST purposes under s11A(1)(w).

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

This Ruling will apply for the period beginning on 11 August 2022 and ending on 10 August 2025.

This Ruling is signed by me on the 11<sup>th</sup> day of August 2022.

**James McKeown**

Tax Counsel Lead, Tax Counsel Office

# OPERATIONAL STATEMENT

Operational statements set out the Commissioner of Inland Revenue's view of the law in respect of the matter discussed and deal with practical issues arising out of the administration of the Inland Revenue Acts.

## OS 22/04: Charities and Donee Organisations - Part 1 Charities

### Scope

1. The purpose of *Operational Statement OS 22/04: Charities and Donee Organisations* is to assist entities in the not-for-profit sector to understand their tax obligations and available tax benefits. This statement is published in two parts: Part 1 discusses charities and Part 2 discusses donee organisations.
2. New Zealand's not-for-profit sector makes an important contribution to the wellbeing of New Zealanders. One way the Government supports the sector is by providing favourable tax treatments for the sector. These come in various forms, depending on the characteristics of the entity involved; for example, various income tax exemptions for the business and non-business income of charities, resident withholding tax (RWT) exemptions, fringe benefit tax (FBT) exclusions, goods and services tax (GST) concessions and interest-free student loans for overseas volunteers of approved charitable organisations. For charities that have donee status, donors may receive favourable tax treatments such as donation tax credits, payroll giving tax credits and income tax gift deductions.
3. Following brief comments about where to get more information, the application date of this statement, and the not-for-profit sector, Part 1 of the Operational Statement:
  - considers what is a charity, including in the context of the two main Acts governing charities: the ITA and Charities Act 2005 (Charities Act) (see from [13]);
  - addresses the relationship between Charities Services | Ngā Ratonga Kaupapa Atawhai (a unit of the Department of Internal Affairs | Te Tari Taiwhenua) and Inland Revenue (see from [24]);
  - explains what charitable purposes are, because that is important to deciding whether an organisation is a charity (see from [37]);
  - outlines the different tax treatments that may be available (see from [44]);
  - discusses the implications for Māori organisations (see from [171]), explains the rules for charitable trusts (see from [183]), and non-resident charities (see from [192]);
  - discusses the tax implications of ceasing to be a tax charity or deregistration (see from [202]); and
  - sets out administrative matters (see from [231]) and highlights other disclosure and reporting regimes (see from [252]).

An appendix of legislation and list of references conclude Part 1.

4. Part 2 of the Operational Statement provides guidance to entities wanting to become donee organisations or that are already donee organisations, including the benefits of being a donee organisation, how to obtain approval as a donee organisation, the requirements for a "charitable or public benefit gift" and the requirements for a donation tax receipt.
5. Part 2 also addresses other administrative tax matters relevant to donee organisations, including record-keeping and the implications of a donee organisation with charitable purposes being removed from the register maintained by Charities Services (Charities Register, described at [28]).
6. Topics relevant to Part 1 that are covered in Part 2 are cross-referenced.

### Further information

7. Inland Revenue has a dedicated email address for inquiries about charities and donee organisations: [charities.queries@ird.govt.nz](mailto:charities.queries@ird.govt.nz)

8. More information about charities is on the Inland Revenue [website](#).<sup>1</sup> All references whether to webpages, reports or other items are listed with their full URL in the References at the end of this document.

## Application date of this statement

9. This Operational Statement (Parts 1 and 2) will apply from 10 October 2022.

## Not-for-profit sector

10. New Zealand's not-for-profit sector is diverse and includes many different types of organisations and entities. A not-for-profit organisation is any society, association or group, incorporated or unincorporated, the activities of which are not carried on for the profit or gain of any individual and the rules of which do not allow any money or property to be distributed to any member.
11. Different parts of the not-for-profit sector have different tax treatments, depending on their characteristics:
- Tax charities – the status of which generally results in an income tax exemption. This category includes organisations registered under the Charities Act (registered charities), deregistered charities (only for a limited period), charities that began the process of becoming a registered charity before 1 July 2008 (which meet other conditions) and a small number of non-resident charities approved as a tax charity by the Commissioner.
  - Donee organisations — the status of which gives tax benefits to donors who make gifts of money (donations) to them. This category includes charities and not-for-profit organisations with cultural, philanthropic or benevolent purposes.
  - Charitable organisations — the status of which may enable them to benefit from exclusion from the FBT rules.
  - Other not-for-profit organisations — organisations not otherwise covered above, which do not have the purpose of making a profit for any individual. They can potentially access tax exemptions or other administrative concessions provided for in the Inland Revenue Acts. (The Inland Revenue Acts are defined in s YA 1 of the ITA and listed in schedule 1 of the Tax Administration Act 1994 (TAA).) Examples of tax exemptions available to not-for-profit organisations are the income tax exemption for amateur sports promoters (s CW 46) and the income tax deduction of up to \$1,000 (s DV 8).
12. A not-for-profit organisation may or may not be a charity, depending on whether it satisfies the legislative requirements described in this part. Additionally, a not-for-profit organisation may or may not be a donee organisation, depending on whether it satisfies the legislative requirements described in Part 2 of this Operational Statement. Some not-for-profit organisations are both a charity and a donee organisation, while some are neither.

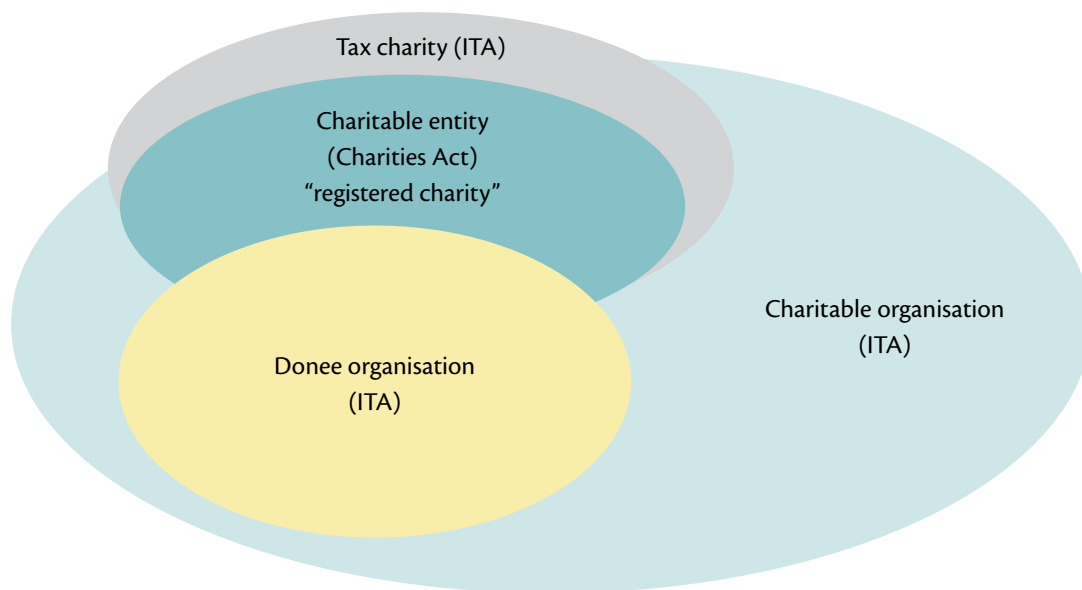
## Definition of a “charity”

13. There is no legislative definition of a “charity” in the ITA or Charities Act. However, common law<sup>2</sup> has established that the hallmarks of a charity are that:
- the purposes of the charity are for the public benefit; and
  - the purposes are charitable within the sense the law recognises.
- Both public benefit and charitable purposes are discussed from [37].
14. The ITA defines a “tax charity, “charitable organisation” and “donee organisation” and the Charities Act defines a “charitable entity”.
15. A charitable entity that has obtained registration under the Charities Act is referred to in this Operational Statement as a “registered charity”.
16. All registered charities will meet the definition of tax charity under the ITA. However, there are other entities that are tax charities that are not registered charities.
17. The definitions under the ITA and Charities Act overlap.

<sup>1</sup> Inland Revenue, Charities | Ngā kaupapa atawhai (webpage).

<sup>2</sup> *A-G v Family First NZ* [2022] NZSC 80 at [10] – [12], *Re Greenpeace of NZ Inc* [2014] NZSC 105, [2015] 1 NZLR 169 at [18].



**Figure 1: Relationship between overlapping definitions in the ITA and Charities Act**

18. Whether or not a charity is registered does not affect its legal status or its ability to accept funds from the public. However, to qualify for the favourable tax treatments, a charity must meet the legislative requirements described in this Operational Statement.
19. A “charitable entity” is a society, institution or the trustee(s) of a trust that is (or are) registered as a charitable entity under the Charities Act (s 4 of the Charities Act).
20. Requirements for registration (s 13 of the Charities Act) are as follows:
  - For a society or institution to be registered, it must be established and maintained exclusively for charitable purposes (see from [38]) and not carried on for the private pecuniary profit of any individual.
  - For trustees of a trust to be registered, the trust must be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes. The name of the entity (as per s 6 of the Charities Act) must be the name of the incorporated board (if incorporated under the Charitable Trusts Act 1957) or the name of the trust or a name nominated by the trustees if the trust does not otherwise have a name.
21. Once registered under the Charities Act, the charitable entity is commonly known as a “registered charity”.
22. A “charitable organisation” means, for a quarter or an income year, an association, fund, institution, organisation, society or trust to which s LD 3(2) or schedule 32 applies (s YA 1). It may include an entity removed from the Charities Register (but only for a limited time), but it does not include a local authority, a public authority or a university. Charitable organisations are discussed in more detail in Part 2 of this Operational Statement.
23. A “tax charity” (defined in ss YA1 and CW 41(5)) is:
  - a trustee, society or institution registered as a charitable entity under the Charities Act;
  - a trustee, society or institution that has started the process of registration before 1 July 2008 and intends to complete the process and has not notified the Commissioner that it is not a tax charity;
  - a non-resident trustee, society or institution that carries out charitable purposes outside New Zealand that is approved by the Commissioner as a tax charity in circumstances where registration under the Charities Act is unavailable; and
  - entities removed from the register (but only for a limited period).

## Role of Charities Services

24. The Charities Act provides for the registration of entities (defined in s 4 of that Act as societies, institutions or trustees of a trust) as charitable entities. The purposes of the Charities Act (s 3 of that Act) include promoting public trust and confidence in the charitable sector, encouraging and promoting effective use of charitable resources, providing for registration and deregistration of charities, and requiring compliance with certain obligations.
25. Under the Charities Act, three members of the Charities Registration Board (the Board) are appointed by the Minister responsible for the administration of the Charities Act and are required to act independently from the Minister. The Board is the statutory decision maker responsible for decisions on the registration and deregistration of charities (s 8 of the Charities Act).
26. In addition, the Board delegates routine decisions to Charities Services, a unit of the Department of Internal Affairs (s 9 of the Charities Act).
27. Charities Services (s 10 of the Charities Act):
  - provides a registration and monitoring system for charitable entities;
  - collects and processes annual returns, including making available registered charities' annual financial information on the publicly accessible Charities Register;
  - provides an inquiry function into alleged breaches of the Charities Act or serious wrongdoing in connection with a registered charity;
  - supplies information to Inland Revenue; and
  - provides support and education to charities on good governance and management practice.
28. Charities Services maintains a public, searchable Charities Register<sup>3</sup> containing a list of all charities registered under the Charities Act. The Charities Register helps the public, funders and other users make better-informed decisions about charities they may wish to support.
29. For a society or an institution to be eligible to register with Charities Services, generally it must have been established and be maintained exclusively for charitable purposes and not be carried on for the private pecuniary profit of any individual. If it is established and maintained partly for charitable purposes and partly for benevolent, philanthropic or cultural purposes it may be able to register with Charities Services, provided the benevolent, philanthropic or cultural purposes are ancillary to the charitable purposes.
30. In the case of trustees of a trust, the trust will qualify for registration with Charities Services if it is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes (s 13 of the Charities Act). Trusts that derive income in trust for benevolent, philanthropic or cultural purposes that are not also regarded as charitable purposes may not be registered with Charities Services unless those purposes are ancillary to the charitable purposes.
31. An entity may be removed from the Charities Register at its request or at the direction of the Board. The grounds for removal include where:
  - the entity is not or is no longer qualified for registration as a charitable entity;
  - the entity has engaged in serious wrongdoing;
  - any person has engaged in serious wrongdoing in connection with the entity; or
  - the entity has significantly or persistently failed to comply with the Charities Act (for example, non-filing of annual returns).
32. Before an entity can be removed from the Charities Register at the direction of the Board, it has a reasonable opportunity to make submissions to the Board. The Board's decision can be appealed to the High Court or be subject to an application for judicial review.
33. One of the Government's aims in establishing the charities registration process was to create, as much as possible, a seamless interface between a charity's registration and its entitlement to tax exemptions, including by way of s 30 of the Charities Act, which allows Charities Services to provide information to Inland Revenue.
34. To further enable Charities Services and Inland Revenue to work together, a memorandum of understanding provides for the sharing of information in respect of charitable entities.<sup>4</sup>

<sup>3</sup> Charities Services, Search the register (webpage).

<sup>4</sup> Inland Revenue, Department of Internal Affairs (DIA) | Te Tari Taiwhenua (DIA) - Supplying of information in respect of charitable entities (webpage).

35. All such information exchanges take account of relevant legislative provisions regarding confidentiality of tax information and the requirements of the Privacy Act 1993 and the Official Information Act 1982.
36. The Charities Services **website** provides general information about charities and how to apply for registration.<sup>5</sup>

## Charitable purposes

37. For a society or institution to be a charity, it must be established and maintained exclusively for charitable purposes. For a trust to be a charity, its income must be derived by the trustees in trust for charitable purposes.
38. The definitions of “charitable purpose” in s YA 1 of the ITA and s 5 of the Charities Act are materially the same and relevantly provide that charitable purpose includes “every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community”.
39. A charity’s purpose or purposes must be of public benefit within the sense the law recognises as charitable.<sup>6</sup> This is assessed by considering the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted (*Re Greenpeace* at [76]).
40. The definitions of charitable purpose (in s YA 1 of the ITA and s 5 of the Charities Act) also provide specifically that a marae will have a charitable purpose where its:
  - physical structure is on Māori reservation land; and
  - funds are used only for the administration and maintenance of the land and the structure of the marae or for a purpose that is a charitable purpose (s YA 1 of the ITA and s 5(2)(b) of the Charities Act).
41. Further, the definitions of charitable purpose provide that the public benefit requirement for charitable purposes will not be defeated simply because beneficiaries or members are related by blood (s YA 1 of the ITA and s 5(2)(a) of the Charities Act).
42. An entity may be eligible for charitable registration, even if it has a non-charitable purpose, where the non-charitable purpose is merely ancillary (s 5(3) of the Charities Act).
43. Sporting organisations may be eligible for registration, provided the promotion of amateur sport is the means by which its charitable purpose is pursued (see s 5(2A) of the Charities Act).

## Summary of tax treatment available to charities

44. Tax charities in New Zealand are generally treated favourably for tax purposes as a reflection of wider government objectives. The annual Tax Expenditure Statement the Treasury produces for the Budget provides further transparency around policy-motivated “expenditures”. These tax expenditures take the form of an exemption, allowance, preferential tax rate, deferral or offset that reduces a tax obligation to achieve a specific policy objective. This Operational Statement focuses on the expenditures related to charities and not-for-profit organisations, sometimes referred to as “concessions”.
45. This support is provided for in the ITA, primarily through income tax exemptions. One exemption is for the non-business (passive) income of a tax charity (s CW 41). Another exemption is for the business income of a tax charity (s CW 42), subject to the additional territorial and control restrictions (see from [81]).
46. Income tax exemptions are a departure from the Government’s broad-based, low-rate tax framework. Therefore, as a matter of general principle, exemption from income tax is restricted to organisations that are both not-for-profit and operate for the public benefit – the main category of such organisations being registered charities.
47. Certain charities and not-for-profit organisations with New Zealand purposes are also eligible to be treated as donee organisations, meaning taxpayers may receive tax benefits for donations of money made to these organisations. Donee organisations are discussed in more detail in Part 2 of this Operational Statement.
48. Other tax treatment available may include RWT exemptions, FBT exclusions, GST concessions and interest-free student loans for overseas volunteers of approved charitable organisations. Also discussed from [171] are special tax treatments of Māori organisations that are registered charities.
49. The favourable tax treatment available to tax charities will not be available to a board incorporated under the Charitable Trusts Act 1957 unless the board becomes a registered charity. For more information about the tax treatment of charitable trusts, see from [183].

<sup>5</sup> Charities Services, Charities Services | Ngā Ratonga Kaupapa Atawhai (webpage).

<sup>6</sup> *A-G v Family First NZ* [2022] NZSC 80 at [10] – [12], *Re Greenpeace of NZ Incorporated* [2014] NZSC 105, [2015] 1 NZLR 169 at [18]

50. One area where tax charities do not receive favourable treatment is in the imputation system. Under the imputation system, a company effectively attaches income tax credits (known as “imputation credits”) to dividends distributed to shareholders. The shareholders then use those imputation credits to reduce their own income tax liability in respect of the dividend they receive. Where a shareholder is a tax charity that does not have to pay tax on the dividend received, the imputation credits cannot be used and the credits cannot be refunded.

## Income tax exemptions

### Qualifying for income tax exemptions

51. Income tax exemptions for tax charities are provided under:
- s CW 41 – exemption for non-business income; and
  - s CW 42 – exemption for business income.
52. In addition, charitable bequests may be exempt from income tax (s CW 43). There are further specific exemptions from income tax, for example for community housing trusts and companies (s CW 42B), friendly societies (s CW 44) and bodies promoting amateur games and sports (s CW 46), amongst others provided under Subpart CW of the ITA.
53. There are also restrictions on when the non-business income of a council-controlled organisation will be eligible for the income tax exemptions.
54. A council-controlled organisation is defined in s YA 1 more broadly than in s 6(1) of the Local Government Act 2002 and can include an organisation that is not a company. Generally, an organisation will be a council-controlled organisation where:
- it is subject to the direct or indirect control of one or more local authorities; or
  - a local authority has the direct or indirect power to control at least 50% of the votes at any meeting of the members or controlling body of the organisation, or the direct or indirect right to appoint at least 50% of the trustees, directors or managers of the organisation.
55. A council-controlled organisation will not be eligible for tax exemptions for non-business or business income unless it is operating a hospital as a charitable activity or operating a hospital as a charitable activity on behalf of the local authority (ss CW 41(4) and CW 42(2)).

### Income tax exemption for non-business income (s CW 41)

56. Section CW 41 provides a tax charity with an income tax exemption for non-business income. An example of non-business income is investment income (for example, interest or dividends). Section CW 41 also allows the income tax exemption for non-business income of a deregistered charity (but only for a limited time).
57. This exemption does not apply to any income derived from a business carried on by, or for or for the benefit of, the tax charity (this situation is dealt with under s CW 42).

### Income tax exemption for business income (s CW 42)

58. Section CW 42 provides an income tax exemption for business income when certain conditions are satisfied at the time the income is derived.
59. To qualify for the business income exemption:
- a tax charity must derive the income directly or indirectly from a business (see from [66]);
  - the business must be carried on by, or for, or for the benefit of the tax charity (see from [72]);
  - the entity carrying on the business must be a registered charity at the time the income is derived (see from [79]);
  - the territorial restriction must be satisfied (see from [81]); and
  - the control restriction must be satisfied (see from [90]).
60. Each of these five requirements is discussed in a separate subsection below.
61. The main difference between the tests under ss CW 41 and CW 42 is that exemption under s CW 42 is subject to the additional territorial and control restrictions.
62. The “territorial restriction” applies where the charitable purposes of the tax charity that derives the business income are not limited to within New Zealand (see from [ 81]). The territorial restriction requires that the business income be apportioned and only the income apportioned to charitable purposes in New Zealand can be exempt.

63. The “control restriction” requires that no person with some control over the business can direct or divert income derived from the business to their benefit or advantage (see from [90]).
64. A registered charity that carries on a business for or for the benefit of another tax charity is referred to as the “operating entity”. The tax charity that the operating entity carries on its business for, or for the benefit of, is referred to as the “controlling entity”. (The controlling entity may also be a registered charity, but it is not required to be one.)
65. For more information about the applicability of the business income exemption under s CW 42, see the explanation of the amendments to the legislation.<sup>7</sup>

***Tax charity derives income directly or indirectly from a business***

66. The first requirement to qualify for the business income tax exemption is that the tax charity must derive income directly or indirectly from a business.
67. “Business” is defined for the purposes of the ITA in s YA 1 as including any profession, trade or undertaking carried on for profit.
68. The leading case on the meaning of “business” is *Grieve v CIR* [1984] 6 NZTC 61,682 (CA), which established the following:
- The words “for profit” in the context of the definition of “business” mean with the intention of making a profit.
  - A business means an activity of a commercial nature that is carried on in an organised and coherent way with the intention of making a profit (being a profit ascertained in accordance with ordinary commercial principles and excluding allowances and deductions provided as tax incentives).
  - To determine whether there is a business, it is necessary to consider the nature of the activities and the taxpayer’s intention in carrying on the activities.
  - Both subjective and objective evidence is relevant in determining whether the taxpayer’s intention in carrying on an activity is to make a profit. However, subjective evidence must be tested against objective evidence. The objective matters that may be relevant in determining a taxpayer’s intention in carrying on an activity include: the nature of the activity; the period over which it is engaged in; the scale of the operations and volume of transactions; the commitment of time, money and effort; the pattern of activity; and the financial results.
  - A taxpayer’s motive (underlying purpose) for carrying on an activity is irrelevant in determining whether the activity is a business.
69. Many organisations in the not-for-profit sector engage in activities on a continuous and ongoing basis, commit time, money and effort to those activities, and conduct a large volume of transactions, with the intention of making a surplus. Organisations that carry on this type of activity are carrying on a business as that term is defined in s YA 1.
70. A trustee is treated as carrying on a business if they derive rents, fines, premiums or other revenues from a trust asset and the asset was disposed of to the trust by a person having control over the business (as described at [94]), and either the person retains or reserves an interest in the asset or the asset will revert to the person (s CW 42(3)).
71. Inland Revenue’s Public Ruling BR Pub 22/06,<sup>8</sup> while dealing primarily with the exclusion from FBT of benefits provided to employees of qualifying non-profit organisations (under s CX 25), outlines what constitutes a “business”.

***Business carried on by, or for, or for the benefit of the tax charity***

72. The second requirement to qualify for the business income tax exemption is that the business is carried on by the tax charity or the business is carried on for or for the benefit of the tax charity.
73. If the tax charity is carrying on a business, the second requirement will be satisfied.
74. A business is carried on “for, or for the benefit of, a tax charity” where a registered charity (the operating entity) is carrying on a business for or for the benefit of the tax charity (the controlling entity).
75. Further, where a business is carried on by a registered charity in partnership with a non-charitable entity, the income derived may still be exempt under s CW 42 (subject to satisfaction of the territorial and control restrictions).<sup>9</sup>

<sup>7</sup> Inland Revenue, “Charities and donee organisations” section on “New Legislation” in *Tax Information Bulletin* Vol 31, No 4 (May 2019) at 132-133 (publication).

<sup>8</sup> Inland Revenue, *Public Ruling BR Pub 22/06 - Fringe Benefit Tax - Charitable and Other Donee Organisations and Fringe Benefit Tax* (May 2022) at page 9 (publication).

<sup>9</sup> Inland Revenue, QB 21/03: *Charities business [income] exemption - business carried on in partnership* (Question we’ve been asked / 2021, May 2021) at (11) (publication).

76. This will also be the case where a non-charitable entity is in partnership with an operating entity carrying on a business for, or for the benefit of, a controlling entity.<sup>10</sup>
77. A business is not automatically considered to be carried on for, or for the benefit of, a tax charity merely because some of the income from the business is paid to a tax charity. Instead, the business must be carried on for or for the benefit of the tax charity.
78. A business does not cease to be carried on for, or for the benefit of, a tax charity if the business income is accumulated from year to year, as long as the income and resulting assets are ultimately paid to the tax charity.<sup>11</sup>

**Entity carrying on the business must be a registered charity**

79. The third requirement to qualify for the business income tax exemption is that the entity carrying on the business must be a registered charity at the time the income is derived.
80. From the 2020/21 income year, where business income is derived by an operating entity for a controlling entity, the operating entity must itself be a registered charity to qualify for the business income exemption. The controlling entity must be a tax charity. The controlling entity may also be a registered charity (although this is not a requirement).

