

29 May 2020

Public Consultation
Inland Revenue
Wellington

By email: PublicConsultation@ird.govt.nz

Re: PUB00332: Draft Interpretation Statement IS XX/XX Goods and Services Tax - Unconditional Gifts

The New Zealand Law Society (**Law Society**) welcomes the opportunity to comment on the draft item *PUB00332: Goods and services tax – unconditional gifts (draft)* which provides guidance on the interpretation and application of the “unconditional gift” definition in section 2(1) of the Goods and Services Tax Act 1985 (**GSTA**).

Comments from the Law Society’s Tax Law Committee are set out below. For ease of reference, the comments are set out under the headings used in the draft.

Summary (paras. [1] to [9])

At [1], the draft states that if a payment made to a *GST-registered* non-profit body is an unconditional gift, it is not consideration for a supply and is not subject to GST. Whether or not a payment is an unconditional gift is also relevant in determining whether or not a non-profit body reaches the turnover threshold for GST registration purposes. This could be noted in the summary and/or addressed later in the item.

From [1] onward, the draft refers only to “payments”, as per the “consideration” and “unconditional gift” definitions in section 2(1) of the GSTA. Inland Revenue should confirm, in the summary or later in the item, its position regarding payments “in kind”, i.e. supplies of goods and/or services, being “unconditional gifts”.

From [2] to [7], the draft provides a summary of the requirements for a payment to be an unconditional gift. This summary should be amended as follows:

- 1) At [2], the summary should refer to payment *generally* being one that is not made under a contractual obligation (for example, a payment under a deed of gift may still be an unconditional gift).
- 2) At [2] and possibly also [4], the summary should refer to the requirement that the payment must be made to the non-profit body for the carrying on or carrying out of its purposes.
- 3) The references at [2] and [4] to a benefit being “dependent” on a payment should be revised. This issue is discussed further below (in relation to [57] to [64]).

At [7], the words “*that is GST registered or required to be registered*” should be deleted, to avoid the implication that the Crown/public authority payment exclusion is only relevant to GST-registered non-

profit bodies. As noted above, it may be relevant to whether or not a non-profit body meets the turnover threshold for GST registration purposes.

The intent of [9] should be clarified. Although the item does not specifically discuss the issue of whether koha is an unconditional gift, presumably the analysis set out in the item will apply to koha.

Introduction (paras. [10] to [13])

At [11], the references to “unconditional *gift*” not referring to the word “gift”, to gift issues in other contexts, and to the “essential enquiry” being whether or not a payment is consideration for a supply of goods or services, are potentially confusing. It would be preferable to state, for example:

The specific terms of the “unconditional gift” definition must be applied, and the analysis of whether or not a payment falls within those terms is not the same as the analysis of whether a payment is a gift at common law or for income tax purposes (eg, under donation tax incentive provisions) or for other GST purposes (eg, under the “donated goods and services” definition).

Analysis – preliminary discussion (paras. [14] to [23])

At [14], or in a separate paragraph, there should be reference to the term “consideration” also being relevant to the “taxable activity” definition. Also at the end of the first line of [16] it would be appropriate to add “whether or not the non-profit body is GST-registered”.

Paragraphs [18] and [19] discusses the relationship between the “consideration” and “unconditional gift” definitions.

The discussion should be amended to make it clear that a payment to a non-profit body may not fall within the first part of the “consideration” definition, in which case the issue of whether or not the payment is an “unconditional gift” will be irrelevant. Public binding ruling *BR Pub 18/06 Goods & Services Tax – Payments Made By Parent to State and State Integrated Schools* provides an example of this and could be cross-referenced in this part of the item. That ruling determines that various payments to schools are not “consideration” (and discusses the first part of the “consideration” definition in some detail), and having determined that the payments are not consideration it does not discuss at all the issue of whether or not the payments would also be unconditional gifts.

In contrast, the current drafting of [18] and [19] wrongly implies that a payment to a non-profit body is likely to be caught as consideration in the first instance, especially when it over-simplistically suggests that “*a payment may be consideration for a supply to a third party or the general public*”. In many cases, a payment to a non-profit body relating to that body supplying goods or services to third parties or the general public will be a payment to support that body’s activities and not “consideration”.

What does “voluntarily made” mean? (paras. [24] to [35])

As noted earlier, the discussion of this aspect of the definition should acknowledge that although voluntary payment will *generally* be one that is not made under a contractual obligation, there may be circumstances in which this is not the case (for example, a payment under a deed of gift may still be an unconditional gift). The *Leary* case noted at [31], albeit a case relating to the term “gift” for Australian donation tax incentive purposes, supports this point. Paras. [32] and [35] should be revised accordingly.

The summary at [35] should also include an additional bullet point affirming that, as per *Case 8/2018* and the *Rumney Football Club* case (and also *The Church of Jesus Christ of Latter-day Saints Trust Board v CIR*

[2020] NZCA 143), a non-profit body soliciting or encouraging donations and/or recommending or suggesting donation amounts does not render payments involuntary.

