

Income tax: Income – when gifts are assessable income

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A gift is not usually subject to income tax. This interpretation statement considers the circumstances in which a gift is subject to income tax in the recipient's hands.

The statement applies both to monetary gifts and to non-monetary gifts that are convertible to money. It does not apply to gifts that are not subject to income tax but may be family scheme income for the purposes of Working for Families tax credits.

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

REPLACES | WHAKAKAPIA

- Assessability of gifts received by volunteer workers in NZ, *Tax Information Bulletin* Vol 6, No 3 (September 1994): 8.
 - Cash gifts received by voluntary workers, *Tax Information Bulletin* Vol 4, No 5 (December 1992): 42
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Summary | Whakarāpopoto

1. Broadly, income tax legislation taxes “income”. Gifts are not usually subject to income tax in the recipient’s hands because, generally, they are made as a mark of affection, esteem or respect for an individual and do not have the character of “income”.¹ However, in some circumstances a gift may be assessable income in the recipient’s hands. This interpretation statement considers those circumstances.
2. In this statement, a “gift” refers to the receipt of an amount in money or money’s worth that the payer makes voluntarily by way of benefaction and the payer receives no material benefit or advantage in return.² A gift for the purposes of this statement may include koha.³
3. A gift may be liable to income tax if it is a person’s income under a provision in Part C. The specific provisions of Part C relevant to gifts include amounts derived:
 - from a business (s CB 1);
 - from carrying on or carrying out an undertaking or scheme entered into or devised for the purpose of making a profit (s CB 3) (a profit-making activity);
 - in connection with employment (s CE 1); and
 - in undertaking a voluntary activity (s CO 1, subject to s CW 62B which exempts reimbursements of expenditure).
4. In addition, a gift may be income under the ordinary meaning of the word “income” (ie, income under ordinary concepts) and liable to income tax under s CA 1(2). Section CA 1(2) is a “catch-all” provision and likely to apply only in the alternative to other specific provisions in Part C.
5. Whether a gift is assessable to the recipient must be objectively decided on a case-by-case basis, considering all the circumstances of how and why the gift was made. Each gift must be considered on its own facts.

Employment income

6. Decided court cases show the courts consider a number of factors when deciding whether a voluntary payment such as a gift is employment income of the person

¹ For a discussion of the character of “income” in relation to “income under ordinary concepts” see from [160].

² See QB 16/05: Income Tax – Donee organisations and gifts, *Tax Information Bulletin* Vol 28, No 7 (August 2016): 33.

³ See IR 278 Payments and gifts in the Māori community or IR 382 Ngā utu me ngā koha i te hapori Māori: [Donations \(koha\) \(ird.govt.nz\)](https://ird.govt.nz).

receiving the gift. The following are some factors that support a conclusion that a gift is employment income:

- The amount of the payment reflects the extent of any services provided.
- The payment is made in the hope of future services or to encourage further efforts by employees.
- The recipient's employment agreement contemplates the payment (although a payment of employment income could be under the terms of a separate agreement).
- The payment has recurred, or it is foreseeable that it will recur, rather than being a one-off payment.
- The payment is related to duties that are expected of the employee (although if an employee willingly does something beyond their usual duties and is paid for that, the range of duties is enlarged to encompass it).
- The payments are commonplace as a matter of practice in the occupation, profession or industry.
- The gift is one commonly provided to the holder of a position or office that has a degree of continuance and independence from the current incumbent.

7. The following factors support a conclusion that the gift is not employment income:

- The payer expresses the payment in terms of a mere personal gift. However, the payer's motive is seldom determinative. Simply stating a payment is a personal gift does not rule out the possibility that it is employment income.
- The recipient has already been fully remunerated for any services to which the payment might be related.
- The employment relationship has ended at the time of the payment and is unlikely to resume (although a payment may be employment income where it is connected with a past, present or future employment relationship).
- The payer is not a person with whom the taxpayer has an employment relationship. However, a payment may be employment income even where the payer is a person with whom the recipient has no employment relationship.

8. The following are some factors that are not necessarily relevant to the issue:

- The employment is unpaid.
- The recipient of the payment had to be an employee to be eligible for the payment.

Business or profit-making activity

9. A gift that the payer makes as a mark of affection, esteem or respect for an individual is a “mere gift” and is not business income or income from a profit-making activity. The fact that a gift is received in this context by a non-individual, does not necessarily exclude the payment from being a “mere gift”.
10. Gifts are business income or income from a profit-making activity when they are a **financial** product of the business or profit-making activity. That is, where the payment can be attributed to the activities or specific work the recipient has carried out.
11. The collective understanding of the parties as to how and why the payment was made may be determinative of the character of the payment.
12. The motive of the payer is relevant, but on its own it will seldom be determinative. However, a gift may be assessable income from a business or profit-making activity if the payer has an interest in the business or the activity continuing and makes the payment with the intent of helping the business or activity.
13. Decided court cases show courts consider there are a number of factors when deciding whether a gift is business income or income from a profit-making activity. For example, the following factors support a view that a gift is income of a business or profit-making activity:
 - The payer and recipient are both carrying on a business or profit-making activity.
 - The recipient cannot continue to carry on the activity without the payment.
 - The recipient is not a charity.
14. The following are some factors that support a conclusion that a gift is not business income or income from a profit-making activity:
 - The gift is unexpected or unsolicited.
 - The gift is made in recognition of past services that have been fully remunerated for at the time.
 - The gift is made in recognition of, or consolation for, the severance of a business connection that has no prospect of resuming. However, a gift promised while the business connection is current that would otherwise be assessable income, does not cease to be assessable income solely because it is paid after the connection is severed.
 - The business or profit-making activity had ended at the time of the payment.
 - The recipient is unaware of how the payer calculated the amount of the gift.
 - The calculation of the payment is not linked to trading between the parties.