**Application of the territorial restriction**

81. The fourth requirement to qualify for the business income tax exemption is that the territorial restriction is satisfied.
82. Where an entity's charitable purposes are limited to within New Zealand, the territorial restriction is satisfied, so no apportionment of income is required.
83. Where an entity's charitable purposes are not limited to within New Zealand, the territorial restriction applies and the business income must be apportioned reasonably between the purposes within New Zealand and those outside New Zealand and taxed accordingly. Only income apportioned to the charitable purposes in New Zealand is exempt income (s CW 42(4)).
84. There is no prescribed apportionment methodology in s CW 42. One just and reasonable manner of apportioning income would be to examine the historical distribution pattern and apportion in that manner.<sup>12</sup>
85. It is considered that a method based on the historical distribution pattern might be reasonable, subject to the following caveats:
- Where the taxpayer has retained income, an apportionment based on the historical distribution pattern might still be appropriate, provided there are no indications the purposes of the taxpayer are to change in the future.
  - If apportionments have been based on a historical distribution pattern in the past, but the taxpayer's purposes change, apportionment would be justified to take that change into account.
86. This does not mean the "historical distribution pattern" apportionment method is the only reasonable apportionment method. Other methods may be reasonable, depending on the facts of the case.
87. The courts have considered apportionment more generally in the context of allowable deductions.<sup>13</sup> This case law can be useful in determining a reasonable apportionment. These cases establish that when determining what is reasonable in cases of apportionment:
- where an amount can be apportioned between purposes it should be, but where it serves two purposes indifferently the best apportionment that can be made must be made based on the facts of the case; and
  - although an apportionment cannot be based on mere speculation, absolute precision may not be possible, and some degree of arbitrariness is acceptable if no better apportionment can be made on the facts.
88. The term "New Zealand" is defined in s YA 1. It is an inclusive definition (that is, it is not exhaustive) and includes the continental shelf and the water and air space above the continental shelf that is beyond New Zealand's territorial sea (subject to some limitations). In essence, "in New Zealand," when used as a territorial description, means the islands and territories within the Realm of New Zealand; but does not include the self-governing state of the Cook Islands, the self-governing state of Niue, Tokelau or the Ross Dependency.

<sup>10</sup> Inland Revenue, QB 21/03: *Charities business [income] exemption - business carried on in partnership* (Question we've been asked / 2021, May 2021) at (13) (publication).

<sup>11</sup> *Calder Construction Co Ltd v CIR* [1963] NZLR 921 (SC).

<sup>12</sup> *CIR v Dick* [2002] 2 NZLR 560 (HC).

<sup>13</sup> *Buckley & Young Ltd v CIR* (1978) 3 NZTC 61,271 (CA); *NZ Co-operative Dairy Co Ltd v CIR* (1988) 10 NZTC 5,215 (HC); *Christchurch Press Co Ltd v CIR* (1994) 16 NZTC 11,124 (HC).



89. When tax charities undertake an ongoing self-assessment (required of all tax charities at least year by year), they must calculate a reasonable apportionment between charitable purposes within New Zealand and those outside New Zealand, where applicable. The tax charity must keep records to show where its charitable purposes are carried out, in New Zealand or outside New Zealand. Additionally, the tax charity must keep records of the method and rationale it used to apportion business income.

#### *Application of the control restriction*

90. The fifth requirement to qualify for the business income tax exemption is that the control restriction is satisfied.
91. In this regard, the controlling entity and the operating entity are each required to ensure no person with some control over the business can divert an amount derived from the business for their own benefit or advantage or for the benefit or advantage of another person that is not for the purpose of the tax charity (see s CW 42(5) to (8)).
92. In any audit, documentation will be examined to determine whether a person with some control over the business is able to exert influence that would enable someone to receive a benefit or advantage.
93. Adequate records of the decision-making process (for example, minutes of meetings and resolutions), as well as documentation such as trust deeds, constitutions and accounting records must be kept. The meanings of “some control over the business” and “benefit or advantage” are discussed from [94] and [106] respectively.

#### *Meaning of “some control over the business”*

94. The first matter to be consider within the control restriction is whether any person has some control over the business to be able to divert an amount.
95. A wide spectrum of situations exists in which a person may be able to exercise some control over a business. At one extreme are situations of duress or oppressive conduct, or where the person controls the decision-making in terms of majority voting rights or with associated persons controlling the board, or where the trust instrument grants a right of veto over decisions to that person. At the other end of the spectrum are situations where the settlor is consulted but has no power to direct or the person in question is only one of several trustees or directors involved in decision making.
96. Generally, whether a person can divert an amount by materially influencing decisions is a matter of fact and degree. When considering whether a person has some control over the business, it is not necessary for the benefit or advantage to be actually received.
97. Under s CW 42(7), a person does not have some control over a business merely because they provide professional services to the trust or company by which the business is carried on and their ability to determine the benefit or advantage arises because they are:
- providing services in professional public practice;
  - a statutory trustee company;
  - the Public Trust; or
  - the Māori Trustee.
98. In some circumstances a person will be treated as having some control over the business of the charity and as being able to direct or divert amounts from the business to their own benefit or advantage (s CW 42(5)). This will be the case if they are directly or indirectly able to determine or materially influence the determination of the nature or extent of a relevant benefit or advantage, or the circumstances in which a benefit or advantage is given or received, because they are:
- a settlor or trustee of the trust carrying on the business;
  - a shareholder or director of the company carrying on the business;
  - a settlor or trustee of a trust that is a shareholder of the company carrying on the business; or
  - an associated person of any settlor, trustee, shareholder or director described above.
99. In instances where two or more people can influence a decision, whether a person is able to **materially** influence may depend on whether the person actually participates in the discussion and decision making. Even if a person is in the minority of the decision-making group, they may still exert material influence over the decision to their advantage (for example, because they are well regarded).
100. Where there is a sole trustee, the implication is that the sole trustee can exert the requisite influence.

101. Past behaviour (such as the pattern of distributions or whether benefits have been afforded to any person who is able to influence the entity by virtue of their status) can be a guide to whether, in practice, the person in question can materially influence the setting of benefits (*CIR v Dick*).<sup>14</sup>
102. Where it is clear that the setting of any benefit or advantage has been undertaken in a scientific manner to ensure market value is paid, the Commissioner will accept that there has been no material influence to provide a benefit or advantage (*CIR v Dick*).
103. A person's legal, as well as practical, ability to divert an amount by influencing the decision will be considered (*CIR v Dick*).
104. The Companies Act 1993 provides certain rights and powers to shareholders and directors. The control test will not be satisfied where those rights enable a person to influence the decisions of the business to divert an amount from the business to the benefit or advantage of a particular person that is not for the purpose of the operating entity or controlling entity. When the control test is not satisfied, the income derived from that business will not be exempt from tax under s CW 42.
105. The company's board may enact special provisions to restrict or eliminate the powers given by the Companies Act to shareholders or directors that could enable them to influence company decisions.

#### **Meaning of "benefit or advantage"**

106. The second matter to be considered within the control restriction is whether a person with some control over the business (as described above) can direct or divert an amount derived from the business to the benefit or advantage of a person as described in s CW 42(1)(c).
107. A benefit or advantage that is received or can be received by a person is defined widely in s CW 42(8) and includes:
- receiving something that may or may not be convertible into money;
  - deriving an amount that would be income of the person (with certain exclusions); and
  - retaining or reserving an interest in an income-earning asset, if the person has disposed of the asset to the trust or the asset will revert to them.

#### **Charitable bequests (s CW 43)**

108. Another income tax exemption that may be available relates to charitable bequests. A charitable bequest is a gift made to a charity in a will.
109. The intent of s CW 43 is to exempt income accruing to an executor or administrator of a deceased's estate to the extent to which the amount:
- arises or is attributable to assets of the estate that have been left to a tax charity (s CW 43(2)); and
  - if derived by the tax charity, would have been exempt income under s CW 41 (non-business income) or s CW 42 (business income) (s CW 43(3)).
110. Section CW 43 operates to allow income derived by the deceased's executor or administrator between the date of death and the end of the income year following the income year in which death occurred to be exempt, regardless of the charity not being registered under the Charities Act. Income accruing between the date of death and the distribution of the estate would be taxable, if it were not for s CW 43(4) and (5). However, any such income the charity derives after this period will not be exempt, unless the charity is a tax charity.

#### **Resident withholding tax exempt status**

111. Another type of income tax exemption available to charities relates to RWT. RWT is a tax that is deducted from investment income before the investor receives it.
112. From 1 April 2020, the Commissioner accepts a person registered under the Charities Act as having RWT-exempt status for the duration of their registration and they will no longer need to apply for an exemption certificate.
113. Entities that held an RWT certificate of exemption before 1 April 2020 were added to the electronic register of those with RWT-exempt status unless:
- their exemption was cancelled, expired or revoked; or
  - if the entity was exempt under an Act other than the Inland Revenue Acts and it had not been approved under criteria contained in the Inland Revenue Acts.

<sup>14</sup> *CIR v Dick* [2002] 2 NZLR 560 (HC).



114. Payers of non-business income to tax charities can now check in real-time, by IRD number, that an entity has RWT-exempt status and the date from which that exemption started on the RWT-exemption register (see s RE 29).<sup>15</sup>
115. The Commissioner also publishes the date RWT-exempt status ended on the RWT-exemption register. (The start and end dates of RWT-exemption are no longer published in the *New Zealand Gazette*.)
116. Entities on the RWT-exemption register must notify the Commissioner if they no longer meet the criteria for the exemption (s 32K(2) of the TAA), unless they are a charity that is deregistered, in which case the Commissioner will receive the information from Charities Services directly. For more information about RWT-exemption status when a charity is deregistered, see [223].
117. More information about RWT generally is available on Inland Revenue's website<sup>16</sup> including in:
- *Resident Withholding Tax on Interest (RWT) Payer's Guide* (IR283);<sup>17</sup> and
  - *Resident Withholding Tax (RWT) on Dividends: Payer's guide* (IR284).<sup>18</sup>

## Non-resident withholding tax

118. If a charity pays passive income (such as interest or dividends) to a non-resident (referred to as non-resident passive income), the charity needs to register as a non-resident withholding tax (NRWT) payer, deduct NRWT from the payment and remit the NRWT to the Commissioner.
119. Note that non-resident passive income does not include exempt income, such as the passive investment income of a non-resident charity recognised as a "tax charity" (s CW 41(5)).
120. For more information about NRWT generally, see *NRWT: Payer's guide* (IR291).<sup>19</sup>

## Fringe benefit tax exclusion

121. Not-for-profit organisations are liable for FBT **unless** the exclusion from FBT in s CX 25 applies to them.
122. The exclusion in s CX 25 applies to charitable organisations, which are defined in s YA 1, and include most donee organisations. The definition of charitable organisation also includes registered charities removed from the register that have challenged the decision and have not yet received a final decision.
123. Local authorities, public authorities and universities are excluded from being charitable organisations, so the standard FBT rules apply to them.
124. For ease of reference, in this Operational Statement the types of not-for-profit organisations that can rely on the FBT exclusion in s CX 25 are referred to as "qualifying organisations".
125. Qualifying organisations carry on a variety of activities. Those activities may include business activities. Those business activities may be within the organisation's benevolent, charitable, cultural or philanthropic purposes or outside those purposes – even if undertaken to help fund the organisation's benevolent, charitable, philanthropic or cultural purposes.
126. The exclusion from FBT for qualifying organisations is set out in s CX 25(1) and applies to the extent to which the qualifying organisation provides a benefit to an employee mainly in connection with their employment and the qualifying organisation's activity is:
- not a business; or
  - a business and the business activity is within the qualifying organisation's benevolent, charitable, cultural or philanthropic purposes.
127. The FBT exclusion does not apply where benefits are provided by way of short-term charge facilities (s CX 25(2) and (3)), see [141].

## Meaning of "mainly in connection with employment"

128. Section CX 25(1)(a) applies only where the employee receives the benefit mainly in connection with their employment.
129. This wording recognises that a qualifying organisation may provide benefits to people who are acting in different capacities for the organisation. It is not unusual for people to be employed by the organisation in a particular role and for those same people to also provide additional or different services to the organisation, for example, on a voluntary (unpaid) basis.

<sup>15</sup> Inland Revenue, Resident withholding tax exemption register | Te rēhita aweretanga tāke kaiponu kainoho-tāwāhi (webpage).

<sup>16</sup> Inland Revenue, Resident withholding tax (RWT) | Te tāke kaiponu kainoho (webpage).

<sup>17</sup> Inland Revenue, *IR283 - Resident withholding tax on interest (RWT) - payer's guide* (June 2020) (publication).

<sup>18</sup> Inland Revenue, *IR284 - Resident withholding tax (RWT) on dividends - payer's guide* (September 2020) (publication).

<sup>19</sup> Inland Revenue, *IR291 - NRWT - payer's guide* (September 2020) (publication).

130. A potential liability for FBT will arise only where an employee receives a benefit from a qualifying organisation mainly in their employment capacity and not in some other capacity (for example, their voluntary capacity).
131. A benefit will be provided to an employee of a qualifying organisation **mainly** in connection with their employment, if the benefit arises primarily in connection with their employment. If an employee is only employed by a qualifying organisation (that is, they do not do voluntary work), then any benefits provided to that employee are provided in connection with their employment. However if, for example, the employee is both employed by and volunteers for a qualifying organisation, it is necessary to determine in which capacity the benefit primarily arises.
132. If the benefit arises equally in connection with both capacities, the benefit will be provided mainly in connection with the capacity in which the employee is predominately engaged.

### Activity that is not a business

133. Where the qualifying organisation's activity is not a business and a benefit is provided to an employee mainly in connection with their employment, the exclusion from FBT applies.
134. For the meaning of business and carrying on a business, see from [66].

### Activity that is a business and “within the qualifying organisation’s benevolent, charitable, cultural or philanthropic purposes”

135. Where the qualifying organisation's activity is a business and a benefit is provided to an employee mainly in connection with their employment, the exclusion from FBT applies only if the business activity is within the qualifying organisation's benevolent, charitable, cultural or philanthropic purposes.
136. Determining whether a qualifying organisation's business activity is within its benevolent, charitable, cultural or philanthropic purposes requires an understanding of the types of activities the qualifying organisation is carrying on.
137. The Commissioner considers activities are carried on within a qualifying organisation's purposes when they:
- are the performance of a qualifying organisation's benevolent, charitable, cultural or philanthropic purposes; or
  - directly facilitate the carrying out of the qualifying organisation's benevolent, charitable, cultural or philanthropic purposes.
138. Activities the Commissioner considers will usually be characterised as being carried on within a qualifying organisation's purposes include:
- the carrying out of the qualifying organisation's purposes;
  - appeals for funds for the qualifying organisation's purposes;
  - passive investment and management of the qualifying organisation's funds, so long as the organisation does not carry on a business of fund investment; and
  - the administration of the above activities.
139. If the employment of the qualifying organisation's employee consists of the carrying on by the organisation of a business whose activity is outside the organisation's charitable, benevolent, philanthropic or cultural purposes, benefits provided to the employee will not come within the exclusion provided by s CX 25. When this is the case, the organisation may be subject to FBT.
140. For more information and practical examples of where the FBT exclusion will or will not apply, see Inland Revenue's Public Ruling BR Pub 22/06<sup>20</sup>.

### Short term charge facilities

141. The exclusion from FBT in s CX 25(1) does not apply to benefits provided by way of short-term charge facilities in specified circumstances (s CX 25(2) and (3)).
142. A short-term charge facility, as defined in s CX 25(3), is an arrangement that:
- enables an employee of the qualifying organisation to obtain goods or services that have no connection with the employer or its operations by:
    - buying or hiring the goods or services;

<sup>20</sup> Inland Revenue, *Public Ruling BR Pub 22/06 - Fringe Benefit Tax - Charitable and Other Donee Organisations and Fringe Benefit Tax* (May 2022) at page 20 (publication).

- charging the costs of the goods or services to an account; or
  - providing consideration other than money for the goods or services; and
  - requires the employer to provide some or all of the payment or other consideration for the goods or services; and
  - is not a fringe benefit under s CX 10.
143. A short-term charge facility includes some vouchers but does not include an employment-related loan (s CX 10). An example of a fringe benefit provided by way of a short-term charge facility is in Inland Revenue's Public Ruling BR Pub 22/06.<sup>21</sup>
144. To determine whether a taxable fringe benefit has been provided when a qualifying organisation provides a benefit to an employee, first determine the lesser of 5% of the employee's salary and wages for the tax year or \$1,200. If the value of the benefit provided by way of a short-term charge facility is more than this figure, then a taxable fringe benefit has been provided (s CX 25(2)).

### Goods and services tax and non-profit bodies

145. There are also favourable GST rules for non-profit bodies (including charities). GST is a broadly based consumption tax that is imposed under the Goods and Services Tax Act 1985 (GST Act) on the supply of goods and services in New Zealand and on imported goods.
146. The GST Act has provisions relating to a "non-profit body" (s 2(1) of the GST Act). For the purposes of the GST Act, a non-profit body is any society, association or organisation, whether incorporated or not, that is:
- carried on other than for the purposes of profit or gain to any proprietor, member or shareholder; and
  - 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 any other way, to any such proprietor, member or shareholder.
147. In general, charities fall within the definition of non-profit body in the GST Act, depending on the terms of their constitution and rules.
148. The threshold for mandatory GST registration for a non-profit body is the same as for any other entity, as is the requirement for keeping GST records (see from [231]). Non-profit bodies operating below the threshold for mandatory GST registration may voluntarily register. However, in either case (that is, mandatory or voluntary registration), the non-profit body must have a taxable activity to qualify.
149. Consistent with the general rules for GST, the taxable activity of a non-profit body must be a continuous or regular activity involving the making of supplies of goods and/or services for consideration.
150. 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. However, it does not include any payment made by any person as an unconditional gift to any non-profit body (s 2(1) of the GST Act).
151. The receipt and payment of unconditional gifts are outside the scope of GST. An unconditional gift is defined in s 2(1) of the GST Act. It is a payment, voluntarily made to any non-profit body for the carrying on or carrying out of the purposes. No identifiable direct valuable benefit can or may arise in the form of a supply of goods and services to the person making the payment (or any associated person). However, an unconditional gift does not include any payment made by the Crown or a public authority. For more information on unconditional gifts and GST, see *GST: Unconditional gifts* (IS 20/09).<sup>22</sup>
152. GST-registered non-profit bodies can claim an input tax deduction for most goods and services they acquire (even if the goods and services do not directly relate to the making of taxable supplies) to the extent that they are not used for the making of exempt supplies (s 20(3K) of the GST Act).
153. An example of an exempt supply is the supply by any non-profit body of donated goods and services (s 14(1) of the GST Act). Donated goods and services are goods and services that are gifted to a non-profit body and intended for use in the carrying on or carrying out of the purposes of that non-profit body (s 2(1) of the GST Act). For example, the sale of donated clothing by a non-profit body would be an exempt supply, so not liable to GST.

<sup>21</sup> Inland Revenue, *Public Ruling BR Pub 22/06 - Fringe Benefit Tax - Charitable and Other Donee Organisations and Fringe Benefit Tax* (May 2022) at page 22 (publication).

<sup>22</sup> Inland Revenue, *Interpretation Statement IS 20/09 – GST - unconditional gifts* (December 2020) (publication).

### Election for an asset to not be part of taxable activity

154. From 15 May 2018 to 31 March 2021, a non-profit body could have made an election under s 20(3KB) of the GST Act, with respect to a supply, to exclude the supply from the effect of s 20(3K) of the GST Act.
155. When such an election was made with regards to an asset, when the non-profit body sells that asset it will not be subject to GST on the sale (or an equivalent event).

### Valuation on deemed disposal of assets by GST deregistration

156. Section 88 of the GST Act provides for the valuation of supplies of assets used by GST-registered non-profit bodies. This section requires:
- a non-profit body to be bound by a tax position concerning the output tax on the disposal of an asset if the tax position is taken in a return **before** 15 May 2018 (s 88(1) and (2) of the GST Act); and
  - the availability of an election concerning the value of a supply that is made **during the period** 15 May 2018 to 31 March 2021 as a consequence of the GST deregistration of the non-profit body (s 88(3) to (5) of the GST Act).

### Input tax credit limitation for the acquisition of second-hand goods

157. The amount of input tax credit that may be claimed by a registered recipient of a second-hand good that has been subject to an election under s 20(3KB) or s 88(4) is limited to the amount of GST paid by the non-profit body under the election. This limitation applies when the recipient is:
- associated with the original owner;
  - a non-profit body; or
  - associated with a non-profit body (s 88(6) to (8) of the GST Act).

### Further GST information

158. Other sections of the GST Act that may be relevant to non-profit bodies include ss 2A(1)(f)–(h) (meaning of associated persons), 6(3) (taxable period returns), 19A(1(a)(iii) (requirements for accounting on payments basis), 19D(2B) (invoice basis for supplies over \$225,000) and 51(5) (persons making supplies in course of taxable activity to be registered).
159. For more information, including examples, see “GST and assets sold by non-profit bodies”.<sup>23</sup>
160. For general information about GST, see Inland Revenue website<sup>24</sup> and guides:
- *Charitable and Donee Organisations* (IR255);<sup>25</sup> and
  - *GST Guide: Working with GST* (IR375).<sup>26</sup>
161. The following table (Table 1) sets out GST treatment of common types of receipts of non-profit bodies.

<sup>23</sup> Inland Revenue, “GST and Assets Sold by Non-profit Bodies”, *Tax Information Bulletin* Vol 31, No 4 (May 2019) at 101–106 (publication).

<sup>24</sup> Inland Revenue, File your GST return (webpage).

<sup>25</sup> Inland Revenue, *IR255 - Charitable and donee organisations* (December 2021) at 13-15 (publication).

<sup>26</sup> Inland Revenue, *IR375 - GST guide - Working with GST* (April 2022) (publication).

**Table 1: Categories of supplies by non-profit bodies liable for GST, not liable for GST and exempt from GST**

| Type of receipt                   | Liable for GST | Not liable for GST | Exempt from GST |
|-----------------------------------|----------------|--------------------|-----------------|
| Subscriptions                     | ✓              |                    |                 |
| Donations                         |                | ✓                  |                 |
| Koha                              |                | ✓                  |                 |
| Bequests                          |                | ✓                  |                 |
| Grants                            | ✓              |                    |                 |
| Unconditional gifts               |                | ✓                  |                 |
| Subsidies                         | ✓              |                    |                 |
| Suspensory loans                  | ✓              |                    |                 |
| Trading activities                | ✓              |                    |                 |
| Raffles or house proceeds         | ✓              |                    |                 |
| Admission fees                    | ✓              |                    |                 |
| Affiliation fees                  | ✓              |                    |                 |
| Sale of donated goods or services |                |                    | ✓               |
| Sale of purchased goods           | ✓              |                    |                 |
| Sale of assets or equipment       | ✓              |                    |                 |
| Insurance receipts                | ✓              |                    |                 |
| Hall or equipment hire            | ✓              |                    |                 |
| Rent received (residential)       |                |                    | ✓               |
| Rent received (commercial)        | ✓              |                    |                 |
| Penalty payments (fines)          | ✓              |                    |                 |
| Advertising or sponsorship        | ✓              |                    |                 |
| Interest or dividends             |                |                    | ✓               |
| Gaming machines                   | ✓              |                    |                 |

**Source:** Inland Revenue, Income tax and GST for not-for-profits | Te tāke moni whiwhi me te tāke hokohoko mō ngā whakahaere kore moni hua (webpage, last updated 28 April 2021).

### Interest-free student loan concession

162. Usually, when someone with a student loan travels overseas for more than six months, they are charged interest on their loan.

163. If a charitable organisation obtains approval under the Student Loan Scheme Act 2011, volunteers working for the organisation overseas may be able to keep their student loan interest free. The concession may apply if work is performed for no more than 24 months and is performed voluntarily or for no more than a token payment.

164. The volunteer work for the charitable organisation must be to:

- relieve poverty, hunger, sickness, or the impacts of war or natural disaster; or
- improve the economy or raise educational standards in a country that is on the OECD list of countries receiving development assistance.

165. For a charitable organisation to obtain this approval, it must submit a letter to the Commissioner explaining why the organisation should be granted approval. The organisation should send the letter through the online myIR service if it has such an account, otherwise via email to [charities.queries@ird.govt.nz](mailto:charities.queries@ird.govt.nz) or via post to Inland Revenue, PO Box 1147, Palmerston North Central, Palmerston North 4440.

166. The letter should include:

- whether the charitable organisation is a registered charity;
- whether the charitable organisation is a non-resident tax charity with an income tax exemption approved by the Commissioner;
- information on the work the charitable organisation does;
- details of the work volunteers will do for the charitable organisation; and
- details of any payments for which the volunteers will qualify.