The discussion of *Case J76* at [27] to [29] should be deleted. The school fee payments made by the taxpayer in that case were arguably “voluntarily made” (to help children whom the taxpayer had no obligation to support) but they were not “gifts” because the transaction was a mutual exchange transaction, ie the payments secured a contractual entitlement to education. Para. [30] should also be deleted, as it is misleading and not necessary in this context.

What is an “identifiable direct valuable benefit”? (paras. [41] to [56])

In this part of the draft, Inland Revenue should consider addressing, as the relevant composite phrase, “*identifiable direct valuable benefit... in the form of a supply of goods and services to [the person making the payment or an associated person]*”. For example, at [55] the draft states that the meaning of the term “benefit” is coloured by the adjectives that precede it. The meaning is also coloured by the words that follow it, i.e. the benefit must be a supply of goods and/or services to the payer or an associated person. The above phrase also colours the interpretation of “*in respect of*”, discussed further below.

It may also be helpful to readers for the item to expressly note that the reference to “*a supply of goods and services*” in the above phrase is to be read as “*a supply of goods and/or services*”, as per section 2(2) of the GSTA.

In relation to supporting authority, this part of the draft refers to various cases decided in other contexts in relation to particular terms used in the above phrase.

Inland Revenue should consider referring instead, or in addition to, the examples of benefits that New Zealand courts have found to be “*identifiable direct valuable benefits... in the form of a supply of goods [and/or] services*” that preclude payments from being unconditional gifts i.e.:

- 1) The non-profit body recipient of the payment entering into a lease with the payer and improving the payer’s property (*Case U37*).
- 2) The provision of education/tuition services to the payers’ children (*Case 8/2018*).
- 3) The payers’ use of the non-profit body recipient’s courts and coaching services (*Case 6/2019*).

When does a benefit arise “in respect of” a payment? (paras. [57] to [64])

The Tax Law Committee considers that the draft item’s discussion of this aspect of the “unconditional gift” definition should be reviewed and revised, particularly in relation to the reference to a benefit having a “sufficient connection” with a payment based on the benefit being “conditional or dependent” on the payment.

We appreciate that Taxation Review Authority cases have repeated Judge Barber’s paraphrasing of the “unconditional gift” definition in *Case U37* stating that any relevant benefit that arises must not be “conditional or dependent” on the payment to the non-profit body. However, we note the following points in relation to those cases:

- 1) In *Case U37* itself and also *Case 6/2019* (the most recent case referring to Judge Barber’s comments), the relevant benefits that arose were conditional upon, and therefore very clearly arose “in respect of”, the payments at issue. The cases did not focus at all on the issue of a benefit being “dependent”, in the sense of “reliant”, on a payment.

- 2) In *Case 8/2018*, the relevant education/tuition benefits that arose were viewed as “dependent” in the sense of “reliant” (and not “conditional”) on parents’ payments to the school, and this was relevant to the authority’s conclusion that the benefits arose “in respect of” the payments at issue. However, this was in circumstances where:
- (a) the school’s overall operations were dependent on parents making the type of payments at issue; and
 - (b) there were various other factors relating to the way in which the payments were set, solicited and administered/collected by the school which indicated that the education/tuition benefits arose *in respect of* the payments.

When reading and applying the cases, it is important not to lose sight of the relevant statutory wording, which refers to a payment in respect of which no identifiable direct valuable benefit arises in the form of a supply of goods and/or services.

The approach taken to the word “dependent” in *Case 8/2018*, is arguably an incorrect interpretation when reviewed in light of the ordinary statutory wording. A benefit being “dependent” (in the sense of “reliant”) on the non-profit body’s receipt of the type of payment at issue is either not relevant at all or, at most, it is a factor that may (together with other factors, as in *Case 8/2018*) contribute to the conclusion that a payment is not an “unconditional gift”.

This is reflected in the Tax Law Committee’s further comments below regarding Example 3 in the draft.

In the discussion of the *Rumney Rugby Football Club* case at [62] to [63], the statement that “*it seems unlikely the club would have been dependent on the payments...*” should be deleted, as it is speculative and wrongly implies that this was relevant to the decision that the payments in that case were donations.

What does “arises or may arise” mean? (paras. [65] to [69])

This part of the draft would benefit from a review.

The draft discussion at [65] to [69] is confusing and does not appear to stay focused on the words “arises or may arise”. Instead, it appears to relate back to whether a relevant benefit is “in respect of” a payment, and in doing so inappropriately introduces subjective elements (“seeking”, “expecting” or “anticipating” a benefit) into the analysis. The apparent intent of the words “arises or may arise” is simply to cover an actual or future or contingent benefit, which must still be a relevant benefit “in respect of” the payment.

The discussion at [66] regarding cases relating to “gifts” for donation tax incentive purposes also should be deleted, as the cases do not add anything to the analysis (and the High Court decision regarding missionary-related donations has also been superseded by the Court of Appeal decision in *The Church of Jesus Christ of Latter-day Saints Trust Board v CIR* [2020] NZCA 143).