- The parties undertake no correspondence, bargaining or negotiations with each other.
15. Where a charity achieves its charitable object by carrying on a business, gifts to that charity may be described as intended to supplement its trade receipts or helping it to carry out its business activity. However, this alone is not determinative of whether the gifts are income of the business activity.
 16. For more guidance on gifts received by online content creators carrying on a business or profit-making activity, see IS 21/01: Content creators – tax issues.⁴

Voluntary activities

17. A gift is income under s CO 1 when the gift and the activity of the recipient have a sufficient connection. This means, s CO 1 raises considerations similar to those involved in addressing the question of whether gifts are “a product of” or “in connection with” an employment activity.
18. The following are some relevant factors that support a view that s CO 1 applies:
 - The amount of the gift reflects the amount of the recipient’s personal exertions in undertaking the voluntary activity.
 - The payer makes the gift as a quid pro quo in the hope that the recipient will undertake future activities or to encourage them to make further efforts.
 - The gift has recurred or has a foreseeable element of recurrence rather than being a one-off payment.
 - Such gifts are expected or asked for or are commonplace as a matter of practice in undertaking the voluntary activity.
19. The following are some relevant factors that support a view that s CO 1 does not apply:
 - The receipt is expressed in terms of being a mere personal gift inspired by personal goodwill rather than as consideration for the voluntary activities the recipient has undertaken.
 - The voluntary activity had ended at the time the payer made the gift.

Income under ordinary concepts

20. “Income” under ordinary concepts does not have a precise meaning in tax law. It is decided per ordinary concepts and usages.

⁴ IS 21/01: Content creators – tax issues, *Tax Information Bulletin* Vol 33, No 10 (November 2021): 33 at [31]-[37] and example 7.

21. Generally, "income" is:
 - something that comes in (ie, it does not include a savings in expenditure);
 - ascertained and judged in relation to the recipient (rather than the payer);
 - often shown by its periodicity, regularity and recurrence;
 - something that the recipient beneficially receives; and
 - a gain from carrying on an organised activity where the gain is, in a relevant sense, a product of that activity.
22. The courts have usually adopted a process of "characterisation" in which they weigh up a number of factors to decide whether an amount is income in a particular case. Several factors may be influential. Different factors in the same case can point in different directions and some factors may have greater relevance in some cases than in others. If the presence or absence of a particular factor is determinative in one case this does not mean that factor will be determinative in other circumstances.
23. While income is decided from the recipient's perspective:
 - it is still necessary to consider the relationship between the payer and recipient;
 - the motive of the payer and whether a receipt was paid voluntarily or not is relevant, but not determinative; and
 - the motive of the payer is only significant to the extent that it bears on the character of the payment in the recipient's hands.
24. In many cases, a payment that occurs periodically and regularly and recurs is income because these qualities allow receipts to become part of the funds the recipient may expect to depend on for meeting living expenses. However, a lump-sum payment is income if, at the time of the payment, the payment is the first of a series of expected periodic and regular payments.
25. If a taxpayer expects that, because of their activity, they will receive gifts that will provide for the maintenance of the taxpayer and their family, this may show the payments will be income. This is more likely where multiple payers are involved, or the taxpayer is actively soliciting gifts.
26. Also relevant is whether the receipt is an expected periodic payment that the payer makes for the purpose of the recipient using it for their living costs.
27. In the Commissioner's view, a series of gifts may be income under ordinary concepts under s CA 1(2) where:
 - The series of gifts fulfils the notion of "an income". That is, the gifts have the necessary periodicity, and the payer makes them for the recipient to rely upon, or

intends the recipient to rely on them, for regular living expenses and they are so relied upon by the recipient.

- The necessary periodicity of the payments refers to payments made with such regularity, recurrence, amount and frequency that they amount to “an income”.
- The payments are periodic and made with the intention of providing an income when they began (or this has been established over the passage of time) to the extent that the recipient could reasonably have expected to rely on the payments for their living costs.
- The recipient relies on the payments for their financial support.
- The payments are connected with some activity or personal exertion of the recipient, even though that exertion or activity does not necessarily arise in the context of an employment relationship (past, present or future) and does not amount to a business or a profit-making activity.