167. If the charitable organisation is not a registered charity in New Zealand, it must also provide:

- a copy of the charitable organisation's trust deed, constitution or other governing rules;
- whether it is recognised as a charitable organisation with an overseas tax authority or government charity regulator (if so, copies of the relevant documentation should be provided);
- evidence of standing and credibility as a charitable organisation;
- whether the charitable organisation is publicly accountable;
- monitoring and evaluation processes in place;
- accounting and record keeping practices; and
- any other relevant matters.

168. If the Commissioner approves the charitable organisation as one whose volunteers may be exempted from interest on their student loans, it will be added to the approved charitable organisation list. It may then apply for the suspension of interest on the student loans of its volunteers, if the criteria are satisfied.

169. The application to suspend interest on a particular volunteer's student loan must be made to the Commissioner by submitting a letter, on the charitable organisation's letterhead, stating:

- the volunteer's name;
- the volunteer's IRD number;
- the length of time the volunteer will spend overseas;
- the specific tasks and duties the volunteer will undertake; and
- details of any payments the volunteer may receive for the work.

170. For more information about the interest-free student loan concession, see Inland Revenue's website.<sup>27</sup>

## Māori organisations

171. Many Māori organisations, including marae, are registered charities with obligations, advantages and tax treatment consistent with charities generally. However, additional specific rules should be noted.

172. In addition to charitable purposes including the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community, the definition of charitable purpose (s YA 1 of the ITA and s 5 of the Charities Act) also provides that a marae will have a charitable purpose where its:

- physical structure is on land that is a Māori reservation referred to in Te Ture Whenua Māori Act 1993 | Māori Land Act 1993; and
- funds are used only for the administration and maintenance of the land and structure of the marae or for a purpose that is a charitable purpose (s YA 1 of the ITA and s 5(2)(b) of the Charities Act).

173. The definitions of charitable purpose also provide that the public benefit requirement for charitable purposes will not be defeated simply because beneficiaries or members are related by blood (s YA 1 of the ITA and s 5(2)(a) of the Charities Act).

174. Māori organisations can receive many types of payment such as subscriptions, grants, subsidies, donations, koha, fees, raffle money and trading profits from selling assets. Most of these income types are taxed under general taxation principles, with some specific treatment. For more information, see Inland Revenue's factsheet *Payments and Gifts in the Māori Community* (IR278).<sup>28</sup>

<sup>27</sup> Inland Revenue, Charitable organisations and the student loan scheme | Ngā whakahaere kaupapa atawhai me te kaupapa pūtea taurewa ākongā (webpage).

<sup>28</sup> Inland Revenue, IR278 – *Non-profit groups* | Ngā Roopu Kore Moni Hua: *Payments and gifts in the Māori community* (December 2015) (publication).



175. Further information about, for example, the treatment of koha and Māori donee organisations generally is in Part 2 of this Operational Statement.

### Charitable registration of a marae on land that is a Māori reservation

176. To register as a charity with Charities Services, a marae on land that is a Māori reservation referred to in Te Ture Whenua Māori Act 1993 | Māori Land Act 1993 should provide Charities Services with:

- the Māori reservation location (block name and/or number or Māori Land Court order or Gazette notice relating to the setting apart of land as a Māori reservation);
- a copy of its charter (drawn up by the reservation trustees), if available;
- any other governing document such as rules, a trust deed or constitution;
- details (such as names, positions, addresses and dates of birth) of the trustees of the Māori reservation;
- information about the marae such as who is part of the marae (such as iwi, hapū, whānau, church, wider community or other specific groups); and
- details of the activities of the marae (such as providing facilities for hui, whānau gatherings, wānanga, community gatherings and meetings; organising events such as cultural, sporting, local community, fundraising and educational events; running programmes such as training, social or health services; running events to promote religious beliefs; running language or cultural groups; holding tangihanga and unveilings; looking after urupā; and any other specific activities).

### Registration of Māori entities under the Charitable Trusts Act 1957

177. Many Māori organisations with charitable purposes, such as Māori private training establishments and certain hapū and iwi organisations, seek incorporation as a board under the Charitable Trusts Act (see from [183]).

### Trusts established under Te Ture Whenua Māori Act 1993 | the Māori Land Act 1993

178. Te Ture Whenua Māori Act 1993 | the Māori Land Act 1993 was established to assist in retaining Māori land (comprising Māori customary land and Māori freehold land) in Māori ownership. Five types of land-holding trusts can be established under this Act, and they are generally designed to limit the further fragmentation of Māori land titles by limiting certain rights of succession.

179. The trustees of any trust established under Te Ture Whenua Māori Act 1993 may apply to the court for an order that they hold any part of the trust's income on trust for such charitable purposes as are specified in the court order (s 245 of Te Ture Whenua Māori Act 1993).

180. Where the income derived by the trustees is deemed to be income derived by trustees in trust for charitable purposes under s 24B of the Māori Trust Boards Act 1955, they meet the principal requirement for registration under the Charities Act (s 13 of the Charities Act) and, if registered under the Charities Act, the income could be exempt under s CW 41 or s CW 42 of the ITA.

### Deregistration for marae on land that is a Māori reservation established under Te Ture Whenua Māori Act 1993

181. A deregistered charity will generally be required to pay tax on the net assets it retains (deregistration tax). For more information about deregistration, see [202].

182. For the purposes of deregistration tax, in the context of a marae on Māori reservation land, the value of the land and improvements on the land will be excluded from the net asset calculation (s HR 12 of the ITA).

### Charitable trusts

183. Section HC 13 defines a charitable trust, for the purposes of the "trust rules" (also a defined term – see s YA 1), as a trust:

- for which all income derived or accumulated, in the current or any earlier income year, is held for charitable purposes; and
- for which any income derived in the current year is exempt income under s CW 41(1) or s CW 42(1).

184. The charitable trust may or may not be incorporated under the Charitable Trusts Act 1957. However, to be eligible for an income tax exemption under s CW 41 or s CW 42, the charitable trust must **also** be a registered charity under the Charities Act.

185. Under the Charitable Trusts Act 1957, a charitable society or the trustees of a charitable trust may be incorporated as a board and included on the register of charitable trusts the Companies Office maintains. As with any charity, these boards may make profits on their trading activities, but the profits must be used for their charitable purposes and cannot be distributed to members. Boards incorporated under the Charitable Trusts Act may be eligible for favourable tax treatment if they meet certain requirements. For example, the charitable income tax exemptions (ss CW 41 and CW 42) require a charity to be a tax charity, which may require registration under the Charities Act. Similarly, charities must be registered to access donee status unless the Commissioner approves their donee status where they have benevolent, philanthropic or cultural purposes (see s LD 3(3) and Part 2 of this Operational Statement).
186. Generally, trustees of a trust who derive assessable income for a tax year must file a tax return and provide certain additional information (see s 59BA(1) of the TAA). However, trustees of a trust incorporated as a board under the Charitable Trusts Act 1957 are relieved of the requirement to include some of the information with the return (s 59BA(3)(c) of the TAA). Additionally, from 30 March 2021, trustees of a trust that is a registered charity are also relieved of this requirement (s 59BA(3)(d) of the TAA).
187. Special rules regarding distributions and settlor liability apply to charitable trusts.
188. While many charitable trusts will not have “beneficiaries” and will instead use funds for charitable purposes, the s YA 1 definition of charitable purposes is broad enough to include trusts that have beneficiaries. Distributions of amounts that are not beneficiary income are exempt income under ss HC 20 and CW 53. Distributions of beneficiary income, where that income is exempt income of the charitable trust under s CW 41 or s CW 42, is exempt income of the beneficiary.
189. A settlor can be liable, as agent of the trustee, for the tax liabilities of the trustee where no trustee is resident in New Zealand. However, this rule does not apply to settlors of charitable trusts (s HC 29(4)). This rule ensures residents who make donations to charitable trusts that have non-resident trustees are not liable for any tax liabilities of the trust.
190. Charitable trusts are subject to the provisions of the Trusts Act 2019 that set out mandatory and default duties of the trustees. However, the one duty that will not affect trustees of Charitable Trusts is the requirement that trustees disclose basic trust information to beneficiaries (s 50(2) of the Trusts Act 2019).
191. For more information about the tax treatment of charitable trusts, see *Interpretation Statement IS 18/01: Taxation of trusts – income tax*.<sup>29</sup>

## Non-resident charities

### Overview

192. To be eligible for registration by Charities Services, a non-resident charity must be either:
- established in New Zealand; or
  - have a very strong connection to New Zealand.
193. To be registered with Charities Services, charities do not have to be incorporated. However, if a non-resident charity is incorporated, it must be incorporated under New Zealand law to be considered “established in New Zealand.” For example, a non-resident charity that is a company must be incorporated in New Zealand under the Companies Act 1993.
194. If a non-resident charity is not incorporated under New Zealand law, it can be registered with Charities Services if it has a very strong connection to New Zealand. For more information about how Charities Services determines whether a “very strong connection to New Zealand” exists, see the Charities Services website.<sup>30</sup>
195. Non-resident charities that cannot be registered by Charities Services may still apply to the Commissioner for an exemption from income tax on their non-business income as a “tax charity” (s CW 41(5)(c)). The organisation must fulfil the Commissioner’s required criteria as set out in the guidelines for being a non-resident tax charity.<sup>31</sup>

<sup>29</sup> Inland Revenue, *Interpretation Statement: IS 18/01 - Taxation of trusts - income tax* (June 2018), at 86–89 (publication).

<sup>30</sup> Charities Services, *International charities and activities* (webpage).

<sup>31</sup> Inland Revenue, *Tax exemptions for non-resident charities* | Ngā aweretanga tāke mō ngā kaupapa atawhai kainoho-tāwāhi (webpage).



## Guidelines for non-resident charities applying to be a tax charity

196. When making an application to the Commissioner to be recognised as a tax charity, under s CW 41(5)(c), the non-resident charity must:

- produce evidence of having been declined registration by Charities Services due to an insufficient connection to New Zealand; or
- explain why it considers it would not be able to be registered with Charities Services.

197. A non-resident charity seeking to be recognised as a tax charity must satisfy the Commissioner that it:

- is not resident in New Zealand;
- carries out all of its charitable purposes overseas;
- is not carried on for and does not apply any funds towards the private profit of any individuals; and
- is recognised as being charitable by one or more overseas charities regulators or tax authorities.

198. Applications to be recognised as a tax charity should include:

- the non-resident charity's constitution, trust deed or other governing documents;
- evidence of incorporation or legal registration in its (main) country of residence;
- certification or a letter confirming it has charitable status or registration with one or more overseas charities regulators or tax authorities;
- information about the work it does, which may include annual reports, brochures, articles, testimonials or relevant websites; and
- evidence Charities Services declined registration because it had an insufficient connection to New Zealand or an explanation of why it believes it is not able to register with Charities Services.

199. If the Commissioner approves the non-resident charity as a tax charity, it may be eligible for the non-business (passive) income exemption under s CW 41. The non-resident charity will not be eligible for the business income exemption under s CW 42.

200. If a non-resident charity is not exempt from New Zealand tax under the provisions of s CW 41, it may be eligible for relief from taxation in New Zealand under a double tax agreement between New Zealand and the country of residence of the non-resident charity. For more information on double tax agreements generally, see the Inland Revenue [website](#).<sup>32</sup>

201. Application by a non-resident charity wishing to be recognised by the Commissioner as a tax charity should be sent, along with supporting information, to:

- Inland Revenue, PO Box 1147, Palmerston North Central, Palmerston North 4440; or
- [charities.queries@ird.govt.nz](mailto:charities.queries@ird.govt.nz).

## Tax implications of ceasing to be a tax charity or deregistration

202. A charity's tax obligations, including income tax, RWT-exemption, FBT-exclusion and donee organisation status may all be affected if the charity ceases to be a tax charity or is deregistered (see [210]–[221]). Additionally, a charity may be subject to a "deregistration tax" when it ceases to be a tax charity or is deregistered.

203. A charity is deregistered when it is removed from the register held by Charities Services (s 32 of the Charities Act). A charity ceases to be a tax charity when it no longer meets the requirements in the definition of tax charity in the ITA, see [23].

204. A charity that has ceased to be a tax charity or been deregistered needs to determine whether any new tax obligations apply and from what date.

## Date from which tax obligations will apply

205. Where a charity ceases to be a tax charity, tax obligations will arise from the date that it ceases to qualify as a tax charity.

206. Where a charity is deregistered, when tax obligations arise depends on why the charity was deregistered (see Table 2)

<sup>32</sup> Inland Revenue, Double tax agreements (DTAs) | Ngā whakaetanga tāke taurua (DTA) (webpage).

**Table 2: When tax obligations arise following deregulation**

| Situation triggering deregistration   | Date tax obligations will apply   |
|---|---|
| Voluntary deregistration (provided the charity does not come within any of following three situations)  | From the date the charity voluntarily deregistered.   |
| Failure to file annual returns with Charities Services as required (provided the charity has otherwise always kept to its rules held on the Charities Register) | From the date the charity is deregistered or all appeals are final or exhausted, whichever comes later. |
| Failure to keep to its rules held on the Charities Register (after an initial period of compliance)   | From the date the charity stopped keeping to its rules (unless it is otherwise exempt).                 |
| Failure to keep to its rules held on the Charities Register from the time of registration   | As if the charity were never a tax charity.   |

### Income tax rates applicable after ceasing to be a tax charity or upon deregistration

207. If a charity is incorporated under the Incorporated Societies Act 2022 (or during that Act's transition period, under the Incorporated Societies Act 1908) or the Companies Act 1993, it is considered to be a company for income tax purposes. If it does not qualify for a tax exemption, its income is taxed at the company rate.
208. A charity that operates as a trust, including trusts incorporated under the Charitable Trusts Act 1957, that are not tax-exempt are liable for tax on the trustee's income. For more information, see the Inland Revenue website<sup>33</sup> and *Trusts and Estates Income Tax Rules* (IR288).<sup>34</sup>
209. A charity that is not incorporated under a specific Act and is not entitled to a tax exemption is liable for income tax at the same rate as an individual taxpayer. However, it does not qualify for any of the tax credits individual taxpayers can claim.

### Income tax on net assets of deregistered charity ("deregistration tax")

210. A tax applies on the current market value of accumulated net assets of a deregistered charity if it does not dispose of or transfer its net assets for a charitable purpose within one year of deregistration. The value of the net assets retained is treated as income unless the deregistered charity qualifies for another tax exemption. The income tax on the value of net assets is commonly referred to as the "deregistration tax" (ss CV 17 and HR 12).
211. Deregistration tax applies unless a deregistered charity has within one year from its end date (the day of final decision, s HR 12(7)):
- re-registered as a charity; or
  - disposed of or transferred its net assets:
    - to a registered charity; or
    - for charitable purposes; or
    - as set out in its rules while it was on the Charities Register.
212. A deregistered charity that has not taken these actions needs to include the current market value of its net assets on deregistration in its income tax return (unless it is exempt under a provision other than s CW 41 or s CW 42).
213. The income tax return that must include the value of the deregistered charity's net assets is the return for the period that includes the day one year after the end date.
214. For example, if a charity voluntarily deregisters on 1 November 2020 and keeps some assets, it needs to include the value of those assets in its 2022 income tax return. This is because 2 November 2021 (the day one year after the end date) is in the 2022 income year.

<sup>33</sup> Inland Revenue, *Trusts and tax residency* | Ngā rōpū kaitiaki me ngā kainoho tāke (website).

<sup>34</sup> Inland Revenue, *IR288 - Trusts and estates income tax rules* (March 2021) (publication).

## When a charity will not be liable for deregistration tax

215. A deregistered charity is not liable to pay the deregistration tax if:

- the charity was involuntarily deregistered by Charities Services or the Charities Registration Board before 1 April 2015 (ss 31 and 32(a)–(e) of the Charities Act);
- the charity was voluntarily deregistered before 14 April 2014;
- the charity was deregistered after 1 April 2019 and had net assets worth \$10,000 or less one year after its end date (s HR 12(2)(c)); or
- the deregistered charity was a company and was deregistered because its shares were disposed of and the disposal was for market value consideration (s HR 12(2)(b)).

## Value of net assets

216. The value of the net assets of a deregistered charity is determined by the current market value of the total assets of the charity at its end date, less the current market value of the total liabilities of the charity on its end date (s HR 12(3)).

217. Market value refers in general terms to the price that an asset would be sold for in an arm's length transaction. This is usually determined from market-based evidence by appraisal. In two situations valuing assets and liabilities at market value is not required:

- Where certain assets (premises, plant, equipment and trading stock) have a prescribed valuation method in the deregistration rules. That value should be used for the purposes of the net assets calculation.
- If the deregistered charity has assets and liabilities not subject to the prescribed valuation method, and it valued these assets and liabilities at fair value to comply with Public Benefit Entity International Not-for-Profit Accounting Standard 17, then the fair value should be used for the purposes of the net asset calculation.

218. Not included in the value of net assets are (s HR 12(3)):

- assets disposed of or transferred for charitable purposes or in accordance with the charity's rules and within one year of the end date;
- assets received from the Crown to settle a Treaty of Waitangi claim;
- assets received from the Crown to settle a claim under the Māori Fisheries Act 2004;
- marae land and improvements as defined in Te Ture Whenua Māori Act 1993 | the Māori Land Act 1993;
- assets, other than money, that were gifted or bequeathed to the charity when it was exempt from income tax; and
- in some circumstances, assets that are shares in companies.

219. Large charities sometimes operate as part of a group, with charitable entities holding equity investments in other registered charities. If a parent entity and one or more members of a charitable group are deregistered at the same time, the value of the parent's shares in the subsidiary is ignored for the purposes of calculating the parent's income under the deregistration tax rules (s HR 12(3)(d)).

220. The net assets include the value of depreciable property and financial arrangements held at the time of deregistration.

221. For examples of how to calculate net assets (including how to value depreciable property and financial arrangements), see *Charitable and Donee Organisations* (IR255).<sup>35</sup>

## Organisations that run businesses for charity and deregistration tax

222. An entity that is not a registered charity but derived exempt income under s CW 42 before 1 April 2020 and subsequently ceases to meet the requirements for exemption under s CW 42 (for example because it failed to register as a charity by 31 March 2020) is subject to the deregistration tax.

## RWT-exempt status when a charity is deregistered

223. When a charity is deregistered, it will have RWT obligations unless it qualifies for a different exemption from RWT (s 32E(k) of the TAA). Examples of other RWT exemptions include where a charity is a community housing entity (s CW 42B), an amateur sports promoter (s CW 46), a body promoting scientific or industrial research (s CW 49) or a community trust (s CW 52).

<sup>35</sup> Inland Revenue, *IR255 - Charitable and donee organisations* (December 2021) at 37–39 (publication).

224. The deregistered charity needs to notify its bank and anyone else that pays it interest or dividends that its RWT-exempt status has ended.

225. The deregistered charity's status is updated to "cancelled" on the RWT-exemption register the Commissioner maintains.

### **FBT-exclusion when a charity is deregistered**

226. If the deregistered charity does not come within the definition of a charitable organisation (s YA 1), and it remains operating and provides fringe benefits to its employees, then it is liable for FBT (s CX 25).

### **Donee organisation status when a charity is deregistered**

227. When a registered charity is deregistered, it will not lose its donee organisation status, provided it has a philanthropic, benevolent or cultural purpose and it applies to the Commissioner to maintain donee status on this basis.

228. If it does not have one of these purposes and had only a charitable purpose, different rules apply. It will keep its donee status up to the date it is removed from the Charities Register or when all appeals of the decision to deregister are final or exhausted, whichever is the later.

229. A deregistered charity that had only charitable purposes will lose its eligibility to issue donation tax receipts, meaning that donors to the entity will not be able to claim tax credits or donation deductions for donations made to the entity during the period of deregistration (s LD 3). For more information, see Part 2 of this Operational Statement.

### **More information on consequences of deregistration**

230. For further guidance about the consequences of deregistration, see:

- *Charitable and Donee Organisations* (IR255);<sup>36</sup>
- "New rules for deregistered charities";<sup>37</sup>
- "Tax on net assets of deregistered charities: Remedial amendment";<sup>38</sup> and
- "Charities and donee organisations".<sup>39</sup>

## **Administrative matters**

231. Under the Inland Revenue Acts, charities are required to meet certain administrative tax requirements, for example, obtaining an IRD number (if required, as described below), keeping records, and self-assessing each year whether the charity meets the income tax exemption requirements and/or the requirements for other tax treatments.

232. An IRD number is required if the charity:

- has any non-exempt income;
- is a registered charity (registered charities are automatically RWT exempt and the RWT-exemption register operates by IRD number rather than name);
- has obligations for GST, PAYE, RWT, NRWT or FBT; or
- is a donee organisation.

233. If a registered charity wishes to change its legal structure, it can do so by filling in an update details form and providing its new rules to Charities Services. The new entity can keep its existing Charities Services registration number. For more information about updating details, see the Charities Services website.<sup>40</sup> However, being a new legal entity, it must obtain a new IRD number.

234. Each tax charity must make a self-assessment each year on whether all of its income is exempt. The Commissioner can challenge a charity's decision about the availability of an income tax exemption through the Inland Revenue disputes process.

235. A tax charity must comply with usual GST, PAYE and FBT return filing requirements, if applicable.

<sup>36</sup> Inland Revenue, *IR255 - Charitable and donee organisations* (December 2021) at 35–40.

<sup>37</sup> Inland Revenue, "New Rules for Deregistered Charities", *Tax Information Bulletin* Vol 26, No 7 (August 2014) at 65–69 (publication).

<sup>38</sup> Inland Revenue, "Tax on Net Assets of Deregistered Charities: Remedial Amendments", *Tax Information Bulletin* Vol 30, No 5 (June 2018) at 107–108 (publication).

<sup>39</sup> Inland Revenue, "Charities and Donee Organisations", *Tax Information Bulletin* Vol 31, No 4 (May 2019) at 132–137 (publication).

<sup>40</sup> Charities Services, Update charity details (webpage).

## Record-keeping requirements

236. Charities have information and reporting obligations under the Charities Act (if registered) and under reporting standards set by the External Reporting Board (XRB), the independent Crown entity responsible for developing and issuing accounting standards. Charities must also comply with the record-keeping requirements of the Inland Revenue Acts, including the usual record-keeping requirements under s 22 of the TAA if the charity is in business and under s 75 of the GST Act if the charity is GST registered. These sections require a taxpayer to keep business and GST records in New Zealand and in either English or te reo Māori.
237. Section 22 of the TAA requires a charity that carries on a business in New Zealand to keep sufficient business records to enable the Commissioner to ascertain whether tax is payable and if so, in what amount, and all other tax matters relating to that business. These records should be kept for a minimum of seven years, even if the charity ceases operating.
238. Section 75 of the GST Act requires generally that every person registered for GST must keep records, including books of account (whether contained in a manual, mechanical, or electronic format) recording receipts or payments or income or expenditure, and also includes vouchers, bank statements, invoices, tax invoices, credit notes, debit notes, receipts and such other documents as are necessary to verify the entries in any such books of account.
239. Charities should keep sufficient records to calculate any tax liability and/or to demonstrate eligibility for tax exemptions or concessions (s 32 of the TAA). Depending on the entity and its activities, this may include receipt and payment account books, bank statements, invoices (including GST tax invoices), receipts and wage records for employees and donation tax credit receipts.
240. Section 58 of the TAA provides that every gift-exempt body must, when notified by the Commissioner, furnish a return of its funds derived or received in any tax year and showing the source and application of those funds, together with such other particulars as the Commissioner may require.
241. A “gift-exempt body” is defined in s 3(1) of the TAA (for purposes of s 32 of the TAA) and means:
- (a) any society, institution, association, organisation, trust, or fund specifically named in Schedule 32 of the Income Tax Act 2007; or
  - (b) any other person who has RWT-exempt status following an application made under section 32E(2)(k) or (l) in relation to a tax year in which they have that status.
242. For further information on record keeping, see *Retention of Business Records in Electronic Formats, Application to Store Records Offshore and Keeping Records in Languages other than English or Te Reo Māori* (SPS 21/02).<sup>41</sup>

## Alterations to a charity’s founding documents

243. In the past, the Commissioner suggested charities include clauses in their founding documents that restrict the alteration of certain clauses without prior approval from the Commissioner. The relevant clauses were those defining the charitable purposes or objects, relating to personal advantage, regarding rule changes and regarding winding up.
244. The Commissioner no longer gives prior approval to clause changes and recommends charities remove from their founding documents any such requirement for the Commissioner’s approval.
245. To facilitate this, the Commissioner suggests an amendment to a charity’s alterations clause to include, for example, “No addition to or alteration or removal from the rules shall be made if it detracts from the charitable nature of the organisation or allows private pecuniary benefits to any individual(s)”.
246. Charities Services must be notified of any change to the rules of a registered charity within three months after the effective date of the change. In these cases, the charity must provide Charities Services with a copy of the amendment to its rules. Charities can also provide a copy of the minutes of the meeting (or other record of the decision) specifying the change and effective date of the change.
247. If a charity is incorporated (under the Charitable Trusts Act 1957, Incorporated Societies Act 2022 or Companies Act 1993), it may also have obligations to provide notice of changes to its rules to other authorities (for example, the Companies Office).