Examples (paras. [70] to [87])

We consider that various aspects of examples 1 to 8 in paragraphs [70] to [87] of the draft should be reviewed and revised. We make the following comments on the examples:

- **Example 1:** Example 1 is potentially confusing because it refers to a company’s “*donation*” to a local dance group that “*performs at a corporate function*”. If the example is just intended to show that a payment to a non-profit body is not subject to GST if the recipient body is not GST-registered or

liable to be GST-registered, it could just refer to a “*payment*”. The example could state that: “*The payment is not subject to GST, whether or not the payment is consideration for a supply or is an unconditional gift to the dance group, because the dance group is not a registered person*”. For completeness, the example could note that the group’s turnover level is such that the group would not be required to register even if the payment was consideration for a supply.

- **Example 2:** This example should make the point that the nomenclature used, i.e. the golf club describing the payment as a “donation” (which has the connotation of an “unconditional gift”), does not determine the character of the payment. Viewed objectively, the arrangements show that the payment is consideration for a supply of services, i.e. being permitted to play a round of golf, and is not an unconditional gift, because that supply is an identifiable direct valuable benefit that arises in respect of the payment.
- **Example 3:** This example misleadingly suggests that whether or not the museum is “dependent” on local visitors’ donations to operate impacts on the GST outcome. The museum may well have operations the delivery of which is “dependent” upon the receipt of a certain level of donation funding, i.e. the museum may budget for the receipt of such donations to fund its operations, and the example should make it clear this would not cause the donations to be consideration and not unconditional gifts.

As discussed above, a benefit being “dependent” (in the sense of “reliant”) on a non-profit body’s receipt of the type of payment at issue is either not relevant at all or only relevant in a situation like *Case 8/2018* where the school’s substantial dependence upon parents’ purported “donations” was a factor *additional to various other factors* that led to the payments being viewed as consideration and not unconditional gifts. The museum example is not this type of situation.

- **Example 4:** This example should confirm that the payment is not consideration for any supply under the first part of the consideration definition, as well as confirming that the payment is an unconditional gift. In the latter regard, it should also note that Jack and his children are associated with Jack’s company but any benefit to Jack and his children from the children using the shaded playground at their school is not an identifiable direct valuable benefit that arises in respect of the company’s payment.
- **Example 5:** This example should also confirm that the payment is not consideration for any supply under the first part of the consideration definition, as well as confirming that the payment is an unconditional gift.
- **Example 6:** As with example 2, example 6 should make the point that the nomenclature used, i.e. the non-profit body describing the payment as a “donation”, does not determine the character of the payment. Example 6 could also address some useful fact variations, e.g. if Jack just received one instead of four free \$60 tickets (3% of the “donation” value instead of 12%) and the facts were otherwise the same, the company’s \$2,000 payment presumably would still be viewed by Inland Revenue as consideration and not an unconditional gift; whereas if the non-profit body just gave Jack or his company a ticket or tickets as a ‘thank you’, without having promised any free tickets, the company’s payment would not be consideration for any supply under the first part of the consideration definition and would be an unconditional gift.
- **Example 7:** As with examples 2 and 6, this example should make the point that the nomenclature used, i.e. description of the payment as a “donation”, does not determine the payment’s character.

- **Example 8:** The suggestion in this example that Wiremu’s donation to the surf club could arguably be consideration for supplies made by the club to members of the public should be deleted. That suggestion is not consistent with case law authority regarding the first part of the consideration definition. The example should confirm that the Wiremu’s donation is not consideration under the first part of the consideration definition, as well as confirming that the donation is an unconditional gift. It might also be more useful to replace Example 8 with Example 7 from QB 16/05 regarding a payment to a surf lifesaving club, and to provide the same confirmations in relation to the \$500 payment in that example.

We recommend that Inland Revenue consider adding one or more additional examples to the draft. These could include:

- **Example(s) from QB 16/05:** One or more of the examples set out in *QB 16/05 Income tax – donee organisations and gifts*. For instance, Example 8 in QB 16/05 regarding payments by a parent to her children’s local football club (adding to the example that the club is GST-registered) would be useful for illustrating a payment subject to GST (fees paid for membership) and a payment for a particular club purpose that is not subject to GST (donation for junior equipment fundraising).
- **Community funding example(s):** One or more scenarios illustrating Inland Revenue’s approach to the very common example of funding received by non-profit bodies from funding bodies such as gaming machine trusts, private philanthropic trusts, local authorities and the like, often for a particular project or expenditure undertaken or incurred by the recipient non-profit body in furtherance of its charitable or other purposes.

Further assistance

We trust Inland Revenue will find these comments helpful and if further discussion would assist please contact the Tax Law Committee convenor Neil Russ, through the Law Society’s Law Reform Adviser, Emily Sutton (Emily.Sutton@lawsociety.org.nz).

Yours faithfully



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