Introduction | Whakataki

What this statement is about

28. This interpretation statement provides guidance on when gifts are income in a range of circumstances. In particular, it considers the circumstances in which gifts may be assessable under Part C as income:
 - from employment activities;
 - from carrying on a business or a profit-making undertaking or scheme (a profit-making activity);
 - from a voluntary activity; or
 - under ordinary concepts.
29. This statement applies, therefore, to a range of entities and individuals that are receiving gifts in circumstances where assessable income under Part C may arise. This will be particularly pertinent for not-for-profit entities that are not registered charities and may commonly receive gifts but, due to their unregistered status, do not have an income tax exemption.
30. However, gifts that are not assessable income under Part C can still be family scheme income for the purposes of the Working for Families entitlements and tax credits for families arising under subparts MA to MG and MZ of the Act. This statement does not consider such gifts.

31. Non-cash or in-kind gifts that are not convertible to money are not “amounts” of income (see [44] below). Non-cash gifts may be subject to fringe benefit tax (FBT) where they are benefits provided in connection with employment. FBT is not the focus of this statement.

A “mere gift” is not assessable in the recipient’s hands

32. Income tax “is a tax on income”.⁵ Voluntary payments, such as gifts, are not usually taxed in the recipient’s hands because often they do not have the character of “income”.
33. However, in certain circumstances, this is not the case. For instance, in *Hayes v FCT* Fullagar J distinguished between a “mere gift” and a gift that can be regarded as income.⁶

A voluntary payment of money or transfer of property by A to B is *prima facie* not income in B's hands. If nothing more appears than that A gave to B some money or a motor car or some shares, what B receives is capital and not income. But further facts may appear which show that, although the payment or transfer was a “gift” in the sense that it was made without legal obligation, it was nevertheless so related to the employment of B by A, or to services rendered by B to A, or to a business carried on by B, that it is, in substance and in reality, not a *mere* gift but the product of an income-earning activity on the part of B, and therefore to be regarded as income from B's personal exertion.

34. On this reasoning, Fullagar J’s view is as follows:
- In the simple case of a voluntary payment of money or transfer of property from one person to another, the payment or transfer will not be income of the recipient.
 - Further facts may, however, show the payment or transfer is “so related to”, or a product of, an income-earning activity the recipient is carrying on (eg, employment, a business activity or a profit-making activity). If so, it may be concluded that the payment or transfer gives rise to income in the recipient’s hands.
35. When considering whether a gift was income from employment, Viscount Cave LC referred to a “mere gift” in *Seymour v Reed* as follows:⁷

The question, therefore, is whether the sum ... fell within the description, ... of “salaries, fees, wages, perquisites, or profits whatsoever therefrom” These words and the corresponding expressions contained in the earlier statutes (which were not materially

⁵ *London County Council v Attorney-General* [1901] AC 26 (PC) per Lord Macnaghten at 35.

⁶ *Hayes v FCT* (1956) 11 ATD 68 (HCA) at 72.

⁷ *Seymour v Reed (Inspector of Taxes)* [1927] All ER Rep 294 (HL) at 297.

different) have been the subject of judicial interpretation in cases which have been cited to your Lordships; and it must now, **I think, be taken as settled that they include all payments made to the holder of an office or employment as such, that is to say, by way of remuneration for his services, even though such payments may be voluntary, but that they do not include a mere gift or present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services.** [Emphasis added]

36. Further, in *G v CIR*, McCarthy J made a distinction between a “personal gift”, and one made in relation to the activities of the recipient:⁸

Each gift must be considered on its own facts, the test being whether on the one hand the gift was made in relation to the activities of the appellant of the income producing character which I have discussed, or whether it was a personal gift made purely as a mark of affection, esteem or respect.

37. Thus a “mere gift” is one that someone makes as a mark of personal affection, esteem or respect for the recipient and is not assessable income in the recipient’s hands.
38. However, further facts may reveal that the gift is not a mere gift in this sense. What the courts have seen as relevant further facts are considered later in this statement. Where a gift is assessable income, it is because it can be shown that some specific provision in the Act makes it taxable.⁹ This means the gift must come within a provision in Part C. Part C includes specific provisions that capture common sources of income relevant to a gift, including an amount derived:
- in connection with employment (s CE 1);
 - from a business (s CB 1);
 - from carrying on or carrying out an undertaking or scheme entered into or devised for the purpose of making a profit (s CB 3); and
 - by a person from undertaking a voluntary activity (s CO 1).
39. Part C includes a “catch-all” provision that includes items of “income” that do not necessarily fall within other specific provisions in Part C. That provision is s CA 1(2) (income under ordinary concepts).
40. The following analyses focus on the factors that the courts have found relevant when considering whether a voluntary payment (including a gift) is assessable income in the recipient’s hands. Each analysis focuses on where one of the specific provisions in Part C mentioned at [38] and [39] above, may apply.

⁸ *G v CIR* [1961] NZLR 994 (SC) at 999.

⁹ *G v CIR* (SC) at 997. See also *Federal Coke Co Pty Ltd v FCT* (1977) 15 ALR 449 (FCA) at 460–461 and *Stedeford v Beloe* [1932] AC 277 (HL) at 390.

Analysis | Tātari – Income from employment

41. The question of when a gift is assessable as employment income arises if the circumstances surrounding the making of the gift include the existence of an employment relationship relevant to the person receiving the gift. That relationship may be relevant whether it is a past, present or future relationship.