<sup>41</sup> Inland Revenue, *Standard Practice Statement SPS 21/02 - Retention of business records in electronic formats, application to store records offshore and keeping records in languages other than English or te reo Māori* (May 2021) (publication).

## Binding ruling applications

248. An entity may apply to the Commissioner for a binding ruling (which includes private rulings and short-process rulings) under part 5A of the TAA. A private ruling is the Commissioner's interpretation of how a tax law applies to a particular arrangement, person or item of property. This can include, for example, a private ruling in relation to whether certain types of income derived are exempt from tax under s CW 41 and/or s CW 42 or in relation to the entity's status (for example, whether it is a non-profit body for the purposes of the GST Act).
249. If the entity receives a private or short-process ruling under part 5A of the TAA, the Charities Act requires that the entity be treated as having satisfied certain of the essential requirements for qualifying as a charitable entity under s 13(2)–(3) of the Charities Act (also referred to in this Operational Statement as a registered charity).
250. The Commissioner has recently entered into a memoranda of understanding with the Department of Internal Affairs to coordinate how their overlapping roles with respect charities will operate.<sup>42</sup>
251. For more information about binding rulings, see the Inland Revenue website.<sup>43</sup>

## Other disclosure and reporting regimes

### Charities that are foreign trusts for income tax purposes

252. New Zealand law considers that a trust is not an entity, but a description of an equitable obligation the law imposes on a person holding property to deal with that property in a certain way, namely, for the benefit of beneficiaries or a charitable purpose. A "foreign trust" for income tax purposes is a trust established overseas or in New Zealand but where no settlor is resident in New Zealand at any time (s HC 11).
253. A foreign trust that is also a registered charity was exempt from the foreign trust disclosure rules until 31 March 2019. From 1 April 2019, however, a foreign trust that is also a registered charity is subject to the foreign trust disclosure rules that require disclosure of some information that is not collected under the Charities Act. This includes identifying particulars and contact details for settlors, trustees and beneficiaries (s 59B of the TAA).
254. Where the Commissioner becomes aware of potential money laundering or terrorism financing activity by a charity that is a foreign trust, the information disclosure rules in part C of schedule 7 of the TAA (disclosures to certain agencies for certain purposes) apply. The Commissioner is permitted to share information relating to the registration (or absence of registration) of a foreign trust with the Department of Internal Affairs and New Zealand Police.
255. For more information about foreign trusts see:
- Special report - Foreign Trust Disclosure Rules;<sup>44</sup>
  - Tax Information Bulletin Article - "Foreign trust disclosure rules";<sup>45</sup> and
  - Inland Revenue website - Foreign trusts with New Zealand resident trustees.<sup>46</sup>

### Charities and international financial reporting obligations

256. The United States Foreign Account Tax Compliance Act (FATCA) and the OECD initiated Common Reporting Standard (CRS) for automatic exchange of financial account information are financial reporting regimes introduced to combat and prevent tax evasion by persons that invest outside their jurisdiction of tax residence.
257. Part 11B of the TAA gives effect to and implements FATCA and the CRS in New Zealand law.
258. Charities may have obligations under one or both of FATCA and CRS. These obligations could apply because the charity is a New Zealand financial institution or because the charity holds an account with a New Zealand financial institution. The term "financial institution" includes obvious financial businesses such as banks and insurers, but it can also include some trusts and other entities that handle investments. This definition is broad, so will include certain charities.

<sup>42</sup> Inland Revenue, Department of Internal Affairs (DIA) | Te Tari Taiwhenua (DIA): "Supplying of information in respect of charitable entities" (webpage).

<sup>43</sup> Inland Revenue, What is a binding ruling? (webpage).

<sup>44</sup> Inland Revenue, special report from Policy and Strategy - *Foreign trust disclosure rules* (March 2017) (publication).

<sup>45</sup> Inland Revenue, "Foreign Trust Disclosure Rules", *Tax Information Bulletin* Vol 29, No 4 (May 2017) at 24 (publication).

<sup>46</sup> Inland Revenue, Foreign trusts with New Zealand resident trustees | Ngā tarahiti o tāwāhi me ngā kaitaki kainoho o Aotearoa (webpage).



259. New Zealand and the United States have entered into a FATCA memorandum of understanding (FATCA MoU<sup>47</sup>) that provides the following organisations are not financial institutions for FATCA purposes:
- organisations incorporated under the Charitable Trusts Act 1957;
  - organisations registered under the Charities Act; and
  - donee organisations as defined in the ITA.
260. Therefore, under the FATCA MoU, these types of entities do not have FATCA due diligence and reporting obligations. Instead, if they hold accounts with New Zealand financial institutions, they are required to respond to due diligence queries from those institutions about their FATCA status.
261. The CRS takes a different approach to that under FATCA and does not offer a similar exclusion from the definition of financial institution for certain charities and donee organisations. This means such entities need to consider whether they are financial institutions with CRS due diligence and reporting obligations (even if excluded from FATCA requirements).
262. For more information, see:
- *Automatic Exchange of Information (IR1033)*;<sup>48</sup>
  - *Guidance on the Common Reporting Standard for Automatic Exchange of Information (IR1048)*;<sup>49</sup>
  - *Foreign Account Tax Compliance Act (FATCA) – Trusts guidance notes (IR1087)*;<sup>50</sup>
  - the Inland Revenue websites: Important FATCA documents<sup>51</sup> and Automatic Exchange of Information and the Common Reporting Standard.<sup>52</sup>

## Appendix – Legislation

### Income Tax Act 2007

#### CV 17 Non-exempt charities: taxation of tax-exempt accumulation

An amount of income of a person under section HR 12 (Non-exempt charities: treatment of tax-exempt accumulation) is income of the person for the income year that contains the day 1 year after the day of final decision.

#### CW 41 Charities: non-business income

##### *Exempt income*

- (1) The following are exempt income:
- (aa) an amount of income derived by a person who is removed from the register of charitable entities (the register) under the Charities Act 2005, if it is derived in the period starting with the day they are registered on the register and ending with the earlier of the following days:
- (i) the day on which the person does not comply with the person's rules contained in the register;
  - (ii) the day of final decision:
- (a) an amount of income derived by a trustee in trust for charitable purposes;
  - (b) an amount of income derived by a society or institution established and maintained exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual.

##### *Exclusion: trustees, society, or institution not registered*

- (2) This section does not apply to an amount of income if, at the time that the amount of income is derived, the trustee or trustees of the trust, the society, or the institution is not, or are not, a tax charity.

<sup>47</sup> Inland Revenue, *Memorandum of Understanding* (between the Government of New Zealand and Government of the United States of America to improve international tax compliance and to implement FATCA) (publication).

<sup>48</sup> Inland Revenue, *IR1033 – Business | Ngā Ūmanga - Automatic Exchange of Information – Your obligations if you hold or control financial accounts* (May 2018) (publication).

<sup>49</sup> Inland Revenue, *IR1048 - Guidance on the Common Reporting Standard for Automatic Exchange of Information* (July 2019) (publication).

<sup>50</sup> Inland Revenue, *IR1087 - Foreign Account Tax Compliance Act (FATCA) - Trust guidance notes* (October 2017) (publication).

<sup>51</sup> Inland Revenue, *Important FATCA documents | Ngā tuhinga FATCA hira* (webpage).

<sup>52</sup> Inland Revenue, *Automatic Exchange of Information and the Common Reporting Standard | Te Whakawhitiwhiti Mōhiohio Aunoa me te Paerewa Pūrongo Noa* (webpage).

*Exclusion: business income*

- (3) This section does not apply to an amount of income derived from a business carried on by, or for, or for the benefit of a trust, society, or institution of a kind referred to in subsection (1).

*Exclusion: council-controlled organisation income*

- (4) This section does not apply to an amount of income derived by—
- (a) a council-controlled organisation, other than a council-controlled organisation operating a hospital as a charitable activity;
  - (b) a local authority from a council-controlled organisation, other than from a council-controlled organisation operating a hospital as a charitable activity on behalf of the local authority.

*Definition*

- (5) Tax charity means,—
- (a) a trustee, a society, or an institution, registered as a charitable entity under the Charities Act 2005;
  - (b) a trustee, a society, or an institution (the entity), that—
    - (i) has started, before 1 July 2008, to take reasonable steps in the process of preparing an application for registering the entity as a charitable entity under the Charities Act 2005; and
    - (ii) intends to complete the process of preparing an application described in subparagraph (i); and
    - (iii) has not been notified by the Commissioner that the entity is not a tax charity;
  - (c) a trustee, a society, or an institution, that is or are non-resident and carrying out its or their charitable purposes outside New Zealand, and which is approved as a tax charity by the Commissioner in circumstances where registration as a charitable entity under the Charities Act 2005 is unavailable;
  - (d) a person who is removed from the register, in the period starting with the day they are registered on the register and ending with the earlier of the following days:
    - (i) the day on which the person does not comply with the person's rules contained in the register;
    - (ii) the day of final decision.

**CW 42 Charities: business income***Exempt income*

- (1) Income derived directly or indirectly from a business carried on by, or for, or for the benefit of a trust, society, or institution of a kind referred to in section CW 41(1) is exempt income if—
- (aa) the entity carrying on the business is, at the time that the income is derived, registered as a charitable entity under the Charities Act 2005; and
  - (a) the trust, society, or institution carries out its charitable purposes in New Zealand; and
  - (b) the trustee or trustees of the trust, the society, or the institution is or are, at the time that the income is derived, a tax charity; and
  - (c) no person with some control over the business is able to direct or divert an amount derived from the business to the benefit or advantage of,—
    - (i) if subparagraph (ii) does not apply, a person other than the trust, society, or institution except for a purpose of the trust, society, or institution;
    - (ii) if a trust, society, or institution (the operating entity) is carrying on the business for or for the benefit of another trust, society, or institution (the controlling entity), a person other than the operating entity or the controlling entity except for a purpose of the operating entity or the controlling entity.

Subsections (3) to (8) expand on this subsection.

*Exclusion*

- (2) This section does not apply to an amount of income derived by—
- (a) a council-controlled organisation, other than a council-controlled organisation operating a hospital as a charitable activity;



- (b) a local authority from a council-controlled organisation, other than from a council-controlled organisation operating a hospital as a charitable activity on behalf of the local authority.

*Carrying on a business: trustee*

- (3) For the purposes of subsection (1), a trustee is treated as carrying on a business if—
  - (a) the trustee derives rents, fines, premiums, or other revenues from an asset of the trust; and
  - (b) the asset was disposed of to the trust by a person of a kind described in subsection (5)(b); and
  - (c) either—
    - (i) the person retains or reserves an interest in the asset; or
    - (ii) the asset will revert to the person.

*Charitable purposes in New Zealand and overseas*

- (4) For the purposes of subsection (1)(a), if the charitable purposes of the trust, society, or institution are not limited to New Zealand, income derived from the business in a tax year is apportioned reasonably between those purposes in New Zealand and those outside New Zealand. Only the part apportioned to the New Zealand purposes is exempt income.

*Control over business*

- (5) For the purposes of subsection (1)(c) and section CW 42B(2)(c) and (4) for an income year, a person is treated as having some control over the business, and as being able to direct or divert amounts from the business if, in the tax year,—
  - (a) they are, in any way, whether directly or indirectly, able to determine, or materially influence the determination of,—
    - (i) the nature or extent of a relevant benefit or advantage; or
    - (ii) the circumstances in which a relevant benefit or advantage is, or is to be, given or received; and
  - (b) their ability to determine or influence the benefit or advantage arises because they are—
    - (i) a settlor or trustee of the trust by which the business is carried on; or
    - (ii) a shareholder or director of the company by which the business is carried on; or
    - (iii) a settlor or trustee of a trust that is a shareholder of the company by which the business is carried on; or
    - (iv) a person associated with a settlor, trustee, shareholder, or director referred to in any of subparagraphs (i) to (iii).

*Control: settlor asset disposed of to trust*

- (6) For the purposes of subsection (5) and section CW 42B(2)(c) and (4), a person is treated as a settlor of a trust, and as gaining a benefit or advantage in the carrying on of a business of the trust, if—
  - (a) they have disposed of an asset to the trust, and the asset is used by the trust in the carrying on of the business; and
  - (b) they retain or reserve an interest in the asset, or the asset will revert to them.

*No control*

- (7) For the purposes of subsection (1)(c) and section CW 42B(2)(c) and (5), a person is not treated as having some control over the business merely because—
  - (a) they provide professional services to the trust or company by which the business is carried on; and
  - (b) their ability to determine, or materially influence the determination of, the nature or extent of a relevant [sic] benefit or advantage arises because they—
    - (i) provide the services in the course of and as part of carrying on, as a business, a professional public practice; or
    - (ii) are a statutory trustee company; or
    - (iii) are Public Trust; or
    - (iv) are the Māori Trustee.

*Benefit or advantage*

- (8) For the purposes of subsection (1)(c) and section CW 42B(2)(c) and (6), a benefit or advantage to a person—
  - (a) may or may not be something that is convertible into money;

- (b) unless excluded under paragraph (d), includes deriving an amount that would be income of the person under 1 or more of the following provisions:
  - (i) section CA 1(2) (Amounts that are income):
  - (ii) sections CB 1 to CB 23 (which relate to income from business or trade-like activities):
  - (iii) section CB 32 (Property obtained by theft):
  - (iv) sections CC 1 (Land), CC 3 to CC 8 (which relate to income from financial instruments), and CC 9 (Royalties):
  - (v) section CD 1 (Dividend):
  - (vi) sections CE 1 (Amounts derived in connection with employment) and CE 8 (Attributed income from personal services):
  - (vii) section CF 1 (Benefits, pensions, compensation, and government grants):
  - (viii) section CG 3 (Bad debt repayment):
  - (ix) sections CQ 1 (Attributed controlled foreign company income) and CQ 4 (Foreign investment fund income):
- (c) includes retaining or reserving an interest in an asset in the case described in subsection (3), if the person has disposed of the asset to the trust or the asset will revert to them:
- (d) does not include earning interest on money lent, if the interest is payable at no more than the current commercial rate, given the nature and term of the loan.

*Non-exempt business income*

- (9) If an amount derived from the carrying on of a business by or for a trust is not exempt income because of a failure to comply with subsection (1)(c), the amount is trustee income.

**CW 42B Community housing trusts and companies**

*Exempt income*

- (1) An amount of income derived by a community housing entity is exempt income.

*Definition*

- (2) In this section and section LD 3 (Meaning of charitable or other public benefit gift), community housing entity means a trustee or company (the entity) whose activities involve the provision of housing or housing assistance (the activities), and—
  - (aa) the entity is a registered community housing provider under the Public and Community Housing Management Act 1992; and
  - (a) the activities are not carried on for the private pecuniary profit of any individual; and
  - (b) all profit is retained by the entity, or distributed or applied to—
    - (i) community housing entities that meet the requirements to derive exempt income under this section:
    - (ii) beneficiaries or clients of the entity:
    - (iii) tax charities:
    - (iv) persons to whom distributions would be in accordance with charitable purposes; and
  - (c) no person with some control over the activities is able to direct or divert an amount derived from the activities to the benefit or advantage of,—
    - (i) if subparagraph (ii) does not apply, a person other than the entity except for a purpose of the entity or a charitable purpose:
    - (ii) if the entity (the operating entity) is carrying on the activities for or for the benefit of a community housing entity or charity (the controlling entity), a person other than the operating entity or the controlling entity except for a purpose of the operating entity or the controlling entity or for a charitable purpose.

*Definition: exception*

- (3) Despite subsection (2), community housing entity does not include a trustee or company (the entity) if—
- (a) more than 15% of the people who become beneficiaries or clients of the entity on a date that is or is after 14 April 2014 have, on that date, income or assets exceeding a value (the entry threshold) set out in schedule 34 (Community housing trusts and companies: income and assets of beneficiaries and clients) that is relevant to the beneficiary or client:
  - (b) the provision of housing or housing assistance to a beneficiary or client who has income and assets not exceeding the entry thresholds is substantially different from the provision of housing or housing assistance to a beneficiary or client who has income or assets exceeding an entry threshold.

*Control over activities*

- (4) For the purposes of subsection (2)(c), for an income year, a person is treated as having some control over the activities, and as being able to direct or divert amounts from the activities if, in the tax year, they are described in section CW 42(5)(a) and (b) and (6) (Charities: business income).

*No control*

- (5) For the purposes of subsection (2)(c), a person described in section CW 42(7)(a) and (b) is not treated as having some control merely because of the factors in section CW 42(7)(a) and (b).

*Benefit or advantage*

- (6) For the purposes of subsection (2)(c), a benefit or advantage to a person includes a benefit or advantage included under section CW 42(8).

**CW 43 Charitable bequests***Exempt income*

- (1) An amount of income derived by a deceased's executor or administrator is exempt income to the extent to which the requirements of subsections (2) and (3) are met, having regard to all relevant matters including—
- (a) the terms of the deceased's will, including the rights of annuitants, legatees, and other beneficiaries; and
  - (b) the nature and extent of the debts and liabilities of, and other charges against, the estate and their likely effect on the income and assets available for distribution to the beneficiaries; and
  - (c) the shares and prospective shares of the beneficiaries in the income and assets of the estate.

*Gift to charity*

- (2) The first requirement is that the amount arises from or is attributable to assets of the estate that have been left to a trust, society, or institution of a kind referred to in section CW 41(1).

*Exempt in hands of charity*

- (3) The second requirement is that the amount, if derived by the trust, society, or institution or by a business carried on by, or for, or for the benefit of it, would be exempt income under section CW 41 or CW 42.

*Timing of registration as charitable entity*

- (4) An amount of income derived by a deceased's executor or administrator that is derived during the period beginning on the deceased's date of death and ending at the end of the income year that follows the income year in which the deceased died is not prevented from being exempt income under this section merely because the trustee or trustees of the trust, the society, or the institution is not, or are not, a tax charity.

*Requirements of sections CW 41 and CW 42 disregarded*

- (5) For the purposes of subsection (4), until the end of the income year that follows the income year in which the deceased died, the requirements of sections CW 41 and CW 42 for the trustee or trustees of the trust, the society, or the institution to be a tax charity must be disregarded when applying those sections for the purposes of this section.

*Amounts derived after end of certain period*

- (6) This section does not apply to an amount of income derived after the end of the income year that follows the income year in which the deceased died if, at the time that the amount of income is derived, the trustee or trustees of the trust, the society, or the institution is not, or are not, a tax charity.

**CX 25 Benefits provided by charitable organisations***When not fringe benefit*

- (1) A charitable organisation that provides a benefit to an employee does not provide a fringe benefit except to the extent to which—
- (a) the employee receives the benefit mainly in connection with their employment; and
  - (b) the employment consists of the carrying on by the organisation of a business whose activity is outside its benevolent, charitable, cultural, or philanthropic purposes.

*When employer provides charge facilities*

- (2) Subsection (1) does not apply, and the benefit provided is a fringe benefit, if a charitable organisation provides a benefit to an employee by way of short-term charge facilities and the value of the benefit from the short-term charge facilities for the employee in a tax year is more than the lesser for the tax year of—
- (a) 5% of the employee's salary or wages;
  - (b) \$1,200.

*Meaning of short-term charge facilities*

- (3) For the purposes of the FBT rules, a short-term charge facility means an arrangement that—
- (a) enables an employee to obtain goods or services that have no connection with the employer or its operations by—
    - (i) buying or hiring the goods or services;
    - (ii) charging the cost of the goods or services to an account;
    - (iii) providing consideration other than money for the goods or services; and
  - (b) requires the employer to provide some or all of the payment or other consideration for the goods or services; and
  - (c) is not a fringe benefit under section CX 10.

**HR 12 Non-exempt charities: treatment of tax-exempt accumulations***Who this section applies to*

- (1) This section applies to—
- (a) a person who—
    - (i) is registered on the register of charitable entities under the Charities Act 2005 for a period; and
    - (ii) derives exempt income under section CW 41 or CW 42 (which relate to charities) in the same period; and
    - (iii) is deregistered as a charitable entity on the end date:
  - (b) [Repealed]

*When this section does not apply*

- (2) This section does not apply if—
- (a) the person is re-registered on the register of charitable entities within 1 year of the end date;
  - (b) the person's end date arises because they are a company and shares in them are disposed of, and the disposal is for market value consideration;
  - (c) the person would, but for this paragraph, have \$10,000 or less income under this section on their end date.

*Treatment of income*

- (3) The person has an amount of income derived on the day that is 1 year after the end date that is equal to the current market value, on the end date, of assets that the person has on the end date less the current market value, on the end date, of liabilities that the person has on the end date, but ignoring:
- (a) assets that are disposed of or transferred within 1 year of the end date, together with any rights and obligations, to another person—
    - (i) for charitable purposes;
    - (ii) in accordance with the person's rules set out in the register of charitable entities immediately before the person's removal from the register:

- (b) assets received from the Crown—
  - (i) to settle a Treaty of Waitangi claim:
  - (ii) in accordance with the Māori Fisheries Act 2004:
- (c) assets that are not money and are gifted or bequeathed to the person when they met the requirements to derive exempt income under section CW 41 or CW 42:
- (d) assets that are land set apart in a Māori reservation for the purposes of a marae or meeting place under Part 17 of the Te Ture Whenua Māori Act 1993:
- (e) assets that are shares in companies, if this section applies to the companies and their end dates are the same as the person's end date.

*Person's rules [Repealed]*

- (4) [Repealed]

*Negative amounts*

- (5) For the purposes of the calculation in subsection (3), if the amount is negative, it is treated as zero.

*References to assets and liabilities*

- (6) In this section, references to assets and liabilities, as applicable,—
- (a) mean the assets and liabilities owned, controlled, or held, wholly or in part, immediately before the end date; and
  - (b) include—
    - (i) all assets of any kind; and
    - (ii) all liabilities, including debts, charges, duties, contracts, or other obligations, whether present, future, actual, contingent, payable, or to be observed or performed in New Zealand or elsewhere.

*Definitions*

- (7) In this section,—
- end date means, for a person, the day of final decision
- current market value means—
- (a) for an asset or liability for which section HR 11 gives a value for the purposes of this Act, that value:
  - (b) for an asset or liability for which section HR 11 does not give a value for the purposes of this Act,—
    - (i) the market value of the asset or liability; but
    - (ii) if the person uses the Public Benefit Entity International Not-for-Profit Accounting Standard 17 (the standard), the fair value of the asset or liability under the standard.

**LD 3 Meaning of charitable or other public benefit gift**

*Meaning*

- (1) For the purposes of sections DB 41 and DV 12 (which relate to deductions for gifts of money), and this subpart, a charitable or other public benefit gift—
- (a) means a gift of money of \$5 or more that is paid to a society, institution, association, organisation, trust, or fund (the entity), if—
    - (i) the entity is described in subsection (2)(a), (ab), (b), (c), or (d), and the name of the entity is on the list published by the Commissioner under section 41A(14) to (16) of the Tax Administration Act 1994:
    - (ii) the entity is described in subsection (2)(ac), (bb), or (bc):
    - (iii) the name of the entity is listed in schedule 32 (Recipients of charitable or other public benefit gifts):
  - (b) includes a subscription of \$5 or more paid to an entity only if the subscription does not confer any rights arising from membership in that entity or any other society, institution, association, organisation, trust, or fund:
  - (c) does not include—
    - (i) a testamentary gift:
    - (ii) a gift made by forgiving some or all of a debt.

*Description of organisations*

- (2) The following are the entities referred to in subsection (1)(a) and (b):
- (a) a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual, and whose funds are applied wholly or mainly to charitable, benevolent, philanthropic, or cultural purposes within New Zealand:
  - (ab) an entity that, but for this paragraph, no longer meets the requirements of this subsection, but only for the period starting on the day it fails to meet those requirements and ending on the later of—
    - (i) the day the entity is removed from the register of charitable entities under the Charities Act 2005;
    - (ii) the day on which all reasonably contemplated administrative appeals and Court proceedings, including appeal rights, are finalised or exhausted in relation to the person's charitable status.
  - (ac) a community housing entity, if the gift is made at a time the entity is eligible to derive exempt income under section CW 42B (Community housing trusts and companies):
  - (b) a public institution maintained exclusively for any 1 or more of the purposes within New Zealand set out in paragraph (a):
  - (bb) a board that is constituted under subpart 5 of Part 3 of the Education and Training Act 2020 and is not carried on for the private pecuniary profit of any individual:
  - (bc) a tertiary education institution:
  - (c) a fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a), by a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual:
  - (d) a public fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a).