Legislation

42. An amount is employment income if it comes within s CE 1(1):

CE 1 Amounts derived in connection with employment

Income

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

43. A gift could potentially come within s CE 1(1) as salary, wages, a bonus or gratuity (para (a)) or as "any other benefit in money" (para (g)). In either case, the gift would need to be an amount derived in connection with the taxpayer's employment or service. The following paragraphs examine each of these elements:
- an "amount" (see [44])
 - "derived" (see [45])
 - "in connection with" (see from [46])
 - the taxpayer's "employment or service" (see from [48]).
44. Section YA 1 defines an "amount" as including "an amount in money's worth". This means that the gift must be in money or be something that can be converted into money (ie, money's worth). Something that can be converted into money is something

capable of “being sold, surrendered, assigned or mortgaged for money or money’s worth”.¹⁰ Part C refers to amounts of income, including income from employment but, generally, non-monetary or in-kind gifts arising in an employment context are considered under the FBT rules.

45. Section BD 3(1) requires income to be allocated to an income year when it is “derived”. Briefly, an employee generally derives income on a cash basis when they receive it (ie, when it is paid). Alternatively, they derive the income when it is credited in their account or is in some other way dealt with in their interest or on their behalf (s BD 3(4)). In a gift context, this means the recipient must have received the gift, or it must have been dealt with for their benefit in some other way.
46. The gift needs to be “in connection with” the relevant employment activity. This means the employment relationship must be the substantial reason for the gift.¹¹ However, there is no requirement to show that, “but for” the employment relationship, the payment would not have arisen. That is, the fact that a recipient of a payment had to be an employee, is not determinative by itself (see [85] below).
47. Also, on some occasions the courts have considered the employment relationship was no more than part of the background facts or a “mere historical connection”. In this situation, the employment connection was not sufficient to mean the voluntary payment was employment income.¹²
48. The phrase “employment or service” used in s CE 1(1) is a “compendious expression”, meaning that the two terms refer to the same concept.¹³ Therefore, the phrase does not refer to anything beyond what “employment” is commonly understood to encompass.
49. Section CE 1 does not specify that the employee’s employer must be the one who pays the employment income. Section YA 1 defines “employer” and “employee” in terms of their relationship with a PAYE income payment (either as payer or recipient of such payments). These terms are not defined in terms of any relationship between the payer and recipient. Although, for the recipient to be an “employee” such a relationship must exist, it may not necessarily be with the payer of a gift. So, the Act could treat a payer of a PAYE income payment (including a gift) to be an employer even though, at law, they have no employment relationship with the recipient of the payment.

¹⁰ *Dawson v CIR* (1978) 8 ATR 605 (SC) per McMullin J at 613.

¹¹ See BR Pub 09/02: Federal Insurance Contributions (FICA) – Fringe Benefit Tax (FBT) Liability, *Tax Information Bulletin* Vol 21, No 4 (June 2009): 2 at 7–8.

¹² See *FCT v Rowe* (1995) 131 ALR 622 (FCA) per Drummond J at 644 and *FCT v Dixon* (1952) 10 ATD 82 (HCA) (*Dixon’s case*) per Dixon CJ and Williams J at 84.

¹³ *Reid v CIR* [1986] 1 NZLR 129 (CA) per Richardson J at 135.

A selection of examples from the courts

50. The Aotearoa New Zealand courts have produced limited examples related to gifts and income, including gifts and employment income. For this reason, it is necessary to look to overseas jurisdictions for guidance. In particular, cases in Australia and the United Kingdom that involve voluntary payments, not necessarily gifts. In some cases, they involve non-cash gifts that may be subject to FBT in Aotearoa New Zealand, rather than giving rise to employment income.
51. However, broadening the inquiry into examples from the courts in this way, establishes a body of cases from which it is possible to discern common themes and factors. A selection of these case examples is discussed next before the common factors are summarised (see from [83] below).

Cases where the courts considered receipts were income

52. The following are some cases where the courts have considered a voluntary payment was employment income.¹⁴

Laidler v Perry (HL): Gift vouchers given to employees

53. *Laidler v Perry* involved gift vouchers a company gave to 2,300 of its employees at Christmas.¹⁵ Each year the gift was enclosed with a letter from the Board of Directors of the company conveying Christmas greetings and expressing the Board's thanks for the recipient's past services and its confidence that the company's good relations with the recipient would continue.
54. The House of Lords concluded the gifts were employment income of the recipients. The main reason for this decision was that the gifts were paid for the purpose of obtaining beneficial results for the company in the future (ie, some future quid pro quo from the recipients) rather than as personal gifts. Such gifts are likely to be subject to FBT in Aotearoa New Zealand if they are not able to be redeemed for cash.

Wright v Boyce (EWCA): Gifts to huntsman

55. *Wright v Boyce* involved cash gifts that a huntsman received under a long-standing custom of providing such gifts following the annual Boxing Day hunt.¹⁶ The court considered the gifts were employment income.

¹⁴ This and later sections generally set out the selected cases in the order of the date of the decisions, from the most recent to the oldest.

¹⁵ *Laidler v Perry (Inspector of Taxes)* [1965] 2 All ER 121 (HL).

¹⁶ *Wright v Boyce (Inspector of Taxes)* [1958] 2 All ER 703 (EWCA).

56. Although personal regard for the huntsman influenced to some extent the making of the gifts, this personal regard had its origins in the way in which the huntsman performed his duties and providing the gifts followed the custom of making such gifts to the huntsman each year. The court held the huntsman received the gifts in his role as huntsman. There was no evidence to show the gifts were made personally to him. The consequence was that the object of the gifts was the huntsman by virtue of his office, though personal consideration may have entered into the matter, particularly in deciding on the amount of the gifts.

***Moorhouse v Dooland* (EWCA): Professional cricket player's receipts from spectator collections**

57. *Moorhouse v Dooland* involved funds collected from spectators at cricket matches and provided to a professional cricket player as contemplated by the player's employment contract.¹⁷ Under the player's employment contract, spectators at matches in which he played could be asked to contribute money to special collections for "meritorious performance". This occurred at 11 out of 25 matches in which the player played in one season. The court considered the funds were employment income.
58. The court considered the fact that the player's employment contract contemplated the collections was particularly important. It also considered that the contract obliged the player to play to his best ability and so receive the collections as a result. The regular occurrence of the collections was another relevant factor.

***Calvert v Wainwright* (EWHC): Gratuities received by a taxi driver**

59. *Calvert v Wainwright* involved customer's tips received by a taxi driver.¹⁸ The driver was employed by a taxi company and the terms of the driver's employment contract had nothing in it on the matter of gifts received from clients.
60. The court considered tips and gratuities received as a reward for services rendered by people other than the driver's employer are employment income "if given in the ordinary way as a reward for services". The court contrasted this situation with gifts made to a person for personal reasons (ie, "mere gifts") "irrespective of and without regard" to the question of whether the driver had rendered any services.
61. In Aotearoa New Zealand, employees should return tips or gratuities received as a reward for services in their annual income tax returns. This applies whether the customer makes them directly to the employee or they are placed in a common pool to be passed on and shared amongst several employees.

¹⁷ *Moorhouse (Inspector of Taxes) v Dooland* [1955] 1 All ER 93 (EWCA).

¹⁸ *Calvert (Inspector of Taxes) v Wainwright* (1947) 27 TC 475 (EWHC).

Weston v Hearn (EWHC): Long-service gifts to employees

62. *Weston v Hearn* involved gifts of fixed-term savings certificates to employees in recognition of their long service.¹⁹ The court considered the gifts were bonuses given for past services and employment income.
63. The court considered that, while the gifts may have been intended to be personal gifts, such an intention cannot make a payment non-assessable if, in fact, the payment is remuneration for services provided.

Mudd v Collins (EWHC): Payment for services outside of employee's usual duties

64. In *Mudd v Collins* the taxpayer was employed as the secretary and a director of a company.²⁰ The taxpayer negotiated the sale of a branch of the company's business for which the company paid him a commission. The taxpayer argued the payment was not employment income on the ground that negotiating the sale was not part of his duties as secretary or as a director. The taxpayer contended, amongst other things, that the payment was a gift.
65. Rowlatt J held the payment was part of the taxpayer's profit from his office and assessable income, saying:²¹

It seems to me quite clear on all the authorities that a voluntary payment, such as this was, does not necessarily thereby cease, by reason of its voluntary character, to be a profit of the office; but the whole point made by Mr. Allen in the argument which he addressed to me, which did not suffer from its shortness because it was extremely clear and good, was that, as this could not be said to be in respect of a duty involved in his secretaryship and directorship, offices which received their own salary for the performance of those duties, therefore it could not be a profit of his office. Now I do not think that is so. It seems to me that if an officer is willing to do something outside the duties of his office, to do more than he is called upon to do by the letter of his bond, and his employer gives him something in that respect, that is a profit; it becomes a profit of his office, which is enlarged a little so as to receive it.

[Emphasis added]

66. On this reasoning, a payment made as a reward for services an employee performs beyond their normal duties will not be a mere gift. It is assessable as employment income as if the employee's normal duties had expanded to include the extra services.

¹⁹ *Weston v Hearn (Inspector of Taxes); Carmouche v Hearn (Inspector of Taxes)* [1943] 2 All ER 421 (EWHC).

²⁰ *Mudd v Collins (Inspector of Taxes)* (1925) 9 TC 297 (EWHC).

²¹ At 300.

***Blakiston v Cooper* (HL): Easter offerings received by vicar**

67. *Blakiston v Cooper* involved Easter cash offerings that parishioners provided to the parish's vicar.²² Providing the Easter offerings to the vicar each year was usual practice, following the written request of the bishop of the diocese. Parishioners did not provide offerings in recognition of any special need or the vicar's personal circumstances.
68. The House of Lords considered the receipts to be income from the vicar's office of employment as vicar, rather than mere gifts to the vicar personally.

Cases where courts considered receipts were not income***Scott v FCT* (HCA): Gift to lawyer from client**

69. *Scott v FCT* involved a gift from a client to their long-serving family lawyer.²³ The court considered that the gift was a genuine gift, insufficiently connected to the services that the lawyer had performed for the client over the years. The lawyer had been fully remunerated for those services at the time. The fact that providing those services prompted the gift was not, by itself, determinative.