*Exception for certain entities*

- (3) Despite subsection (2)(a), (b), (c), and (d), a society, institution, association, organisation, trust, or fund is not a relevant entity for the purposes of subsection (1) if the society, institution, association, organisation, trust, or fund,—
- (a) is not a tax charity, because it is not registered as a charitable entity under the Charities Act 2005; and
  - (b) in the opinion of the Commissioner, is eligible to be registered as a charitable entity under that Act.

Defined in this Act: charitable or other public benefit gift, charitable purpose, community housing entity, New Zealand, pay, tax charity, tertiary

**RE 29 Establishing whether persons have RWT-exempt status**

- (1) This section applies for the purposes of section RE 5(2) to set out the ways for person A to establish—
- (a) whether person B is a person who has RWT-exempt status; and
  - (b) that the status has not ended.
- (2) Person A may establish that—
- (a) they have made a search of the electronic register that the Commissioner provides on which the details of persons with RWT-exempt status are listed; or
  - (b) they have taken reasonable steps to confirm that person B is a person listed in section 32E(2) (a) to (h) of the Tax Administration Act 1994; or
  - (c) except in relation to a person listed in section 32E(2)(k) or (l) of that Act or to whom the Commissioner has provided RWT-exempt status under section 32I of that Act, they have been given person B's tax file number and have been notified that person B has RWT-exempt status.

**YA 1 Definitions**

In this Act, unless context requires otherwise, -

**business—**

- (a) includes any profession, trade, or undertaking carried on for profit:

(b) includes the activities of—

- (i) a statutory producer board:
- (ii) an airport operator:

(c) is further defined in section DD 11 (Some definitions) for the purposes of subpart DD (Entertainment expenditure)

**charitable or other public benefit gift** is defined in section LD3 (Meaning of charitable or other public benefit gift)

**charitable organisation—**

(a) means, for a quarter or an income year, an association, fund, institution, organisation, society, or trust to which section LD 3(2) (Meaning of charitable or other public benefit gift) or schedule 32 (Recipients of charitable or other public benefit gifts) applies—

- (i) in the quarter; or
- (ii) in the income year, if fringe benefit tax is payable on an income year basis under section RD 60 (Close company option); and

(ab) includes a person who has been removed from the register of charitable entities (the register) under the Charities Act 2005, but only for the period starting on the day the person is registered on the register and ending on the earlier of the last day of the following periods:

- (i) the quarter, or income year if section RD 60 (Close company option) applies, in which the person does not comply with their rules contained in the register:
- (ii) the quarter, or income year if section RD 60 applies, in which the day of final decision falls; and

(b) does not include a local authority, a public authority, or a university

**charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community, and—

(a) the purpose of a trust, society, or institution is charitable under this Act if the purpose would meet the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood:

(b) a marae has a charitable purpose if—

- (i) the physical structure of the marae is situated on land that is a Māori reservation referred to in Te Ture Whenua Māori Act 1993 (the Māori Land Act 1993); and
- (ii) the funds of the marae are not used for a purpose other than the administration and maintenance of the land and of the physical structure of the marae, or are used for a purpose that is a charitable purpose

**council-controlled organisation—**

(a) means—

- (i) an organisation that is a council-controlled trading organisation as defined in section 6 of the Local Government Act 2002, and is not a company:
- (ii) a company that is a council-controlled organisation, under paragraph (a)(i) of the definition of council-controlled organisation in section 6(1) of the Local Government Act 2002:
- (iii) an organisation that is a council-controlled organisation, under paragraph (b) of the definition of council-controlled organisation in section 6(1) of the Local Government Act 2002, and that has, in an organisation of a kind described in subparagraph (i) or (ii), control of at least 50% of the votes at any meeting of the members or the controlling body of the organisation, or the right to appoint at least 50% of the directors, managers, or trustees of the organisation (however the positions are described):
- (iv) an organisation that would be a council-controlled organisation of a kind described in paragraph (a) or (b) or (c) if it did not have an exemption granted under section 6(4)(i) of the Local Government Act 2002:
- (v) the New Zealand Local Government Association Incorporated:
- (vi) a company or organisation, as defined in section 6(2) of the Local Government Act 2002, that is subject to the control, directly or indirectly, of the New Zealand Local Government Association Incorporated:
- (vii) New Zealand Local Government Insurance Corporation and any subsidiaries it has:
- (viii) Watercare Services Limited and any subsidiaries it has: but



- (b) does not include Auckland Transport (as established by section 38 of the Local Government (Auckland Council) Act 2009) or Auckland Regional Holdings (as established by section 18 of the Local Government (Auckland) Amendment Act 2004 or the New Zealand Local Government Funding Agency Limited

**donee organisation** means an entity described in section LD 3(2) (Meaning of charitable or other public benefit gift) or listed in schedule 32 (Recipients of charitable or other public benefit gifts)

**Inland Revenue Acts** means the Acts listed in the schedule of the Tax Administration Act 1994

**input tax**—

- (a) is defined in section 3A of the Goods and Services Tax Act 1985; and  
 (b) includes, for a supply, GST levied on goods entered for home consumption under the Customs and Excise Act 2018

**tax charity** is defined in section CW 41(5)

## Tax Administration Act 1994

### 3 Interpretation

- (1) In this Act, unless the context otherwise requires, -

**gift-exempt body**, in sections 18K, 32, and 58, means—

- (a) any society, institution, association, organisation, trust, or fund specifically named in Schedule 32 of the Income Tax Act 2007; or  
 (b) any other person who has RWT-exempt status following an application made under section 32E(2)(k) or (l) in relation to a tax year in which they have that status

### 32 Records of specified charitable, benevolent, philanthropic, or cultural bodies

- (1) All gift-exempt bodies must keep in New Zealand sufficient records in the English language to enable the Commissioner to determine both the sources of donations made to them and the application, within New Zealand or within a country or territory outside New Zealand, of their funds.  
 (2) Despite subsection (1), on application by a gift-exempt body, the Commissioner may notify the body that they are authorised to keep the records in a language other than English.

### 32E Applications for RWT-exempt status

(1A) A person who is registered as a charitable trust under the Charities Act 2005 is treated as having RWT-exempt status for the duration of the registration.

- (1) A person listed in subsection (2) may apply to the Commissioner for RWT-exempt status.

(2) The persons are—

- (a) a registered bank;  
 (b) a building society;  
 (c) the Public Trust or a company that would be a member of the same wholly-owned group of companies as the Public Trust, if it were a company for the purposes of this Act;  
 (d) the Māori Trustee;  
 (e) a statutory trustee company;  
 (eb) a portfolio investment entity;  
 (ec) the trustee of the Niue International Trust Fund;  
 (ed) the trustee of the Tokelau International Trust Fund;  
 (f) a person whose main business is—  
 (i) borrowing money or accepting deposits, or receiving credit or selling a credit instrument; and  
 (ii) lending money or granting credit, or buying or discounting a credit instrument;  
 (g) a person that is—  
 (i) a nominee company subject to practice rules made by the Council of the New Zealand Law Society under section 96 of the Lawyers and Conveyancers Act 2006 and operated by a barrister and solicitor or an incorporated law firm; or



- (ii) a broker's nominee company to which the Securities Act (Contributory Mortgage) Regulations 1988 apply:
- (h) a practitioner within the meaning of the Lawyers and Conveyancers Act 2006 or incorporated firm within the meaning of that Act in relation to the operation of their trust account which is an account maintained under section 112 of that Act:
  - (i) a person—
    - (i) who has met their obligation to file a return of income under the Inland Revenue Acts within the time allowed; and
    - (ii) whose annual gross income for the tax year for which they last filed a return of income is more than \$2,000,000:
  - (j) a person in an accounting year who reasonably believes their annual gross income for the tax year that corresponds to the next accounting year will be more than \$2,000,000:
  - (k) a person who derives in a tax year an amount that is exempt income under sections CW 38(2), CW 38B(2), CW 39(2), CW 40 to CW 52, and CW 64 of the Income Tax Act 2007 in relation to their activities in the capacity in which they derive the exempt income:
  - (kb) a board that is constituted under subpart 5 of Part 3 of the Education and Training Act 2020 and is not carried on for the private pecuniary profit of any individual:
  - (kc) a tertiary education institution that is established under subpart 3 of Part 4 of the Education and Training Act 2020 and is not carried on for the private pecuniary profit of any individual:
  - (kd) a tertiary education subsidiary that derives exempt income under section CW 55BA of the Income Tax Act 2007:
  - (l) a person to whom section DV 8 of the Income Tax Act 2007 applies and who would, but for that section, have net income of an amount less than the amount set out in the section for their most recently ended accounting year.
- (3) The person must apply to the Commissioner, and the application must—
  - (a) state the basis of exemption under subsection (2); and
  - (b) include a declaration by the person or an officer authorised by them that they come within the basis of exemption.
- (4) The person must provide further information in relation to the application as the Commissioner requires.

### 32K Failing to meet basis of exemption

- (1) This section applies when a person who has RWT-exempt status no longer meets the requirements on which their exemption is based.
- (2) If the person becomes aware that they no longer meet the requirements, they must notify the Commissioner within a period of 5 days after the day on which they become aware.
- (3) The Commissioner may ask the person to provide the full name and last known address of all persons to whom they have advised their RWT-exempt status for the purposes of obtaining an exemption from withholding the amount of tax from a payment of resident passive income. The person must respond to the Commissioner's request within 5 days.

### 58 Returns of specified charitable, benevolent, philanthropic, or cultural bodies

Every gift-exempt body must, when notified by the Commissioner, furnish a return of its funds derived or received in any tax year and showing the source and application of those funds, together with such other particulars as may be required by the Commissioner.

### 59BA Annual return for trusts

- (1) A trustee of a trust who derives assessable income for a tax year must file a return for the tax year of all income derived in the corresponding income year by the trustee as trustee of the trust.
- (2) A trustee who is required to file a return for a tax year under subsection (1) and does not meet the requirements of subsection (3) must make the return in the form prescribed by the Commissioner and include, unless otherwise required by the Commissioner,—
  - (a) a statement of profit or loss and a statement of financial position:
  - (b) the amount, and nature, of each settlement that—

- (i) is not the provision to the trustee, at less than market value, of minor services incidental to the activities of the trust; and
- (ii) is made on the trust in the income year:
- (c) the name, date of birth, jurisdiction of tax residence, and tax file number and taxpayer identification number, of each settlor who makes a settlement on the trust in the income year or whose details have not previously been supplied to the Commissioner:
- (d) for each distribution made by the trustee of the trust in the income year,—
  - (i) the amount of the distribution:
  - (ii) the name, date of birth, jurisdiction of tax residence, and tax file number and taxpayer identification number, of the beneficiary who receives the distribution:
- (e) the name, date of birth, jurisdiction of tax residence, and tax file number and taxpayer identification number, of each person having a power under the trust to appoint or dismiss a trustee, to add or remove a beneficiary, or to amend the trust deed:
- (f) the other information required by the Commissioner.
- (3) A trustee of a trust who is required to file a return for a tax year under subsection (1) is not required to file a return in the form required by subsection (2) if—
  - (a) the trustee is excluded from the requirement to make a return by section 43B (which relates to non-active trusts):
  - (b) the trustee is required to make a return by section 59D (which relates to foreign trusts):
  - (c) the trustees of the trust are incorporated as a board under the Charitable Trusts Act 1957:
  - (d) the trust is a charitable trust registered under the Charities Act 2005:
  - (e) the trustee is eligible under section HF 2 of the Income Tax Act 2007 to choose under section HF 11 of that Act to become a Māori authority:
  - (f) the trust is a widely-held superannuation fund, as defined in section YA 1 of the Income Tax Act 2007:
  - (g) the trust is an employee share scheme that is an exempt ESS, as defined in section YA 1 of the Income Tax Act 2007:
  - (h) the trustee is a debt funding special purpose vehicle, as defined in section YA 1 of the Income Tax Act 2007:
  - (i) the trustee is a lines trust established under the Energy Companies Act 1992.
- (4) If the trustee of a trust is a non-resident, a settlor of the trust who is a New Zealand resident is responsible for ensuring the performance of the obligations imposed on the trustee by this section.
- (5) The Commissioner may vary the requirements set out in subsection (2) for a trustee or class of trustees.
- (6) A variation under subsection (5) is secondary legislation (see Part 3 of the Legislation Act 2019 for publication requirements).

## Charities Act 2005

### 4 Interpretation

- (1) In this Act, unless the context otherwise requires,—

...

**charitable entity** means a society, an institution, or the trustees of a trust that is or are registered as a charitable entity under this Act

### 5 Meaning of charitable purpose and effect of ancillary non-charitable purpose

- (1) In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
- (2) However,—
- (a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood; and

- (b) a marae has a charitable purpose if the physical structure of the marae is situated on land that is a Māori reservation referred to in Te Ture Whenua Māori Act 1993 (Māori Land Act 1993) and the funds of the marae are not used for a purpose other than—
  - (i) the administration and maintenance of the land and of the physical structure of the marae:
  - (ii) a purpose that is a charitable purpose other than under this paragraph.
- (2A) The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued.
- (3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
- (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—
  - (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
  - (b) not an independent purpose of the trust, society, or institution.

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## OS 22/04: Charities and Donee Organisations - Part 2 Donee organisations

### Scope

1. The purpose of *Operational Statement OS 22/04: Charities and Donee Organisations* is to assist entities in the not-for-profit sector to understand their tax obligations and available tax benefits. This statement is published in two parts: Part 1 discusses charities and Part 2 discusses donee organisations.
2. New Zealand's not-for-profit sector makes an important contribution to the wellbeing of New Zealanders. One way the Government supports the sector is by providing favourable tax treatments for the sector. These come in various forms, depending on the characteristics of the entity involved; for example, for tax charities - various income tax exemptions for the business and non-business income, and for charitable organisations - resident withholding tax (RWT) exemptions, fringe benefit tax (FBT) exclusions, goods and services tax (GST) concessions and interest-free student loans for overseas volunteers of approved charitable organisations. Donee organisations that meet the definition of tax charity and/or charitable organisation may qualify for these favourable tax treatments, discussed in more detail in *Operational Statement OS 22/04: Charities and Donee Organisations: Part 1 Charities*.
3. For charities that have donee status, donors may receive favourable tax treatments such as donation tax credits, payroll giving tax credits and income tax gift deductions.
4. Following brief comments about where to get more information, the application date of this statement, and descriptions of donee organisations and donee status, Part 2 provides guidance to entities wanting to become donee organisations or that are already donee organisations. It discusses:
  - the types of entity that can become a donee organisation, including registered charities, entities requiring the Commissioners approval as a donee organisation, donee organisations by definition and donee organisations approved by Parliament (see from [15]);
  - tax benefits including tax credits and gift deductions for charitable or other public benefit gifts made by donors and FBT concessions (see from [108]);
5. Part 2 also addresses other administrative tax matters relevant to donee organisations, including record-keeping (see [153]), self-assessment and notification requirements (see [160]), binding rulings (see [163]), winding up a donee organisation (see [165]), and deregistration (see [167]).
6. Part 1 of the Operational Statement explains what a charity is, including in the context of the ITA and the Charities Act 2005 (Charities Act). Part 1 also addresses the relationship between Inland Revenue and Charities Services | Ngā Ratonga Kaupapa Atawhai (which is part of Te Tari Taiwhenua | Department of Internal Affairs), what charitable purposes are and the different tax concessions that may be available. It also sets out administrative tax matters, implications of deregistration and special rules for certain entity types.
7. Topics relevant to Part 2 that are covered in Part 1 are cross-referenced.

### Further information

8. The Inland Revenue dedicated email address for inquiries about charities and donee organisations is [charities.queries@ird.govt.nz](mailto:charities.queries@ird.govt.nz)
9. More information about donee organisations is on the Inland Revenue website.<sup>1</sup> All references whether to webpages, reports or other items are listed with their full URL in the References at the end of this document.

### Application date of this statement

10. This Operational Statement (Parts 1 and 2) will apply from 10 October 2022.

<sup>1</sup> Inland Revenue, Donee organisations needing to register with Charities Services | Ngā whakahaere whiwhi takoha me rehita ki ngā Ratonga Kaupapa Atawhai (webpage).



## What is a donee organisation and donee status

11. “Donee organisation” is defined in s YA 1 as “an entity described in section LD 3(2) (Meaning of charitable or other public benefit gift) or listed in schedule 32 (Recipients of charitable or other public benefit gifts)”.
12. Section LD 3(2) refers to “a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual, and whose funds are applied wholly or mainly to charitable, benevolent, philanthropic, or cultural purposes within New Zealand” among others.
13. An organisation that meets the definition of donee organisation is referred to as having “donee status”.
14. The main advantage of being a donee organisation is the benefit it brings to the donors who make charitable or other public benefit gifts of \$5 or more. Individuals who make such gifts may qualify for tax benefits (such as donation tax credits or payroll giving tax credits), while companies and Māori authorities can qualify for tax benefits (such as income tax gift deductions). These tax benefits are subject to maximum limits.

## Types of donee organisations

15. To qualify for donee status, an entity must satisfy at least one of the descriptions of a donee organisation set out in s LD 3(2) or be listed in schedule 32 as a recipient of charitable or other public benefit gifts.
16. The four types of donee organisation are:
  - most entities registered with Charities Services (see from [17]);
  - entities with benevolent, philanthropic or cultural purposes (not registered with Charities Services) approved by the Commissioner (see from [25]);
  - entities that automatically qualify by satisfying specific definitions (see from [93]); and
  - entities that apply funds for other than charitable, benevolent, philanthropic or cultural purposes in New Zealand, approved by Parliament and listed in schedule 32 (see from [96]).

## Donee organisations registered with Charities Services

17. Part 1 of this Operational Statement describes the function of Charities Services with regards to charities and its interrelationship with Inland Revenue.
18. From 1 April 2020, an entity with charitable purposes must register as a charity with Charities Services, if eligible to do so, to obtain donee status.
19. Eligibility criteria for registering as a charity with Charities Services is explained in Part 1 of this Operational Statement. The Charities Services website contains the Charities Register listing all registered charities.<sup>2</sup>
20. For a registered charity to qualify for and maintain donee status, it must apply its funds “wholly or mainly” to charitable, benevolent, philanthropic or cultural purposes within New Zealand (s LD 3(2)). In administration of this requirement, the Commissioner uses a “safe harbour” basis of 75% or more satisfying wholly or mainly for qualifying for donee status. To maintain donee status, an entity may calculate its percentage by using a rolling three-year average. However, if in any year it applies less than 50% to these purposes, it needs to notify Inland Revenue immediately (see from [54]).
21. Accordingly, entities registering with Charities Services are required to indicate if they intend to receive donations and the percentage of the entity’s funds that will be applied towards carrying out charitable, benevolent, philanthropic or cultural purposes overseas. If the registered charity indicates it intends to receive donations, then Inland Revenue uses the percentage information to determine whether the entity meets the “wholly or mainly” requirement of s LD 3(2) and is eligible for donee status without the registered charity making a separate application to the Commissioner.
22. If the registered charity meets the “wholly or mainly” requirement, it is published on the Commissioner’s list of approved donee organisations.<sup>3</sup> It is the responsibility of a donee organisation to advise Inland Revenue as soon as they cease meeting the “wholly or mainly” requirement (see from [160]).
23. Entities established for charitable purposes after 1 April 2020 and not registered with Charities Services will not be published on the Commissioner’s approved donee organisation list. The exceptions to this are entities that obtain the Commissioner’s approval (see from [29]) or, in a rare case, Parliament might approve a donee organisation that is not a registered charity (see from [96]).

<sup>2</sup> Charities Services, The Charities Register | Te Rēhita Kaupapa Atawhai (webpage).

<sup>3</sup> Inland Revenue, Commissioner’s list of approved donee organisations (webpage).

24. For more information, see *Charitable and Donee Organisations* (IR255).<sup>4</sup> Part 1 of this Operational Statement provides information about charities and their tax obligations.

### Entities requiring the Commissioner's approval for donee status

25. Entities not eligible to register as a charitable entity with Charities Services may still apply to the Commissioner for donee status if they meet the definition of donee organisation in s YA 1. This definition refers to entities described in s LD 3(2) and includes entities whose funds are applied for benevolent, philanthropic or cultural purposes (see from [39]).
26. Applications to the Commissioner for donee status should be made in writing (see from [89]).
27. If approved, these entities are placed on the Commissioner's list of approved donee organisations.<sup>5</sup> This process is referred to as "obtaining donee status".
28. Donee organisations have a responsibility to monitor and self-assess their donee status and to advise the Commissioner as soon as they cease to be eligible to be a donee organisation. This is so the Commissioner can remove the entity from the approved donee organisation list.

### Types of entities that can seek Commissioner's approval for donee status

29. Four categories of entities are eligible for the Commissioner's approval of donee status, each with slightly different requirements:
- a society, institution, association, organisation or trust (see from [30]);
  - a public institution (see from [67]);
  - a fund (see from [69]); and
  - a public fund (see from [84]).

Other specific requirements for each of these categories are explained below.

#### **Requirements for a society, institution, association, organisation or trust to obtain donee status**

30. The first category eligible for the Commissioner's approval of donee status includes a society, institution, association, organisation or trust. For an entity of this type to obtain donee status from the Commissioner under s LD 3(2)(a), it must not be eligible to be a registered charity with Charities Services (for example, because its purposes are not charitable, but rather are benevolent, philanthropic or cultural) and it must be able to satisfy the Commissioner that:
- it is a society, institution, association, organisation or trust;
  - its funds are applied wholly or mainly to charitable, benevolent, philanthropic or cultural purposes within New Zealand; and
  - it is not carried on for the private pecuniary profit of any individual.
31. It is the Commissioner's view that it will be difficult for a sports organisation to show benevolent, philanthropic or cultural purposes. However, it may be possible for a sports organisation to have charitable purposes and thus become a donee organisation by first becoming a registered charity.
32. The following elements of these requirements are explained further:
- charitable purpose (see from [34]);
  - benevolent purpose (see from [39]);
  - philanthropic purpose (see from [44]);
  - cultural purpose (see from [47]);
  - "wholly or mainly" application of funds (see from [49]); and
  - requirement of no private pecuniary profit (see from [60]).
33. The terms benevolent, philanthropic and cultural are not defined in the ITA. The Commissioner's operational position regarding the definitions of these terms is based on New Zealand common law and, where New Zealand courts have not fully determined the definition, the decisions of other jurisdictions.

<sup>4</sup> Inland Revenue, *IR255: Charitable and donee organisations* (December 2021) (publication).

<sup>5</sup> Inland Revenue, Commissioner's list of approved donee organisations (webpage).

## Charitable purpose

34. The definitions of “charitable purpose” in s 5 of the Charities Act and s YA 1 of the ITA are materially the same. Both definitions provide that charitable purpose includes “every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community”.
35. A charity’s purpose (or purposes) must be of public benefit within the sense the law recognises as charitable.<sup>6</sup> This is assessed by considering the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted.<sup>7</sup>
36. Generally, the Commissioner will consider applications only where an entity has benevolent, philanthropic or cultural purposes (rather than charitable purposes). Where an entity has only charitable purposes (rather than benevolent, philanthropic or cultural purposes), the Commissioner cannot approve that entity as a donee organisation unless it is ineligible for registration with Charities Services.
37. For more on charitable purposes, see Part 1 of this Operational Statement.
38. Although distinctly defined, the meaning of “charitable purpose” and the meanings of “benevolent”, “philanthropic” or “cultural” purposes can overlap considerably as described below.