***Louisson v C of T* (CA): Payments to former employee serving in armed forces**

70. *Louisson v C of T* involved monthly payments that a former employer made to the taxpayer to make up the difference between the amount of the taxpayer's previous salary and their military pay they received while serving in the armed forces during World War 2.²⁴
71. The court considered the receipts were not employment income from either the taxpayer's former employment or their current employment in the armed forces and were a series of mere gifts. The court considered the payments were not related to any service, employment or something of this nature between the taxpayer and their former employer.
72. The decision in this case on employment income is consistent with the Australian High Court decision in *Dixon's case* involving similar facts.

²² *Blakiston v Cooper (Surveyor of Taxes)* [1909] AC 104 (HL).

²³ *Scott v FCT* (1966) 14 ATD 289 (HCA). See further discussion of this case in relation to income under ordinary concepts from [187].

²⁴ *Louisson v C of T* [1943] NZLR 1 (CA).

***Dixon's case* (HCA): Payments to former employee serving in armed forces**

73. In *Dixon's case* the High Court of Australia considered the income tax treatment of payments made in the same circumstances as those in *Louisson v C of T* (CA). The court considered the payments were not income from employment but were income derived from all sources.²⁵
74. The court accepted that a payment of employment income need not come from the employer.²⁶ However, it had difficulty in agreeing the payments were “in respect of or in relation, directly or indirectly” to any employment. The court considered that merely having a historical employment relationship was not sufficient to meet the provision. It considered that employment income must relate to either some present services or immediately past services where the income arises at the termination of employment – and neither of these conditions arose in this case.

***Hayes v FCT* (HCA): Gift of shares**

75. *Hayes v FCT* (HCA) involved a gift of shares from a person with personal and professional relationships with the taxpayer.²⁷ At various times the taxpayer had been a professional advisor to, an employee of, or a director or shareholder of a company owned by the person making the gift. The company owner sold all their interests in their company to another company and received shares in the other company as consideration. They then gifted some of the other company's shares to various people, including the taxpayer.
76. The court noted that the taxpayer was fully remunerated for any services at the time they performed them. For the gift to be considered employment income, there needed to be “a real relation between the receipt and the employment or services”, which the court concluded did not exist in this case.

***Benyon v Thorpe* (EWHC): Voluntary pension payments to retired employee**

77. *Benyon v Thorpe* involved voluntary pension payments that a company paid to a retired former employee.²⁸ The court concluded the payments were a series of mere gifts and the former employment relationship was just a part of the background facts.
78. Although the gift was motivated by a past employment relationship, the employment relationship was not a substantial reason for the payments. Also, the former employee had been fully remunerated for any past employment services at that time.

²⁵ See further discussion of this case in relation to income under ordinary concepts from [173].

²⁶ At 85.

²⁷ See further discussion of this case in relation to income under ordinary concepts from [190].

²⁸ *Benyon (Inspector of Taxes) v Thorpe* (1928) 14 TC 1 (EWHC).

Seymour v Reed (HL): Professional cricket player's receipts from benefit match

79. *Seymour v Reed* involved the proceeds of a benefit cricket match provided to a professional cricket player. The House of Lords considered the proceeds were a personal gift to the player and not employment income.
80. The court considered it was relevant that the holding of benefit matches was at the absolute discretion of the club and were usually a one-off affair to provide funds for a player's retirement. The match proceeds included collections from spectators being funds they provided as appreciation of the player's personal qualities and any club contribution could be seen in the same light.

Cowan v Seymour (EWCA): Voluntary payments on winding up of company

81. In *Cowan v Seymour*, shareholders made a voluntary cash payment to the company's former secretary out of the surplus that came from winding up the company.²⁹ The taxpayer had acted as secretary and liquidator for the company without reward. The court considered the payment from the shareholders was not employment income. It was a mere gift.
82. It was relevant that another person received an equal amount from the shareholders even though they had not provided equal services to the company. The court also considered it relevant that the taxpayer's employment relationship with the company had stopped by the time of the payment and the shareholders' resolution making the payment was expressed in terms of a personal gift.

Summary of the relevant factors to consider

83. From these cases and others, several common factors the courts have considered relevant are evident. First, some common factors support a conclusion that a gift is employment income:
 - The amount of the payment reflects the extent of the services the taxpayer has provided to which the payment can be related.³⁰
 - The payment is made as a quid pro quo in the hope of future services from the employee or to encourage further efforts.³¹

²⁹ *Cowan v Seymour (Inspector of Taxes)* [1920] 1 KB 500 (EWCA).

³⁰ *Cowan v Seymour* (EWCA) per Younger LJ at 517. See also *Moore v Griffiths (Inspector of Taxes)* [1972] 3 All ER 399 (EWHC) at 410–411.

³¹ *Laidler v Perry* (HL) per Lord Reid at 125, Lord Morris of Borth-Y-Gest at 127 and Lord Donovan at 128, *Seymour v Reed* (HL) per Viscount Cave LC at 297.

- The payment is a product of, or contemplated by, the terms or implied terms of the recipient's employment agreement.³² However, a payment made under the terms of an agreement separate from the employment agreement may still be treated as employment income.³³
- The payment had recurred or has a foreseeable element of recurrence, rather than being a one-off payment.³⁴
- The employee's services to which the payment can be related are commonly within the range of duties expected of the employee or the range of activities that the employer carries on.³⁵ However, if an employee willingly does something beyond their usual duties and is paid for that, their employment duties are enlarged to encompass it.³⁶
- Such payments (including tips or gratuities) are expected or asked for or are commonplace as a matter of practice in the occupation, profession or industry.³⁷
- The payment is one commonly provided to the recipient, not as a personal gift, but because they are the employee that is the current holder of an office (ie, they hold a position or office that has a degree of continuance and an independent existence from them personally).³⁸

84. Other common factors support a conclusion that the gift is not employment income:

- The payer expressed the payment in terms of a mere personal gift rather than as consideration for services the taxpayer had provided or would provide.³⁹ However, the motives of the payer, while relevant, are seldom determinative because the test is objective, not subjective.⁴⁰ Even where the payer's intention

³² *Moorhouse v Dooland* (EWCA) per Evershed MR at 97, *Seymour v Reed* (HL) per Viscount Cave LC at 297. See also *Kelly v FCT* (1985) 80 FLR 155 (WASC) at 161 and *Corbett v Duff*; *Dale v Duff*; *Freebery v Abbott* [1941] 1 All ER 512 (EWHC) at 514.

³³ See *Clayton (Inspector of Taxes) v Gothorp* [1971] 2 All ER 1311 (EWHC).

³⁴ *Moorhouse v Dooland* (EWCA) per Jenkins LJ at 104 and *Seymour v Reed* (HL) per Viscount Cave LC at 297 and Lord Phillimore at 303. See also *Moore v Griffiths* (EWHC) at 411.

³⁵ See *Naismith v CIR* (1981) 5 NZTC 61,046 (HC) at 61,049 and 61,051 and *Case 18/95* 95 ATC 208 (AAT) at [11] and [46].

³⁶ *Mudd v Collins* (EWHC) at 300.

³⁷ *Scott v FCT* (HCA) at 293 and *Calvert v Wainwright* (EWHC) at 478. See also *Corbett v Duff* (EWHC) at 514, *Davis (Inspector of Taxes) v Harrison* [1927] All ER Rep 743 (EWHC) at 746–747 and *Moore v Griffiths* (EWHC) at 411.

³⁸ *Blakiston v Cooper* (HL) and *Wright v Boyce* (EWCA). See also *Herbert v McQuade* [1902] 2 KB (EWCA).

³⁹ *Cowan v Seymour* (EWCA) per Younger LJ at 517. See also *Moore v Griffiths* (EWHC) at 411 and *Bridges (Inspector of Taxes) v Hewitt*; *Bridges (Inspector of Taxes) v Bearsley* [1956] 3 All ER 789 (EWCA) at 798.

⁴⁰ *Hayes v FCT* (HCA) at 72–73. See also *FCT v Blake* 84 ATC 4661 (QSC) at 4664.

in making the payment is to make a gift, the payment may still be employment income. Stating such an intention as the reason for making the payment does not alter this outcome.⁴¹

- The recipient of the payment has already been fully remunerated for any employment services they provided to which the payment is related.⁴²
- The employment relationship has ended at the time of the payment and is unlikely to resume.⁴³ However, a payment may be employment income where it is in connection with a past, present or future employment relationship.⁴⁴
- The taxpayer does not have an employment relationship with the person making the payment.⁴⁵ However, in some circumstances, a payment may be employment income even though the recipient has no employment relationship with the person making the payment.⁴⁶

85. Finally, the following are some factors that are not necessarily relevant to the issue:

- The employment is unpaid.⁴⁷
- The recipient of the payment had to be an employee to be eligible for the payment.⁴⁸

⁴¹ *Weston v Hearn* (EWHC) at 422.

⁴² *Scott v FCT* (HCA) at 291, *Hayes v FCT* (HCA) at 70–71 and *Benyon v Thorpe* (EWHC) at 14. See also *Naismith v CIR* (HC) at 61,051, *Case 18/95* (AAT) at [44] and *Hochstrasser (Inspector of Taxes) v Mayes* [1959] 3 All ER 817 (HL) per Viscount Simonds at 822, Lord Radcliffe at 823 and Lord Cohen at 825.

⁴³ *Louisson v C of T* (CA) per Myers CJ and Northcroft J at 9, *Cowan v Seymour* (EWCA) per Lord Sterndale at 508–509, 510 and Aitkin LJ at 511–512. See also *FCT v Rowe* (FCA) per Burchett J at 635 and Drummond J at 644 and *Moore v Griffiths* (EWHC) at 410–411.

⁴⁴ See *Clayton v Gothorp* (EWHC) at 1320, *Louisson v C of T* (CA), *Hayes v FCT* (HCA), *Laidler v Perry* (HL), *Bridges v Bearsley* (EWCA) and *Weston v Hearn* (EWHC).

⁴⁵ *Cowan v Seymour* (EWCA) per Lord Sterndale at 509.

⁴⁶ *Dixon's case* (HCA) per Dixon CJ and Williams J at 85, *Calvert v Wainwright* (EWHC) at 477. See also *FCT v Rowe* (FCA) per Drummond J at 643 and *Kelly v FCT* (WASC).

⁴⁷ *Cowan v Seymour* (EWCA) per Lord Sterndale at 508–509.