## Benevolent purpose

39. The meaning of benevolent differs from the meaning of charitable and, in its ordinary use, has a meaning wider than the word charitable.<sup>8</sup> Courts have found the meaning of benevolent to be so vague that it caused a trust for “charitable and benevolent” purposes to be void for uncertainty. Similarly, a bequest for “charitable or benevolent purposes” was found not be a charitable gift, due to the vagueness of meaning of “benevolent” permitting the possibility that all of the funds could be used for non-charitable, but benevolent, purposes.<sup>9</sup>
40. However, s 61B of the Charitable Trusts Act 1957 now provides that where there are charitable purposes, the inclusion of non-charitable and invalid purposes does not invalidate a trust where the intention was to create a charitable trust.
41. Benevolence is not limited to the provision of money, housing, food, medicine or other basic elements. The provision of services to relieve distress may be benevolent, even if the services are not free.<sup>10</sup>
42. An institution with the predominant purpose of making a profit for its owner will not have a benevolent purpose because it is not desiring to do good for others.<sup>11</sup>
43. The promotion of sport and the relief of suffering by animals are not benevolent purposes.<sup>12</sup>

## Philanthropic purpose

44. Philanthropic purposes are more narrowly defined than benevolent purposes. While a benevolent purpose may be directed to the goodwill of a particular individual only, a philanthropic purpose indicates goodwill to humankind at large.<sup>13</sup>
45. A philanthropic purpose relates to the promotion of the welfare of other human beings in general.<sup>14</sup> It is not limited to the provision of necessities. The provision of schools, libraries, public art galleries, museums, or free or subsidised concerts could be a philanthropic purpose.<sup>15</sup>

<sup>6</sup> *A-G v Family First NZ* [2022] NZSC 80 at [10] – [12], *Re Greenpeace of NZ Inc* [2014] NZSC 105, [2015] 1 NZLR 169 at [3].

<sup>7</sup> *Greenpeace* at [76].

<sup>8</sup> *Re Knowles: Brown v Knowles* [1916] NZLR 83 (CA) at 117, affirmed *A-G v Brown* [1917] AC 393 (PC); *Molloy v CIR* [1981] 1 NZLR 688 (CA) at 691.

<sup>9</sup> *Re Catherine Smith (deceased): Campbell v NZ Insurance Co Ltd* [1935] NZLR 299 (CA) at 328, affirmed *A-G v NZ Insurance Co Ltd* [1937] NZLR 33 (PC).

<sup>10</sup> *Australian Council of Social Service Inc v Commissioner of Pay-roll Tax* 85 ATC 4,235; *Mines Rescue Board of New South Wales v FCT* (2000) ATC 4,191; *Trustees of the Indigenous Barristers' Trust* (2002) ATC 5,055; *Northern Land Council v Commissioner of Taxes (NT)* (2002) ATC 5,117.

<sup>11</sup> *Commissioner of Pay-Roll Tax v Cairnmillar Institute* 92 ATC 4,307.

<sup>12</sup> *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51; *FCT v Royal Society for the Prevention of Cruelty to Animals Queensland Inc* 92 ATC 4,441.

<sup>13</sup> *Re Knowles: Brown v Knowles* at 128.

<sup>14</sup> *Re MacDuff* [1895-99] All ER Rep 154; *Residence “Joie de Vivre” Inc v Niagara Falls (City)* [1994] OJ No 749; *Rotary International v Commissioners of Customs & Excise* [1991] VATTR 177; *Hallé Concerts Society v Revenue and Customs Commissioners* [2016] UKFTT 294; *Wilson v Flowers* 58 NJ 250 (1971).

<sup>15</sup> *Hallé Concerts Society v Revenue and Customs Commissioners* [2016] UKFTT 294.

46. However, philanthropic purposes do not include purposes directed at the care and welfare of animals (other than human beings).<sup>16</sup>

### Cultural purpose

47. A cultural purpose relates to the training, development and refinement of mind, taste and manners.<sup>17</sup> An example of a cultural purpose is support for dramatic, theatrical, dance, choral or musical arts.
48. It is also the Commissioner's view that the promotion of sport is not a cultural purpose.

### “Wholly or mainly” application of funds

49. To qualify for and maintain donee status under s LD 3(2)(a), an entity's funds must be applied “wholly or mainly” to charitable, benevolent, philanthropic or cultural purposes within New Zealand. In this section of Part 2 of the Operational Statement, charitable, benevolent, philanthropic or cultural purposes are referred to collectively as “specified purposes”.
50. An entity applying to the Commissioner for donee status must indicate the percentage of its fund it anticipates applying to purposes other than for specified purposes within New Zealand. Provided the entity indicates this percentage is at or below 25%, the Commissioner will generally accept that the wholly or mainly requirement is satisfied (see the description of safe harbour from [54]). The donee organisation should subsequently assess its continuing compliance with this requirement each year.
51. The expression “funds are applied” suggests the:
- application of funds arises as a result of the organisation spending money or taking action to invest or set aside the money for future spending for some purpose or purposes;
  - decision to accumulate funds has been made at the appropriate level in the organisation for decisions of that type according to its established management practices; for example, the trustees of a charitable trust resolving to set aside money in the trust's on-call savings account pending a capital purchase; and
  - decision to accumulate funds needs sufficient detail to be able to characterise that application of funds as advancing specified purposes within New Zealand.
52. The application of funds can occur on a continuing basis over the lifetime of the donee organisation. This is so, even though for administrative purposes to gauge compliance with the ongoing wholly or mainly requirement, it is more practicable to look at funds applied over a discrete period, such as a year, and then from year to year.
53. It is the specified purposes that must be “within New Zealand” not the application of funds. This means the location where funds are spent is not relevant. It is the objectively determined purpose sought to be achieved through the application of the funds that is important. For example, if funds were spent in Australia to produce an educational video to be used by a New Zealand charity in New Zealand, then the funds have been applied for charitable purposes in New Zealand.<sup>18</sup> Conversely, if funds are spent in New Zealand to produce an educational video for use in Australia, these funds are not applied for charitable purposes within New Zealand.
54. In terms of the requirement that the funds are applied wholly or mainly for specified purposes within New Zealand, the Commissioner will generally accept, without further enquiry, that a donee organisation meets the wholly or mainly requirement when it is within the administrative “safe harbour” percentage of 75% or more of its funds being applied for specified purposes within New Zealand.
55. An accepted three-step method to calculate the percentage of funds being applied for specified purposes within New Zealand is as follows:
- Step 1: Gather the charity's “total funds”, using the statement of cash flows or statement of receipts and payments from the charity's financial statements or performance reports.
  - Step 2: Determine the amount of the charity's “funds applied to specified purposes within New Zealand”.
  - Step 3: Calculate the charity's safe harbour percentage (step 1 amount divided by step 2 amount).
56. In determining step 2 it is necessary to decide whether money was spent, invested or set aside:
- entirely for specified purposes within New Zealand;

<sup>16</sup> *Kitchener-Waterloo and North Waterloo Humane Society v City of Kitchener* [1973] 1 OR 490.

<sup>17</sup> *Molloy v CIR* [1981] 1 NZLR 688 (CA).

<sup>18</sup> *Case T50* (1998) 18 NZTC 8,346 (TRA).

- entirely for purposes other than specified purposes within New Zealand; or
  - for a combination of specified purposes within New Zealand and other purposes (apportion on a reasonable basis, including overheads and operating funds).
57. If a donee organisation fails to meet the safe harbour percentage (75%) in any year, the Commissioner will accept a revised calculation based on the current year and two preceding years. In such a case, the donee organisation can recalculate the percentage based on the cumulative total of its funds applied over the current and preceding two years. This allows some year-on-year variation for exceptional years. This is illustrated in Table 1.

**Table 1: Example of calculating safe harbour percentage allowing for year-on-year variation**

| Category   | Year 1 | Year 2 | Year 3 |
|--|--------|--------|--------|
| Total funds (\$)   | 10,000 | 5,000  | 5,000  |
| Funds applied to specified purposes within New Zealand (\$)                        | 9,000  | 4,000  | 3,000  |
| Percentage of total funds applied to specified purposes within New Zealand         | 90%    | 80%    | 60%    |
| Cumulative total funds (\$)  | 10,000 | 15,000 | 20,000 |
| Cumulative funds applied to specified purposes within New Zealand (\$)             | 9,000  | 13,000 | 16,000 |
| Cumulative percentage total funds applied to specified purposes within New Zealand | 90%    | 87%    | 80%    |

58. For more information on these requirements, see *Interpretation Statement IS 18/05: Income tax – donee organisations – meaning of wholly or mainly applying funds to specified purposes within New Zealand*.<sup>19</sup>
59. For more information on applying the safe harbour approach, including examples of how to determine when funds are applied to specified purposes within New Zealand and how to apply the rolling three-year cumulative approach that Inland Revenue will accept, see *Interpretation Statement 18/05: Fact Sheet – applying the “safe harbour” approach (IS 18/05 FS)*.<sup>20</sup>

### Requirement of no private pecuniary profit

60. Another condition under the ITA for obtaining the Commissioner’s approval as a donee organisation is that the entity cannot be carried on for the private pecuniary profit of an individual. (This is also a requirement under the Charities Act for those entities that apply to become a registered charity.) This means a donee organisation’s funds must not be used to provide more than a minor personal benefit to its members, officers, trustees, related parties or associates.
61. Sometimes the stated aims or powers of an entity may allow benefits to members, but these benefits should be very limited. Examples of acceptable benefits are:
- newsletters that don’t require a subscription;
  - voting rights to appoint officers of the entity; and
  - benefits also available on the same terms to the public.
62. If any member can receive more than these benefits, then the entity is not eligible to be a donee organisation. Further, if a member can in any way influence (by way of their position or otherwise) the amount of any benefit they receive, the entity will not qualify as a donee organisation.
63. Examples of private or pecuniary profit to members include a member:
- being paid either beyond what is reasonable (more than the standard commercial rate) for their services or for services not actually provided;
  - being reimbursed for expenses incurred on the donee organisation’s behalf beyond what is reasonable;
  - transferring items to a donee organisation for a price that is above the arm’s length price; and
  - earning interest on money lent to the donee organisation at higher than a usual commercial rate.

<sup>19</sup> Inland Revenue, *Interpretation Statement IS 18/05: Income tax – donee organisations – meaning of wholly or mainly applying funds to specified purposes in New Zealand* (September 2018) (publication).

<sup>20</sup> Inland Revenue, *Interpretation Statement IS 18/05 FS (Fact Sheet): - Applying the ‘safe harbour’ approach* (September 2018) (publication).

64. If an entity's rules allow unrestricted benefits to members, a clause preventing this must be added before the Commissioner will grant donee organisation status. Examples of necessary clauses include:
- All income, benefit or advantage must be used to advance the charitable, benevolent, philanthropic or cultural purposes of the entity.
  - No member of the entity or anyone associated with a member is allowed to take part in or influence any decision the entity makes in respect of payments to or on behalf of the member or associated person of any income, benefit or advantage.
  - Any payments made must be for goods or services that advance the charitable, benevolent, philanthropic or cultural purposes and must be reasonable and relative to payments that would be made between unrelated parties.
65. Companies must also have clauses in their rules that:
- prevent distribution of dividends or payments to shareholders; or
  - restrict current shareholders and the transfer and issue of shares to not-for-profit entities or trustees of a trust for charitable purposes.
66. For more information about the requirement of no private pecuniary profit, see also *Charitable and Donee Organisations* (IR255).<sup>21</sup>

#### **Requirements for a public institution to obtain donee status**

67. The second category eligible for the Commissioner's approval of donee status is a public institution. For a public institution to obtain donee status from the Commissioner under s LD 3(2)(b), it must be maintained exclusively for one or more of the following purposes within New Zealand:
- charitable;
  - benevolent;
  - philanthropic; or
  - cultural.

These purposes were described from [34].

68. An institution is public if its purpose is to benefit an appreciable section of the community.<sup>22</sup> As a public institution, no funds can be applied for a private pecuniary profit (see from [60]).

#### **Requirements for a fund to obtain donee status**

69. The third category eligible for the Commissioner's approval of donee status is a fund.
70. For a fund to obtain donee status from the Commissioner under s LD 3(2)(c), the fund must be established and maintained:
- by a non-profit entity (being a society, institution, organisation or trust that is not carried on for the private pecuniary profit of an individual); and
  - exclusively for the purpose of providing money for one or more of the charitable, benevolent, philanthropic or cultural purposes within New Zealand of the non-profit entity.
71. The fund must become a registered charity if it is eligible to do so. If Charities Services determines that the fund is not eligible to register, the fund should provide evidence of this to the Commissioner, who may still consider the fund's application for donee status if the fund satisfied all the requirements to become a donee organisation. It is the responsibility of the non-profit entity to monitor and self-assess the fund's donee status and to advise the Commissioner as soon as the fund ceases to be eligible to be a donee organisation so that the Commissioner can remove the entity from the list of approved donee organisations.
72. The meanings of charitable, benevolent, philanthropic and cultural purposes were described from [34].

#### **Defining a fund**

73. In general terms, a "fund" in this context means an actual stock of money or assets set aside for charitable, benevolent, philanthropic or cultural purposes within New Zealand rather than a mere accounting expression. This includes, for example, a fund represented by a credit balance in a bank account.

<sup>21</sup> Inland Revenue, *Charitable and donee organisations* (IR255) (December 2021) (publication).

<sup>22</sup> *Maughan v FCT* (1942) 66 CLR 388 (HCA) at 397–398.



### Establishing the fund

74. A non-profit entity can set up such a fund by making book entries in its financial accounts, but the entries must be supported by an actual stock of money or other assets and show that the fund has been set up on a firm or permanent basis for the provision of money for charitable, benevolent, philanthropic or cultural purposes within New Zealand of the non-profit entity. Best practice suggests a fund is established and maintained through a combination of book entries and a document setting out terms for the establishment, operation and winding up of the fund (either as part of the rules of the non-profit entity or as a stand-alone document).
75. The fund must apply to the Commissioner to obtain donee status. In the application, it should be made clear that donee status is being sought for the fund (not for the non-profit entity).

### Using the fund's money

76. The fund's money must be used for, or used to provide money for, the charitable, benevolent, philanthropic or cultural purposes within New Zealand of the non-profit entity when it was established. Whether money is used for these purposes is determined by where those purposes are advanced (that is, within New Zealand) rather than where the fund's money is spent.
77. The fund's money may be used for purposes other than the provision of money for charitable, benevolent, philanthropic or cultural purposes within New Zealand, if those other purposes are subordinate or incidental to this purpose and are not independent purposes.
78. The non-profit entity may use the fund's money to meet or reimburse costs it incurs in administering the fund. This includes a contribution to meet a reasonable share of the non-profit entity's administration costs where such costs include the costs of administering the fund.
79. The non-profit entity may use the fund's money to meet or reimburse costs it incurs advancing the non-profit entity's purposes, provided these are exclusively charitable, benevolent, philanthropic or cultural purposes within New Zealand and are consistent with the purposes of the fund.

### Maintaining the fund

80. The fund must be maintained for the provision of money for charitable, benevolent, philanthropic or cultural purposes within New Zealand of the non-profit entity throughout its lifetime, including the disposal of the fund's money or other assets if wound up.
81. Maintaining the fund requires maintaining the actual stock of money or other assets consistent with any book entries, as the fund's actual stock of money or other assets at its establishment may change over time. Best practice suggests movements of the money or other assets in the fund are tracked and reported on in the non-profit entity's financial accounts.
82. It may be preferable to keep the fund, in particular the fund's money, separate from the non-profit entity's other money and assets, for instance, by having a separate bank account for the fund. This makes it easier to show an actual stock of money exists and that the purposes of the fund have been maintained over time (by seeing how the money in the account has been used).
83. For more information, see *QB 19/10: Donations – what is required to establish and maintain a fund under s LD 3(2)(c) of the Income Tax Act 2007?*<sup>23</sup> QB 19/10 considers what is needed to establish and maintain such a fund so that it qualifies as a “donee organisation” and clarifies the Commissioner's views and expectations for those setting up and operating funds under s LD 3(2)(c). QB 19/10 complements *Interpretation Statement IS 18/05: Income tax – donee organisations – meaning of wholly or mainly applying funds to specified purposes within New Zealand*<sup>24</sup> and its accompanying factsheet on *Applying the “safe harbour” approach*.<sup>25</sup>

### Requirements for a public fund to obtain donee status

84. The fourth category eligible for the Commissioner's approval of donee status is a public fund.

<sup>23</sup> Inland Revenue, *QB 19/10: Donations – what is required to establish and maintain a fund under s LD 3(2)(c) of the Income Tax Act 2007?* (Question we've been asked / 2019) (publication).

<sup>24</sup> Inland Revenue, *Interpretation Statement IS 18/05: Income tax – donee organisations – meaning of wholly or mainly applying funds to specified purposes within New Zealand* (September 2018) (publication).

<sup>25</sup> Inland Revenue, *Interpretation Statement IS 18/05 FS (Fact Sheet): - Applying the 'safe harbour' approach* (September 2018) (publication).

## What is a public fund

85. In general terms, a “public fund” in this context means an actual stock of money or assets set aside for charitable, benevolent, philanthropic or cultural purposes within New Zealand, rather than a mere accounting expression. This includes, for example, a public fund represented by a credit balance in a bank account. A public fund originates in a public initiative, and the public both contributes to and participates in the administration of the fund.
86. For a public fund to obtain donee status from the Commissioner under s LD 3(2)(d), the public fund must be established and maintained exclusively for the purpose of providing money for one or more of the following purposes within New Zealand:
- charitable;
  - benevolent;
  - philanthropic; or
  - cultural.
- These purposes were described from [34].
87. A public fund must meet the requirements for use of the fund’s money (see from [76]) and for maintaining the fund (see from [80]) with the modification that a reference to a registered charity should be read as the public fund.
88. For more information, see *QB 22/02: Donations: What is required to establish and maintain a “public fund” under s LD 3(2)(d) of the Income Tax Act 2007*.<sup>26</sup>

## Written applications to the Commissioner for donee status

89. Charities will automatically be considered for donee status on their registration by Charities Services (where they have indicated they intend to receive donations). These charities should not make a separate application to the Commissioner for donee status.
90. Entities that do not have charitable purposes or for any other reason are not eligible to register with Charities Services, may seek donee status by applying to and receiving approval by the Commissioner (for example, if they have benevolent, philanthropic or cultural purposes). There is no prescribed form of application; instead, those entities seeking to obtain donee status approval from the Commissioner should send their request through the online myIR service or write to the Commissioner seeking approval to be placed on the Commissioner’s list of approved donee organisations.
91. The written application (through myIR or by post to Inland Revenue, PO Box 1147, Palmerston North Central, Palmerston North 4440) should include:
- the entity’s IRD number – if the entity has no IRD number, then an application for one must be made and can be done online;<sup>27</sup>
  - a copy of the entity’s rules, constitution, trust deed or other founding documents (as applicable);
  - a copy of the entity’s certificate of incorporation (if applicable);
  - a copy of the letter or other communication with Charities Services in which the entity’s application to be a registered charity was declined or an explanation of why the entity believes it is not eligible to register;
  - details of how the entity has been or will be operated, including:
    - (i) how the entity’s funds will be applied;
    - (ii) for an entity that is a society, institution association, organisation or trust - whether (and what percentage) of the funds will be applied for purposes outside New Zealand; and
    - (iii) for an entity that is a public institution, a fund or a public fund - confirmation that the entity’s funds will not be applied for purposes outside New Zealand.
92. It is often helpful to include further information if it illustrates the objects, activities and achievements of the entity, such as website references, reports, newsletters, media articles or testimonials.

<sup>26</sup> Inland Revenue, *QB 22/02: Donations - what is required to establish and maintain a “public fund” under s LD 3(2)(d) of the Income Tax Act 2007?* (Questions we’ve been asked / 2022) (publication).

<sup>27</sup> Inland Revenue, *New Zealand business or organisation IRD number application* | Te tono i tētahi tau tāke mō tētahi pakihi, whakahaere rānei kei Aotearoa (webpage).

## Other entities that automatically qualify as donee organisations by definition

93. Section LD 3(2) describes certain types of entities that are recognised as being donee organisations:
- a community housing entity (as defined in s CW 42B), if at the time the gift is made the entity is eligible to derive exempt income under s CW 42B (community housing trusts and companies) (see s LD 3(2)(ac));
  - a board of trustees that is constituted under subpart 5 of part 3 of the Education and Training Act 2020 and is not carried on for the private pecuniary profit of any individual (see s LD 3(2)(bb)); and
  - a tertiary education institution (as defined in s YA 1) that is established under subpart 3 or subpart 4 of part 4 of the Education and Training Act 2020 (and has not been disestablished under that Act) that is not carried on for the private pecuniary profit of any individual (ss LD 3(2)(bc) and YA 1).
94. Entities meeting these definitions do not need to seek approval from the Commissioner and will generally not be included on the Commissioner's list of approved donee organisations (although historically, many of these entities have been included on the list). This type of entity may appear on the list if it is a registered charity.
95. For example, boards of trustees of state schools and state integrated schools are donee organisations by virtue of s LD 3(2) (bb), even though they may not be listed in the Commissioner's list of approved donee organisations. School parent-teacher associations or parent support groups that are established independently from the school's board of trustees may qualify as donee organisations, but they need to apply to the Commissioner to obtain donee status. Further guidance on gifts made by parents to state and state-integrated schools is in:
- QB18/10: Income Tax – state schools and donation tax credits;<sup>28</sup> and
  - QB 18/11: Income Tax – state integrated schools and donation tax credits.<sup>29</sup>

## Charities approved as donee organisations by Parliament (schedule 32 of the ITA)

96. Entities that apply a significant part (or all) of their funds for purposes other than charitable, benevolent, philanthropic or cultural purposes within New Zealand can be approved as donee organisations only by Parliament.
97. Legislation, rather than approval by the Commissioner, is used to implement decisions to grant donee status in these cases. This is because it is an exception to the policy that tax benefits for donations should be limited to entities with purposes within New Zealand.
98. The Commissioner recommends to Cabinet whether an application should be granted or not. If approved by Parliament as a donee organisation, schedule 32 to the ITA is amended to add the entity.
99. A charity seeking to obtain donee status in this way should be prepared to provide, among other things:
- the charity's goals and long-term vision;
  - the charity's governing documents (constitution and trust deed) showing that its activities and purposes are consistent with Cabinet's criteria (see [103]);
  - evidence that its purposes are entirely within the purposes described in the guidelines for Cabinet criteria and that no personal pecuniary profit can be derived;
  - governing documents that contain clauses governing the nature and extent of discretionary powers, the winding-up clause and the ability to amend the governing document;
  - the charity's internal policies and procedures, where relevant; for example, an anti-money laundering policy, a child protection policy or a memorandum of understanding with the charity's key stakeholders;
  - information about the charity's past, current and proposed activities;
  - the charity's in-country partners;
  - the charity's financial statements;
  - evidence of the degree of control over the application of the charity's funds overseas and procedures to ensure accountability for funds;
  - the planning, monitoring and evaluation processes used regarding the application of the charity's funds, including how recipients use the funds, as well as the processes used to select beneficiaries or projects to support; and
  - evidence of the charity's legal presence in New Zealand and whether it is a registered charity.

<sup>28</sup> Inland Revenue, *QB18/10: Income Tax – state schools and donation tax credits* (Question we've been asked / 2018) (publication).

<sup>29</sup> Inland Revenue, *QB 18/11: Income Tax – state integrated schools and donation tax credits* (Question we've been asked / 2018) (publication).

100. Applicants for overseas donee status should complete a request form,<sup>30</sup> then send it with supporting documents by email to [policy.webmaster@ird.govt.nz](mailto:policy.webmaster@ird.govt.nz) or post to Inland Revenue, Policy and Regulatory Stewardship, PO Box 2198, Wellington 6140.
101. Inland Revenue makes an initial assessment and contacts the charity's representative to make any necessary further enquiries. Any concerns or issues with the charity or its officers or trustees are communicated to the relevant parties directly. Generally, trustees or officers will be asked to consent to a New Zealand Police vetting check.
102. The Commissioner's review process is very involved (multi-year, including enactment) to manage risk, to inform spending decisions to be made by Ministers, and because Ministers want to be assured of the credibility, transparency and accountability of the applicant so tax relief afforded by donee status is appropriately targeted and the potential misuse of public money is minimised.
103. Following the review, the Commissioner makes a recommendation to Cabinet.
- Cabinet decisions to grant or decline donee status are made using the overseas donee guidelines set by Cabinet. The guidelines require that the funds of the charity should be principally applied towards:
  - the relief of poverty, hunger, sickness or the ravages of war or natural disaster; or
  - the economy of developing countries (recognised by the United Nations); or
  - raising the educational standards of a developing country (recognised by the United Nations).
104. In terms of which countries are "developing countries", Cabinet uses as a guideline, the United Nations list of least developed countries,<sup>31</sup> which is reviewed every three years by the United Nations Economic and Social Council, considering the recommendations by the Committee for Development Policy.
105. The eligible purposes set out in the guidelines align with the Government's overseas development objectives (disaster relief, provision of humanitarian aid and assisting developing countries) and are narrower than the common law meaning of "charitable purpose" and the legislative framework in the Charities Act 2005.
106. Additionally, a charity seeking donee status must be resident in New Zealand, and it is preferable that the charity be registered under the Charities Act. A charity formed for the principal purpose of fostering or administering any religion, cult or political creed will not qualify.
107. There are ongoing requirements once an entity gains donee status and is listed in schedule 32, including the requirements for provision of donation tax receipts (see from [143]), record keeping (see from [153]), to self-assess and notify changes (see from [160]) and regarding winding up of the organisation (see from [165]).

## Tax benefits of being a donee organisation

108. The main advantage of being a donee organisation is the benefit it brings to the donors who make charitable or other public benefit gifts. Individuals, companies and Māori authorities may qualify for tax benefits, such as donation tax credits, payroll giving tax credits or income tax gift deductions.
109. Where a donee organisation is a tax charity (as defined in ss YA 1 and CW 41(5)), it may be entitled to exemption from income tax on certain parts, or all, of its income. Where a donee organisation is a charitable organisation (as defined in s YA 1) it may be entitled to the FBT exclusion and/or its volunteers overseas may be entitled to maintain interest-free status of their student loans. Where a donee organisation is a non-profit body (as defined in s 2(1) of the Goods and Services Tax Act 1985) it may also qualify for GST concessions. Each of these tax concessions is described more fully in *Part 1 Charities*.

## Tax credits and deductions for charitable or other public benefit gifts

110. Individuals may claim donation tax credits and companies and Māori authorities may claim income tax gift deductions, if they make qualifying "charitable or other public benefit gifts".
111. A charitable or other public benefit gift is defined in s LD 3 and means a gift of money or a subscription of \$5 or more paid to a donee organisation (so long as any subscription provides no rights arising from membership). It does not include testamentary gifts (that is, a gift made in a will) or gifts made by forgiving some or all of a debt (s LD 3(1)(c)).

<sup>30</sup> Inland Revenue, Form IR 464: *Overseas donee status request* (October 2012) (publication).

<sup>31</sup> United Nations, *List of Least Developed Countries* (as of 24 November 2021) (publication).

### Gift to a donee organisation

112. To qualify as a charitable or other public benefit gift, the gift must be made to an entity that is:

- on the Commissioner's list of approved donee organisations; or
- not included on the approved donee organisation list, but meets one of following descriptions of a donee organisation: a community housing entity (s LD 3(2)(ac)), school board of trustees (s LD 3(2)(bb)) or tertiary education institution (s LD 3(2)(bc)); or
- listed in schedule 32 of the ITA (recipients of charitable or other public benefit gifts).

### Gift of money of \$5 or more

113. To qualify as a charitable or other public benefit gift for the purposes of s LD 3, there must be a "gift of money of \$5 or more".

114. The Commissioner considers that to qualify as a "gift of money of \$5 or more" there must be a payment of money of \$5 or more that is made voluntarily and in circumstances where the donor receives no material benefit or advantage in return. Ordinarily, a gift will confer a benefit on the donee organisation.

115. The Court of Appeal in *Church of Jesus Christ of Latter-day Saints Trust Board and Coward v CIR* (2020) NZCA 143 found that whether a payment is a gift for the purposes of s LD 1 (where no sham and tax avoidance is at issue) must be ascertained by:

- considering the true nature of the transactions by carefully considering the legal arrangement actually entered into and carried out within its context and in light of the surrounding circumstances; and
- determining whether the payments made under those transactions are gifts in light of the text and purpose of the donation tax credit rules.

116. A charitable or other public benefit gift does not include the transfer of property or services to a donee organisation.

117. If something is purchased from a donee organisation, such as a ticket to an event or the purchase of goods (for example, at a charity auction), the payment is not a gift.

118. The Court of Appeal in *CIR v Roberts* [2019] NZCA 654 found that the forgiveness of debt could qualify as a gift of money. However, after *Roberts*, s LD 3(1)(c) was amended to specify that a charitable or other public benefit gift does not include "a gift made by forgiving some or all of a debt". This amendment was retrospective to 1 April 2008, with a savings provision that means taxpayers who claimed a donation tax credit or income tax gift deduction for the forgiveness of debt before 16 December 2019 are allowed the claim or deduction.

119. A gift does not need to be made directly to a donee organisation. For example, it can be made through a third-party, such as an employer via payroll giving (see from [129]) or through an online fundraising platform.

120. Online fundraising platforms, such as crowdfunding services, allow a donor to authorise the service provider to pass on their donation to the recipient of the funds. Whether the donor has made a qualifying gift of money of \$5 or more to a donee organisation is determined on the same criteria as any other gift. For the purposes of claiming a tax credit refund or deduction, the amount that may be claimed is determined by the receipt issued. If the Commissioner considers any administrative charge made by the fundraising platform is unreasonable or excessive, she may reject or adjust the amount of the donation credit or deduction claim.

121. Further guidance on the attributes of gifts to donee organisations is in *QB 16/05: Donee Organisations and Gifts*.<sup>32</sup> *QB 16/05* also provides examples to illustrate the Commissioner's view on when certain common fundraising activities may or may not involve gifts (for example, a charity dinner and dance, charity auction, supporter package for a dramatic society, supporter package for a performing arts centre, supporter afternoon tea, friends' packages, and payments supporting a local football club). While reflecting the Commissioner's considered view, *QB 16/05* should be considered in conjunction with subsequent legislative amendments and the decisions in *Church of Jesus Christ of Latter-day Saints Trust Board and Roberts* described above.

### Donation tax credits for individuals

122. When individuals make qualifying charitable or other public benefit gifts, they are generally entitled to a refundable donation tax credit of 33.33% of such gifts, provided the gift is no more than the amount of the individual's taxable income for the year (s LD 1 of the ITA and s 41A of the Tax Administration Act 1994 (TAA)) and provided they are not an absentee (s 41A(11) of the TAA and s LD 1 of the ITA).

<sup>32</sup> Inland Revenue, *QB 16/05: Donee Organisations and Gifts* (Questions we've been asked / 2016) (publication).



123. Gifts of less than \$5 to a donee organisation can still qualify an individual for a donation tax credit if they are made under an instalment arrangement that is approved by the donee organisation. This means regular instalments can be made and recorded throughout the year for that donor, with each donation clearly attributable to the donor. At the end of the year, the total gift, as returned on the organisation's end-of-year accounts for that person, must be \$5 or more to qualify for a donation tax credit.
124. Individuals can submit their donations tax receipts to the Commissioner through the online myIR service during the tax year or at the end of the tax year. Whichever method is used, the application is processed at the end of the tax year. Individuals have four years from the end of the tax year in which the donation was made to claim donation tax credit refunds (s 41A(6) of the TAA).
125. When the Commissioner has considered an application, the person will be notified of the amount of the credit and refund allowed. If the Commissioner refuses a refund of a tax credit (in full or in part), the taxpayer can challenge that decision through the disputes process by issuing a Notice of Proposed Adjustment. For more information about the disputes process, see the Inland Revenue website.<sup>33</sup>
126. Individuals can also make charitable or other public benefit gifts by way of payroll giving (see [129]).
127. A donor may ask the Commissioner to apply some, or all, of a donation tax credit to satisfy a liability under the Inland Revenue Acts (s RM 10(2) of the ITA and s 173T of the TAA). If a donor does not make such a request, the Commissioner may apply the refund to satisfy any liability of that donor (s RM 10(3)).
128. For more information on making donation tax credit claims, see the Inland Revenue website.<sup>34</sup>

#### **Payroll giving**

129. The payroll giving scheme provides a tax credit for gifts of money that are deducted from an employee's pay through their employer's payroll (ss LD 4 to LD 8). The amount of the tax credit is limited to the amount of tax for the person's pay for the period. Employees receive an immediate reduction in tax by way of tax credit, as a reduction in their PAYE each pay period. This eliminates the need to collect and keep receipts to claim tax relief on gifts of money at the end of the year. To participate in the payroll giving scheme, the recipient organisation must be a donee organisation.
130. Where an employer makes payroll giving donations to a donee organisation, the donee organisation must issue a payroll giving donation tax receipt in the participating employer's business name (not in the name of the individual employees who donated).
131. Employees do not include their payroll giving receipts in their *IR526: Tax Credit Claim Form* at the end of the year.<sup>35</sup> Employers must include employees' payroll giving donations in *IR348: Employment Information*<sup>36</sup> and adjust the PAYE sent to Inland Revenue by the amount of tax credits for payroll giving donations. For further information, see the guide *IR617: Payroll Giving*.<sup>37</sup>

#### **Income tax gift deductions for companies**

132. A company can claim an income tax gift deduction for a charitable or other public benefit gift it makes to a donee organisation (s DB 41(2)). "Company" is defined in s YA 1 broadly enough to include certain societies and clubs.
133. The amount of the company's deduction is limited to the company's net income for the relevant income year (that is, essentially annual income less annual expenses before the donation is deducted).
134. Where money is transferred by a company that has been deregistered as a charity, to another charity, that payment does not qualify for an income tax gift deduction as a charitable or other public benefit gift (s DB 41(2B)).

#### **Income tax gift deductions for Māori authorities**

135. A Māori authority may claim an income tax gift deduction for donations made to a Māori association or a charitable or other public benefit gift made to a donee organisation (s DV 12).
136. The amount of the Māori authority's deduction is limited to the Māori authority's net income for the relevant income year (that is, essentially annual income less annual expenses before the donation is deducted).
137. Where money is transferred by a deregistered charity that is a Māori authority to a charity in accordance with the charity deregistration rules, that payment does not qualify for an income tax gift deduction (s DV 12(1B)).

<sup>33</sup> Inland Revenue, Disputes | Ngā wenewene (webpage).

<sup>34</sup> Inland Revenue, Processes for donation tax credits (webpage).

<sup>35</sup> Inland Revenue, *IR526: Tax Credit Claim Form* (October 2020) (publication).

<sup>36</sup> Inland Revenue, *IR348: Employment Information* (April 2020) (publication).

<sup>37</sup> Inland Revenue, *IR617: Payroll Giving* (April 2020) (publication).

138. For further guidance on Māori authorities, see:

- *Becoming a Māori Authority* (IR487);<sup>38</sup>
- *Māori Authority Tax Rules* (IR1202);<sup>39</sup> and
- *Payments and Gifts in the Māori Community* (IR278).<sup>40</sup>

### Administrative provisions – donation tax credits and income tax gift deductions

139. The usual four-year time bar provisions apply to company and Māori authority income tax returns that include deductions claimed for charitable or public benefit gifts (s 108 of the TAA).

140. For individuals, from 1 April 2019, for the purposes of determining the time bar period (s 41A(6B) of the TAA), the:

- payment of a refund is treated as an assessment; and
- four-year time bar period starts at the end of the tax year in which the person applied for the refund.

141. This means that, absent any wrongdoing in relation to the donation tax credit refund or deduction claimed for charitable or public benefit gifts, the Commissioner cannot amend a taxpayer's claim (to adjust it up or down) after four years have passed.

142. Specific anti-avoidance rules apply when a person enters into an arrangement and the arrangement has a purpose or effect of defeating the intent and application of s LD 1 (s GB 55 of the ITA). Companies and Māori authorities continue to be subject to the general anti-avoidance provision (s BG 1 of the ITA).

### Donation tax receipt requirements

143. The Commissioner's requirements for donee organisations when issuing donation tax receipts to donors for gifts they have made are contained in *IR255: Charitable and Donee Organisations*.<sup>41</sup>

144. To assist donors to make claims and to enable the Commissioner to efficiently consider those claims, the donee organisation should provide the donor with a receipt that includes:

- the donee organisation's official stamp or letterhead with the donee organisation's full name (and branch, if appropriate);
- the donee organisation's IRD number and Charities Services registration number (if applicable);
- the donor's full name (and address, if known);
- the full amount and date of the donation (or, if payments were made throughout the year, the total donation amount for the income year ending 31 March provided the entity had donee status for the entire income year);
- a clear statement that the amount received is a donation – the donation amount should be clearly separated from any other amounts covered by the receipt (subscription fees, amounts paid for goods or services, or raffle tickets are not donations, so should be shown separately from the donation amount on the receipt);
- the name, designation and signature of a person authorised to accept donations for the donee organisation (this may be an electronic signature); and
- a receipt number, unique to each receipt.

145. Where a receipt for the donee organisation is re-issued as a replacement, it must be clearly marked "copy" or "replacement".

146. Treasurers and officers of donee organisations should not authorise or sign their own receipts or those relating to their immediate family members.

147. Donee organisations should keep current the contact details of persons authorised to oversee donations, such as the secretary or treasurer, as Inland Revenue may wish to contact them to verify receipts. To update Inland Revenue, use the form *IR401: Appoint an Executive Office Holder to Act on Your Behalf*.<sup>42</sup>

148. Where a donor uses a tax agent or representative to apply for a refund of their donation tax credit, the tax agent or representative must see the receipt of the donor's charitable or other public benefit gift, and the donor must retain the receipt for four tax years after the tax year to which the claim relates (s LD 1(4)).

<sup>38</sup> Inland Revenue, *IR487: Becoming a Māori Authority* (December 2017) (publication).

<sup>39</sup> Inland Revenue, *IR1202: Māori Authority Tax Rules* (May 2022) (publication).

<sup>40</sup> Inland Revenue, *IR278: Non-profit groups - Payments and Gifts in the Māori Community - Factsheet* (December 2015) (publication).

<sup>41</sup> Inland Revenue, *IR255: Charitable and donee organisations* (December 2021) (publication).

<sup>42</sup> Inland Revenue, *IR401: Appoint an Executive Office Holder to Act on Your Behalf* (March 2019) (publication).



149. To claim a donation tax credit, a donor needs to have a valid donation receipt.
150. A donor can start the process of claiming donation tax credits during the year by uploading receipts online as donations are made, rather than waiting to submit everything at the end of the tax year.
151. The donation tax credit is limited to the taxable income of the donor, which is known only at the end of the tax year. All receipts uploaded during the year will be processed as a single claim.
152. If receipts cannot be uploaded online, they may still be submitted along with the *IR526: Tax credit claim form* after the year end.<sup>43</sup>

## Record keeping

153. While registered charities have information and reporting obligations under the Charities Act, they must also comply with the requirements of the Inland Revenue Acts.
154. All donee organisations should keep sufficient records in English or te reo Māori to calculate any tax liability and to demonstrate eligibility for tax exemptions or concessions. Depending on the entity, records may include receipt and payment account books, bank statements, invoices, receipts and wage records for employees (s 32 of the TAA).
155. Additionally, donee organisations must also keep a record of:
- the sources of any donations made to it; and
  - how its funds have been used, within New Zealand or overseas.
156. If the Commissioner requests, a donee organisation may be required to provide a breakdown of donations received, including donor details, respective payment dates and payment methods (s 58 of the TAA).
157. If a donee organisation is registered for GST, it must keep records as required under s 75 of the Goods and Services Tax Act 1985.
158. Records should be kept for a minimum of seven years, even if the donee organisation ceases operating.
159. For further information on record keeping, see *Standard Practice Statement: Retention of business records in electronic formats, application to store records offshore and keeping records in languages other than English or te reo Māori* (SPS 21/02).<sup>44</sup>

## Requirement to self-assess and notify changes

160. All donee organisations must continually self-assess to determine whether they continue to meet the donee status requirements.
161. If a donee organisation determines that it no longer meets the requirements in s LD 3, it must immediately cease issuing donation tax receipts and inform the Commissioner of its change in circumstances by post to Inland Revenue, PO Box 1147, Palmerston North Central, Palmerston North 4440 or by email to [charities.queries@ird.govt.nz](mailto:charities.queries@ird.govt.nz).
162. The entity will then be removed from the Commissioner's list of approved donee organisations (if it was included there). If the entity is listed in schedule 32, the Commissioner will inform Parliament that the entity no longer qualifies for inclusion and Parliament will take the necessary steps to remove it from the schedule.

## Binding rulings

163. An entity may apply to the Commissioner for a binding ruling (which includes short process rulings) under part 5A of the TAA. A binding ruling is the Commissioner's interpretation of how a tax law applies to a particular arrangement, person, or item of property.
164. For more information about binding rulings, see the Inland Revenue website, [What is a binding ruling?](#)<sup>45</sup>

<sup>43</sup> Inland Revenue, *IR526: Tax credit claim form* (October 2020) (publication).

<sup>44</sup> Inland Revenue, *Standard Practice Statement -SPS 21/02: Retention of business records in electronic formats, application to store records offshore and keeping records in languages other than English or te reo Māori* (May 2021) (publication).

<sup>45</sup> Inland Revenue, [What is a binding ruling?](#) (webpage).

## Winding up a donee organisation

165. On winding up, consistent with the “wholly or mainly” requirement, a donee organisation’s remaining income and/or assets should be applied to charitable, benevolent, philanthropic or cultural purposes within New Zealand. The donee organisation’s rules or constitution should contain provisions outlining what will happen to remaining income and assets on winding up.
166. A donee organisation may have other statutory requirements that apply on winding up (for example, requirements on liquidation or dissolution by the Registrar of Incorporated Societies under the Incorporated Societies Act 1908).<sup>46</sup>

## Deregistration

167. Charities that are deregistered (whether voluntarily or because of failing to meet their filing obligations with Charities Services) lose donee status. If the charity appeals the deregistration, it should notify the Commissioner, as it can then retain donee status until its appeal is determined (s LD 3(2)(ab)).
168. If the deregistered charity does not appeal the deregistration, donors to these deregistered entities will not be able to claim a donation tax credit or income tax gift deduction for any donations made to the charity during the period of deregistration.
169. A deregistered charity must ensure its donation tax receipts, websites and newsletters clearly state that donations made after the date of deregistration will not qualify a donor for a donation tax credit or an income tax deduction.
170. The deregistered charity may make a written application to the Commissioner to again be a donee organisation, demonstrating their benevolent, philanthropic or cultural purpose and satisfaction of the other requirements (see from [89]).

## Removal as a donee organisation

171. The Commissioner’s decision to remove an organisation’s donee status is a “disputable decision” (defined in s 3(1) of the TAA) meaning it may be challenged under part 8A of the TAA. For more information about the disputes process, see the Inland Revenue website, Disputes.<sup>47</sup>

## Appendix – Legislation

### Income Tax Act 2007

#### CX 25 Benefits provided by charitable organisations

##### *When not fringe benefit*

- (1) A charitable organisation that provides a benefit to an employee does not provide a fringe benefit except to the extent to which—
- the employee receives the benefit mainly in connection with their employment; and
  - the employment consists of the carrying on by the organisation of a business whose activity is outside its benevolent, charitable, cultural, or philanthropic purposes.

##### *When employer provides charge facilities*

- (2) Subsection (1) does not apply, and the benefit provided is a fringe benefit, if a charitable organisation provides a benefit to an employee by way of short-term charge facilities and the value of the benefit from the short-term charge facilities for the employee in a tax year is more than the lesser for the tax year of—
- 5% of the employee’s salary or wages;
  - \$1,200.

<sup>46</sup> The Incorporated Societies Act 1908 was repealed and replaced by the Incorporated Societies Act 2022, however the former act continues to apply in respect of dissolution or liquidation of a society incorporated under that Act.

<sup>47</sup> Inland Revenue, Disputes | Ngā wenewene (webpage).

*Meaning of short-term charge facilities*

- (3) For the purposes of the FBT rules, a short-term charge facility means an arrangement that—
- (a) enables an employee to obtain goods or services that have no connection with the employer or its operations by—
    - (i) buying or hiring the goods or services;
    - (ii) charging the cost of the goods or services to an account;
    - (iii) providing consideration other than money for the goods or services; and
  - (b) requires the employer to provide some or all of the payment or other consideration for the goods or services; and
  - (c) is not a fringe benefit under section CX 10.

**DB 41 Charitable or other public benefit gifts by company***Who this section applies to [Repealed]*

- (1) [Repealed]

*Deduction*

- (2) A company is allowed a deduction for a charitable or other public benefit gift that it makes to a donee organisation.

*No deduction*

- (2B) Despite subsection (2), a company is not allowed a deduction for the amount of a charitable or other public benefit gift it makes, to the extent to which the amount is, for the company, an asset ignored for the purposes of section HR 12 (Non-exempt charities: treatment of tax-exempt accumulations) and described in section HR 12(3)(a).

*Amount of deduction*

- (3) The deduction for the total of all gifts made in an income year is limited to the amount that would be the company's net income in the corresponding tax year in the absence of this section.

*Link with subpart DA*

- (4) This section supplements the general permission. The general limitations still apply.

**DV 12 Māori authorities: donations***Deduction*

- (1) A Māori authority is allowed a deduction for—
- (a) a donation that it makes to a Māori association, as defined in the Māori Community Development Act 1962, for the purposes of the Act;
  - (b) a charitable or other public benefit gift that it makes to a donee organisation.

*No deduction*

- (1B) Despite subsection (1), a Māori authority is not allowed a deduction for the amount of a donation it makes or for the amount of a charitable or other public benefit gift it makes, to the extent to which the amount is, for the Māori authority, an asset ignored for the purposes of section HR 12 (Non-exempt charities: treatment of tax-exempt accumulations) and described in section HR 12(3)(a).

*Amount of deduction*

- (2) The deduction for the total of all donations and gifts made in an income year is limited to the amount that would be the Māori authority's net income in the corresponding tax year in the absence of this section.

*Link with subpart DA*

- (3) This section supplements the general permission and overrides the capital limitation. The other general limitations still apply.

**GB 55 Arrangements involving tax credits for charitable or other public benefit gifts***When this section applies*

- (1) This section applies when—
- (a) a person enters into an arrangement; and
  - (b) the arrangement has a purpose or effect of defeating the intent and application of section LD 1 (Tax credits for charitable or other public benefit gifts).



- (c) does not include—
  - (i) a testamentary gift;
  - (ii) a gift made by forgiving some or all of a debt.

*Description of organisations*

- (2) The following are the entities referred to in subsection (1)(a) and (b):
  - (a) a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual, and whose funds are applied wholly or mainly to charitable, benevolent, philanthropic, or cultural purposes within New Zealand;
  - (ab) an entity that, but for this paragraph, no longer meets the requirements of this subsection, but only for the period starting on the day it fails to meet those requirements and ending on the later of—
    - (i) the day the entity is removed from the register of charitable entities under the Charities Act 2005;
    - (ii) the day on which all reasonably contemplated administrative appeals and Court proceedings, including appeal rights, are finalised or exhausted in relation to the person's charitable status.
  - (ac) a community housing entity, if the gift is made at a time the entity is eligible to derive exempt income under section CW 42B (Community housing trusts and companies);
  - (b) a public institution maintained exclusively for any 1 or more of the purposes within New Zealand set out in paragraph (a):
    - (bb) a board that is constituted under subpart 5 of Part 3 of the Education and Training Act 2020 and is not carried on for the private pecuniary profit of any individual;
    - (bc) a tertiary education institution;
    - (c) a fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a), by a society, institution, association, organisation, or trust that is not carried on for the private pecuniary profit of an individual;
    - (d) a public fund established and maintained exclusively for the purpose of providing money for any 1 or more of the purposes within New Zealand set out in paragraph (a).

*Exception for certain entities*

- (3) Despite subsection (2)(a), (b), (c), and (d), a society, institution, association, organisation, trust, or fund is not a relevant entity for the purposes of subsection (1) if the society, institution, association, organisation, trust, or fund,—
  - (a) is not a tax charity, because it is not registered as a charitable entity under the Charities Act 2005; and
  - (b) in the opinion of the Commissioner, is eligible to be registered as a charitable entity under that Act.

**LD 4 Tax credits for payroll donations**

*Who this section applies to*

- (1) This section applies to a person who—
  - (a) is an employee whose employer—
    - (i) provides employment income information by electronic means with particulars relating to the person's PAYE income payments for a pay period; and
    - (ii) agrees to offer payroll giving to their employees; and
  - (b) chooses to make a payroll donation in the pay period from an amount derived as pay.

*Amount of credit*

- (2) The person has a tax credit for the pay period equal to an amount calculated using the formula—
 
$$\text{total donations} \times 33\frac{1}{3}\%.$$

*Definition of item in formula*

- (3) In the formula, total donations is the total amount of all payroll donations made by the person in the pay period.

*Maximum credit*

- (4) Despite subsection (2), the amount of the tax credit must not be more than the amount of tax for the person's pay for the period.

*Non-refundable credits*

- (5) A credit under this section is a non-refundable tax credit to which section LA 4(1) (When total tax credit more than income tax liability) applies for the tax year in which the period falls.

*No refunds for donations*

- (6) A person who has a tax credit under this section may not make an application under section 41A of the Tax Administration Act 1994 for any refund relating to the amount of a payroll donation.

*Meaning of pay for payroll donation purposes*

- (7) For the purposes of this section, and sections LD 8(1) and 124ZG of the Tax Administration Act 1994, pay, for a person,—
- (a) means an amount referred to in section RD 5(1)(a) or (b)(i) (Salary or wages); and
  - (b) includes any similar amount earned by an employee in the normal course of their employment; and
  - (c) [Repealed]

**YA 1 Definitions**

In this Act, unless the context requires otherwise,—

**charitable or other public benefit gift** is defined in section LD 3 (Meaning of charitable or other public benefit gift)

**charitable organisation—**

- (a) means, for a quarter or an income year, an association, fund, institution, organisation, society, or trust to which section LD 3(2) (Meaning of charitable or other public benefit gift) or schedule 32 (Recipients of charitable or other public benefit gifts) applies—
  - (i) in the quarter; or
  - (ii) in the income year, if fringe benefit tax is payable on an income year basis under section RD 60 (Close company option); and
- (ab) includes a person who has been removed from the register of charitable entities (the register) under the Charities Act 2005, but only for the period starting on the day the person is registered on the register and ending on the earlier of the last day of the following periods:
  - (i) the quarter, or income year if section RD 60 (Close company option) applies, in which the person does not comply with their rules contained in the register:
  - (ii) the quarter, or income year if section RD 60 applies, in which the day of final decision falls; and
- (b) does not include a local authority, a public authority, or a university

**charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community, and—

- (a) the purpose of a trust, society, or institution is charitable under this Act if the purpose would meet the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood:
- (b) a marae has a charitable purpose if—
  - (i) the physical structure of the marae is situated on land that is a Māori reservation referred to in Te Ture Whenua Māori Act 1993 (the Māori Land Act 1993); and
  - (ii) the funds of the marae are not used for a purpose other than the administration and maintenance of the land and of the physical structure of the marae, or are used for a purpose that is a charitable purpose

**donee organisation** means an entity described in section LD 3(2) (Meaning of charitable or other public benefit gift) or listed in schedule 32 (Recipients of charitable or other public benefit gifts)

## Tax Administration Act 1994

### 3 Interpretation

(1) In this Act, unless the context otherwise requires,—

**disputable decision** means—

- (a) an assessment;
- (b) a decision of the Commissioner under a tax law, except for a decision—
  - (i) to decline to issue a binding ruling under Part 5A; or
  - (ii) that cannot be the subject of an objection under Part 8; or
  - (iii) that cannot be challenged under Part 8A; or
  - (iv) to issue a Commissioner's notice of proposed adjustment under section 89B, a Commissioner's disclosure notice or statement of position under section 89M, or a challenge notice; or
  - (v) to issue, or to decline to issue, a Commissioner's COVID-19 response variation under section 6I; or
  - (vi) to grant, or to decline to grant, a loan under the small business cashflow scheme under section 7AA; or
  - (vii) to make, or to decline to make, a grant under the COVID-19 resurgence support payments scheme under section 7AAB

**gift-exempt body**, in sections 18K, 32, and 58, means—

- (a) any society, institution, association, organisation, trust, or fund specifically named in Schedule 32 of the Income Tax Act 2007; or
- (b) any other person who has RWT-exempt status following an application made under section 32E(2)(k) or (l) in relation to a tax year in which they have that status

### 32 Records of specified charitable, benevolent, philanthropic, or cultural bodies

- (1) All gift-exempt bodies must keep in New Zealand sufficient records in the English language to enable the Commissioner to determine both the sources of donations made to them and the application, within New Zealand or within a country or territory outside New Zealand, of their funds.
- (2) Despite subsection (1), on application by a gift-exempt body, the Commissioner may notify the body that they are authorised to keep the records in a language other than English.

### 41A Returns in relation to charitable or other public benefit gifts

- (1) A person who has a tax credit under sections LD 1 to LD 3 of the Income Tax Act 2007 may apply for a refund by—
  - (a) providing the information on the total amount of the charitable or other public benefit gifts they have made for a tax year with the information provided under Part 3, subpart 3B;
  - (b) notifying the Commissioner by electronic means in relation to an amount of charitable or other public benefit gift that they have made during the tax year to which the application relates;
  - (c) completing the form prescribed by the Commissioner.
- (2) The total amount refunded, including a refund made on an application under subsection (1), must be no more than the annual amount of the tax credits.
- (3) The sum of the charitable or other public benefit gifts under sections LD 1 to LD 3 of that Act made by a person must be no more than their taxable income in the tax year in which the gift is made.
- (4) If subsection (3) applies, the Commissioner must reduce the total amount of charitable or other public benefit gifts so that the total is no more than the person's taxable income in the tax year in which the gift is made.
- (5) An application under subsection (1) must be made in the manner required by the Commissioner, and be accompanied by any information the Commissioner requires, including—
  - (a) [Repealed]
  - (b) the amount of a charitable or other public benefit gift to which sections LD 1 to LD 3 of that Act apply.
- (6) A taxpayer may apply for a refund for the tax year in which the gift is made in the 4-year period beginning with—
  - (a) the 1 April following the end of the taxpayer's income year corresponding to the tax year, if the taxpayer has a standard balance date or an earlier balance date; or



- (b) the day after the end of the taxpayer's income year corresponding to the tax year, if the taxpayer has a late balance date.
- (6B) For the purposes of section 108(1),—
  - (a) the payment of a refund under this section is treated as an assessment; and
  - (b) the 4-year period starts at the end of the tax year in which the person applies for the refund.
- (7) Despite subsection (6), the Commissioner may, in special circumstances, accept an application for a refund before the end of the tax year to which the application relates.
- (8) For the purpose of subsection (7), special circumstances include—
  - (a) the person leaving New Zealand, permanently or for a significant length of time;
  - (b) a trustee of a deceased person's estate wishing to wind up the estate.
- (9) Despite subsection (1), the Commissioner must not refund the amount of a tax credit unless the requirements of subsections (2) and (3) are met.
- (10) When the Commissioner has considered an application, the Commissioner must notify the person of the amount of the tax credit under sections LD 1 to LD 3 of that Act and of the amount of refund allowed.
- (11) A tax credit may not be refunded to an absentee, a company, a public authority, a Māori authority, an unincorporated body, or a trustee liable for income tax under sections HC 16, HC 32, or HZ 2 of that Act.
- (12) A refund under subsection (1) must be paid as if it were tax paid in excess.
- (13) A refund under subsection (1), to the extent to which it is more than the correct amount of refund, is recoverable as an excess tax credit under section 142D.
- (14) The Commissioner must publish, from time to time, in a publication chosen by the Commissioner, a list of the names of entities that—
  - (a) have provided the information required under subsection (16);
  - (b) the Commissioner considers appropriate to include on the list (for example, an entity registered under the Charities Act 2005).
- (15) Despite subsection (14), the name of an entity must not be published on the list if the Commissioner determines that the entity is not described in section LD 3(2)(a), (ab), (b), (c), or (d) of the Income Tax Act 2007.
- (16) An entity may request that their name is included on the list by providing information to the Commissioner in the form prescribed by the Commissioner.

### **58 Returns of specified charitable, benevolent, philanthropic, or cultural bodies**

Every gift-exempt body must, when notified by the Commissioner, furnish a return of its funds derived or received in any tax year and showing the source and application of those funds, together with such other particulars as may be required by the Commissioner.

### **120VD Interest on tax credits for charitable or other public benefit gifts**

No interest shall be payable by the Commissioner under section 120D(3) on an amount of tax credit calculated under section LD 1 of the Income Tax Act 2007.

## **Goods and Services Tax Act 1985**

### **75 Keeping of records**

- (1) For the purposes of this section, the term records includes books of account (whether contained in a manual, mechanical, or electronic format) recording receipts or payments or income or expenditure, and also includes vouchers, bank statements, invoices, tax invoices, credit notes, debit notes, receipts, and such other documents as are necessary to verify the entries in any such books of account.
- (2) Without limiting the generality of subsection (1), the records required to be kept and retained, pursuant to subsection (3), shall contain—
  - (a) a record of all goods and services supplied by or to that registered person showing the goods and services, and the suppliers or their agents, in sufficient detail to enable the goods and services, the suppliers, or the agents to be readily identified by the Commissioner, and all invoices, tax invoices, credit notes, and debit notes relating thereto; and

- (b) the charts and codes of account, the accounting instruction manuals, and the system and programme documentation which describes the accounting system used in each taxable period in the supply of goods and services; and
  - (c) any list required to be prepared in accordance with section 19B(3) or section 78B(7).
- (3) Subject to subsections (4) to (7), every registered person must keep, for a period of at least 7 years after the end of the taxable period to which they relate, the records listed in subsection (2) and records that are sufficient to enable ready ascertainment by the Commissioner or an officer authorised by the Commissioner of the registered person's liability to tax.
- (3BA) A registered person required by subsection (3) to keep and retain a record must keep and retain the record—
  - (a) in English or te reo Māori, or in a language in which the Commissioner authorises the person under subsection (6) to keep the record or the type of record; and
  - (b) at a place in New Zealand, or at a place outside New Zealand where—
    - (i) the Commissioner authorises the registered person under subsection (6) to keep the record or the type of record;
    - (ii) the record is kept by a person authorised by the Commissioner under subsection (6) to keep records for persons that include the registered person.
- (3B) For the purposes of section 11(1)(mb), the supplier must maintain sufficient records to enable the following particulars in relation to the supply to be ascertained:
  - (a) the name and address of the recipient; and
  - (b) the registration number of the recipient; and
  - (c) a description of the land; and
  - (d) the consideration for the supply.
- (3C) Subsections (3D) and (3E) apply when a supply that wholly or partly consists of land is made to a person who is, for the purposes of the supply, an agent acting on behalf of an undisclosed principal.
- (3D) The requirements of subsection (3B)(a) and (b) are met if the supplier maintains sufficient records to enable the particulars of the name, and address, and registration number or tax file number, as applicable of the agent to be ascertained.
- (3E) The agent must maintain sufficient records in relation to the undisclosed principal to enable the name, address, and, if the principal is a registered person or expects to be a registered person, the registration number of the principal to be ascertained.
- (3F) Subsection (3BA) does not apply to require a non-resident supplier whose only supplies are supplies of distantly taxable goods to which section 8(3)(ab) applies or of remote services to which section 8(3)(c) applies, to keep and retain records—
  - (a) in English or te reo Māori or in a language authorised by the Commissioner; or
  - (b) at a place in New Zealand or at a place outside New Zealand authorised by the Commissioner.
- (4) This section shall not require the retention of any records—
  - (a) in respect of which the Commissioner has given notice that retention is not required;
  - (b) of a company which has been liquidated.
- (5) The Commissioner may, by notice given before the expiry of the 7-year retention period specified in subsection (3), require a registered person to retain the records specified in that subsection for a further period not exceeding 3 years following the expiry of the 7-year period where—
  - (a) the affairs of the registered person are or have been under audit or investigation by the Commissioner; or
  - (b) the Commissioner intends to conduct such an audit or investigation before the expiry of the retention period as so extended, or is actively considering any such audit or investigation.

- (6) The Commissioner may, upon application by a registered person or another person, authorise for the purposes of subsection (3BA),—
- (a) a registered person to keep and retain a record or a type of record—
    - (i) in a language other than English or te reo Māori:
    - (ii) at a place outside New Zealand:
  - (b) a person to hold, for a registered person, records—
    - (i) at places outside New Zealand; and
    - (ii) in a form approved by the Commissioner; and
    - (iii) accessible by the Commissioner in a way approved by the Commissioner.
- (7) The Commissioner may, for an authorisation under subsection (6) of a person,—
- (a) impose reasonable conditions on the authorisation:
  - (b) reasonably vary the conditions on the authorisation:
  - (c) withdraw the authorisation, upon request by the person or after giving reasonable notice of the withdrawal:
  - (d) give public notice of an action under subsection (6)(b) or this subsection, in a publication chosen by the Commissioner.
- (8) A registered person who is required under this section to keep and maintain records that are in a language other than English must comply with the requirements of sections 24, 24BA, and 25 relating to English words that must appear on a tax invoice, or a debit note or credit note, provided by the registered person.

## Charities Act 2005

### 5 Meaning of charitable purpose and effect of ancillary non-charitable purpose

- (1) In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
- (2) However,—
- (a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood; and
  - (b) a marae has a charitable purpose if the physical structure of the marae is situated on land that is a Māori reservation referred to in Te Ture Whenua Māori Act 1993 (Māori Land Act 1993) and the funds of the marae are not used for a purpose other than—
    - (i) the administration and maintenance of the land and of the physical structure of the marae:
    - (ii) a purpose that is a charitable purpose other than under this paragraph.
- (2A) The promotion of amateur sport may be a charitable purpose if it is the means by which a charitable purpose referred to in subsection (1) is pursued.
- (3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
- (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—
- (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
  - (b) not an independent purpose of the trust, society, or institution.

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## TECHNICAL DECISION SUMMARIES

Technical decision summaries (TDS) are summaries of technical decisions made by the Tax Counsel Office. As this is a summary of the original technical decision, it may not contain all the facts or assumptions relevant to that decision. A TDS is made available for information only and is not advice, guidance or a “Commissioner’s official opinion” (as defined in s 3(1) of the Tax Administration Act 1994). **You cannot rely on this document as setting out the Commissioner’s position more generally or in relation to your own circumstances or tax affairs.** It is not binding and provides you with no protection (including from underpaid tax, penalty or interest).

### TDS 22/17: Deemed acceptance of shortfall penalties and liability to evasion shortfall penalty

#### Technical decision summary - Adjudication

Decision date: 6 May 2022

Issue date: 12 October 2022

#### Subjects | Kaupapa

Deemed acceptance of shortfall penalties; Liability to evasion shortfall penalty

#### Abbreviations | Whakapotonga

The abbreviations used in this document include:

|              |  |
|--------------|--|
| CCS          | Customer & Compliance Services, Inland Revenue       |
| Commissioner | Commissioner of Inland Revenue                       |
| TSOP         | Statement of Position issued by the Taxpayer         |
| CSOP         | Statement of Position issued by the Commissioner     |
| TNOPA        | Notice of Proposed Adjustment issued by the Taxpayer |
| AAA          | Agreement to Amend Assessment                        |
| TCO          | Tax Counsel Office, Inland Revenue                   |

#### Taxation laws | Ture tāke

All legislative references are to the Tax Administration Act 1994 (TAA) unless otherwise stated.

#### Facts | Meka

1. In September 2020, Customer and Compliance Services, Inland Revenue (CCS) issued a series of default income tax and GST assessments to the self-employed Taxpayer and imposed associated evasion shortfall penalties. The shortfall penalties were reduced by 50% for previous behaviour under s 141FB. The default income tax assessments related to the 2007, 2008, 2015, and 2018 income years. The GST assessments covered the 6-month GST periods occurring during the 2014, 2015, 2017 and 2018 income years.
2. CCS also issued an Agreement to Amend Assessment (AAA) form to the Taxpayer in which they proposed to adjust the Taxpayer’s tax assessments for the 2014 and 2017 income years and impose an evasion shortfall penalty in each year, reduced by 50% under s 141FB for previous behaviour. In December 2021 the Taxpayer signed the AAA form and returned it to CCS.

3. The Taxpayer issued a Notice of Proposed Adjustment in January 2021 (**TNOPA**), and CCS issued a Notice of Response in March 2021. During the conference stage of the dispute the Taxpayer agreed that they would no longer dispute the core tax that was in issue, but they would continue to dispute the shortfall penalties. The Taxpayer issued a Statement of Position in January 2022 (**TSOP**), and CCS issued a Statement of Position in March 2022 (**CSOP**). In the CSOP, CCS argued that the Taxpayer was deemed to have accepted the default assessment shortfall penalties and, if they were wrong in this respect, the Taxpayer's liability for the penalties was proved by the available evidence. The Taxpayer disputed these arguments.

## Issues | Take

4. To determine whether the Taxpayer was liable to pay the evasion shortfall penalties CCS imposed in relation to the default assessments, the Tax Counsel Office, Inland Revenue (TCO) considered the following issues:
  - Was the Taxpayer deemed to have accepted the shortfall penalties?
  - Was the Taxpayer liable under s 141E of the TAA for evasion shortfall penalties? This involved consideration of the following sub-issues:
    - Did the Taxpayer take tax positions in respect of which shortfall penalties could be imposed?
    - The onus and standard of proof.

## Decisions | Whakatau

5. TCO decided that:
  - The Taxpayer was prohibited from challenging the default assessment shortfall penalties in a hearing authority. Therefore, in practical effect, the Taxpayer is deemed to have accepted the default assessment shortfall penalties.
  - The Taxpayer took tax positions in respect of which shortfall penalties could be imposed and CCS met the onus of proving to the required standard of the balance of probabilities that the Taxpayer is liable for the default assessment shortfall penalties under s 141E.
  - If the Taxpayer had disputed the AAA form penalties in a NOPA and raised the same arguments that they did in the TSOP, the arguments would not have succeeded.

## Reasons for decisions | Pūnga o ngā whakatau

### Issue 1 | Take tuatahi: Deemed Acceptance

6. Under s 138B(3) a disputant who does not propose an adjustment to an assessment within the response period for the assessment is prohibited from challenging the assessment. A taxpayer disputes an assessment by issuing a NOPA as provided in s 89D.
7. Section 89F requires a NOPA to be in the prescribed form (IR 770) and it must contain the information specified in ss 89F(3)(a) and (b). In summary a NOPA must:
  - identify the taxpayer's proposed adjustments;
  - state the facts and the law in sufficient detail to inform the Commissioner of the grounds for the taxpayer's proposed adjustments;
  - state how the law applies to the facts, and
  - include copies of significantly relevant documents.
8. In this dispute, the Taxpayer's NOPA did not meet the requirements of ss 89F(3)(a) and (b) because it did not mention the shortfall penalties. While it was arguable that a letter issued by the Taxpayer's agent on 27 January 2021 might meet the requirements of those sections, this ultimately did not assist the Taxpayer. This was because the letter is not in the prescribed form for a NOPA, and it was provided outside of the 4-month response period during which the Taxpayer was required to propose adjustments to the shortfall penalties. This meant that the Taxpayer was prohibited from challenging the assessments in a hearing authority. Therefore, in practical effect, the Taxpayer is deemed to have accepted the shortfall penalties.

## Issue 2 | Take tuarua: Liability for evasion shortfall penalty

9. Although it was considered that there was non-compliance with s 138B(3), the merits of the Taxpayer's claim that they were not liable for shortfall penalties was considered by TCO. This approach was taken in the event that the Taxpayer chooses to file a challenge under s 138B and the TRA or a Court holds that there has been compliance with the statutory requirements and, as such, the challenge may be made and there is no effective deemed acceptance of the shortfall penalties.
10. Section 141E(1)(a) imposes a shortfall penalty for evasion on a taxpayer if the following requirements are satisfied:<sup>1</sup>
  - The taxpayer has taken a tax position. A tax position is a position or approach to tax under a tax law as taken in or in respect of a tax return, income statement, or due date.<sup>2</sup>
  - Taking the tax position has resulted in a tax shortfall. A tax shortfall is the difference between the tax effects of the correct tax position and the tax effects of the taxpayer's tax position.<sup>3</sup>
  - The taxpayer has evaded the assessment or payment of tax. Evasion requires an intention to avoid the assessment or payment of tax known to be chargeable:
    - The element of intention will be satisfied if the taxpayer knows that their action or omission will breach a tax obligation. There must be some blameworthy act or omission on the part of the taxpayer. The required intent for evasion can be inferred from surrounding circumstances and conduct.<sup>4</sup>
    - Recklessness can amount to evasion and involves the conscious taking of risk. Recklessness will be proven where:<sup>5</sup>
      - Facts actually known to the taxpayer were such that they must have put the taxpayer on inquiry that a tax obligation may not be met.
      - The taxpayer made a conscious decision to ignore the facts without making further inquiry.
11. The penalty payable for evasion or similar act is 150% of the resulting tax shortfall.
12. The onus of proof rests with the Commissioner to show that a taxpayer is liable for a shortfall penalty for evasion under s 141E.<sup>6</sup> This is different from the other shortfall penalties where the onus of proof is on the taxpayer. The standard of proof is the balance of probabilities.<sup>7</sup>

### Tax position and tax shortfalls

13. The Taxpayer was required to file GST and income tax returns for the periods in respect of which shortfall penalties have been imposed. The Taxpayer's failure to meet this requirement means that they took tax positions regarding the provision or non-provision of the returns. Further, the Taxpayer's failure to pay any of the tax owing in each period means that they took tax positions regarding their liability for tax in those periods. As the Taxpayer's tax positions were "nil" tax positions, they resulted in tax shortfalls. The amount of the tax shortfall in each period is the amount of tax CCS assessed as payable for the period when they made the default assessment for the period.

### Knowledge and intentions

14. The Taxpayer argued that their non-compliance was attributable to unaddressed mental health problems. A person's health may be a relevant consideration when determining if the person is liable for shortfall penalties.<sup>8</sup> However, TCO concluded the Taxpayer did not provide medical evidence that showed their health issues rendered them incapable of exercising the sort of judgment that would have avoided the tax shortfalls that occurred in this case. Further, the Taxpayer's non-compliance occurred over a significant number of years that spanned beyond the periods in dispute, and during the years of non-compliance, the Taxpayer was able to earn significant amounts of income. These circumstances indicated that the

<sup>1</sup> The shortfall penalty for evasion or a similar act is considered in the Interpretation Statement: Shortfall Penalty—Evasion as published in *Tax Information Bulletin* Vol 18, No 11 (December 2006).

<sup>2</sup> Definitions of "tax position" and "taxpayer's tax position" in s 3 of the TAA.

<sup>3</sup> Definition of "tax shortfall" in s 3 of the TAA.

<sup>4</sup> *Taylor v Attorney-General* [1963] NZLR 261 (SC); *Lloyds Bank Ltd v Marcan* [1973] 2 All ER 359; *Case H90* (1986) 8 NZTC 619; *Case N47* (1991) 13 NZTC 3,388; *R v G* [2013] NZCA 146.

<sup>5</sup> *Case H90* (1986) 8 NZTC 619; *R v Harney* [1987] 2 NZLR 576 (CA); *Case P29* (1992) 14 NZTC 4,213; *Case S100* (1996) 17 NZTC 7,626; *R v G* [2013] NZCA 146.

<sup>6</sup> Section 149A(2) of the TAA.

<sup>7</sup> Section 149A(1) of the TAA.

<sup>8</sup> *Case Y21* (2008) 23 NZTC 13,227.

Taxpayer was capable of exercising better judgement when dealing with their tax obligations including, obtaining and retaining the help of a tax professional.

15. The available evidence showed that the Taxpayer knew they were required to file income tax and GST returns by their due dates and that they knew they were required to include the income from their self-employed activities in the returns. The Taxpayer's knowledge was demonstrated by the fact they filed 3 GST returns and attempted to file one income tax return during the early periods of their self-employed activities. The Taxpayer's knowledge was also demonstrated by the fact they discussed their outstanding tax obligations with two tax accountants and had numerous contacts with Inland Revenue staff in which their tax obligations were also discussed. Further, in July 2016 the Taxpayer filed an income tax return for the 2016 income year.
16. The available evidence also supported an inference that the Taxpayer evaded tax. The inference arose because although the Taxpayer was aware of their filing obligations, they chose not to meet them and as a consequence of this, tax that should have been assessed was not assessed. In the alternative, at a minimum the available evidence supports a conclusion that the Taxpayer intended to evade tax in the sense that they acted recklessly. The Taxpayer's knowledge that they were required to prepare and file income tax and GST returns which included their income would have put them on notice that preparing the returns might show they had tax liabilities. This circumstance supports an inference that the Taxpayer did not file their returns because they did not want to pay the tax that they knew was owing or suspected was owing in each period and, as such, they acted recklessly.
17. A conclusion that the taxpayer intended to evade tax is also supported by the significant extent of the Taxpayer's non-compliance, their dealings with Inland Revenue staff, their dealings with the tax accountants, and their decision to file an income tax return for the 2016 income year in which they claimed a tax refund.

#### **Shortfall penalties in the 2014 and 2017 income years**

18. If the Taxpayer wished to dispute the shortfall penalties in the AAA form, the appropriate course would have been for the Taxpayer to issue a NOPA proposing adjustments to the penalties within the applicable response period. The Taxpayer did not do this. It was observed that even if the Taxpayer had disputed the penalties and in doing so raised the same arguments that they did in the TSOP against the default assessment shortfall penalties, the same result would have applied. This was because the tax shortfalls that relate to the penalties in the AAA form were in all material respects the same as the tax shortfalls that related to the default assessment shortfall penalties. As such, the matters that supported a conclusion the Taxpayer was liable to pay the default assessment shortfall penalties also supported a conclusion that the Taxpayer was liable to pay the AAA form shortfall penalties.

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