⁴⁸ See *Case 18/95* (AAT) at [46], *Clayton v Gothorp* (EWHC) at 1320, *Pritchard (Inspector of Taxes) v Arundale* [1971] 3 All ER 1018 (EWHC) at 1019 and *Hochstrasser v Mayes* (HL) per Lord Radcliffe at 823.

Example | Taurira

Taurira | Example 1: Employment – gifts from employer and staff to current employee

A dealer in fine arts employs Aroha as the company accountant. Aroha has recently completed 30 years' service with the company. The Board of Directors of the company resolved to recognise this milestone. At a celebratory morning tea for all staff, the chair of the Board acknowledged Aroha's diligence and her dedication to the company over the last three decades and expressed the Board's desire that such devotion would continue into future decades. She presented Aroha with a gift of a framed limited-edition print.

The gift in recognition of long service was voluntarily made by the company. Aroha's employment contract does not contemplate such gifts and the company had no other obligation to make it.

Aroha's colleagues like and respect her. Unprompted by the company, they took the opportunity of the special morning tea to present her with a card signed by all the staff and a gift of cash. The cash gift is the proceeds of a collection among other employees of the company. The managing director and chair of the Board also contributed to this collection.

These events have the following income tax implications:

- As a one-off non-monetary gift, the value of the frame print is not employment income in Aroha's hands but as it is related to her employment it may be a benefit that is subject to the fringe benefit tax rules.
- The proceeds of the staff collection (including those from the directors acting in their own capacities) are not assessable income in Aroha's hands. Although the event recognising her long-service prompted the collection and she only received it because she was an employee, the gift is the sum of many mere gifts by her colleagues, which they made out of personal affection, esteem and regard and not as a payment for services.

Analysis | Tātari – Income from a business or a profit-making undertaking or scheme

86. The question of when a gift can be assessable income from a business or profit-making activity arises if the circumstances surrounding the making of the gift include the

existence of a business or a profit-making activity relevant to the person receiving the gift.

Legislation

87. An amount is income if it comes within s CB 1:

CB 1 Amounts derived from business

Income

- (1) An amount that a person derives from a business is income of the person.

Exclusion

- (2) Subsection (1) does not apply to an amount that is of a capital nature.

88. Under s CB 1 amounts derived from a “business” are income. A “business” is relevantly defined in s YA 1 as:

business—

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

...

89. An amount is also income if it comes within s CB 3:

CB 3 Profit-making undertaking or scheme

An amount that a person derives from carrying on or carrying out an undertaking or scheme entered into or devised for the purpose of making a profit is income of the person.

90. Under s CB 3, an amount derived from carrying on or carrying out an undertaking or scheme entered into or devised for the purpose of making a profit is assessable income. As mentioned at [44] an “amount” is defined as including “an amount in money’s worth” meaning income under ss CB 1 or CB 3 can include non-cash amounts.
91. An undertaking or scheme is a plan of action or enterprise directed at profit that is something less than a business to which s CB 1 applies. In either case, the activity must be carried on for a profit, which means much the same issues arise, so this statement considers the two provisions together.
92. All the cases show that, depending on the circumstances, gifts and other voluntary payments made to a recipient that is carrying on a business activity can have the character of income, despite the voluntary nature of the payment. A selection of case

examples is discussed next before any common factors considered by the courts are summarised (see from [138] below).

A selection of examples from the courts

93. There are fewer examples from the courts on gifts and business or profit-making activities in comparison with the previous issue on employment income. Mostly, cases involve business activities and voluntary payments, not necessarily gifts. Some examples are discussed next.

Cases where courts considered receipts were income

FCT v Stone (HCA): Prizes and grants received by a professional athlete

94. *FCT v Stone* involved a professional athlete who sought to exclude prizes and grant monies from the income she gained from athletic activities on the basis they were in the nature of gifts.⁴⁹ The court held the grants were business income because they were a financial product of the taxpayer's athletics activities where those activities were a business. The court said:

61. ... But gratuitous payments may form part of a taxpayer's assessable income. The grant made by QAS, though not recurrent, was paid in recognition of the taxpayer's athletic success in achieving selection for a national athletics team. It was as much a financial product of her athletics activities as her winning a prize in competition, or a sponsor agreeing to pay her to have her endorse the sponsor's product.

95. The court considered it was the business activity that supplied the "unifying ingredient" that made these receipts income, whereas they would not have the character of income when considered individually:

106. ... Prizes, in particular, depend upon providence, are usually intermittent and ordinarily lack periodicity and regularity. They depend upon so many chance factors that they would not normally take on the character of "income" without some additional unifying ingredient.

107. It is the interposition of the postulate of the taxpayer's "business" that affords that additional ingredient that helps to link the several receipts and to colour them — each of them reinforcing the conclusion of the character of "income" that might not otherwise have been drawn reviewing them individually.

96. From this, the court concluded that to decide the question of whether a receipt, including a voluntary payment, is business income it is necessary to consider whether

⁴⁹ *FCT v Stone* 2005 ATC 4,234 (HCA).

the receipt is “a financial product of” the business activity. If so, gifts and other voluntary payments can be considered business income even though individually they would not have the character of income.

McGowan v Brown and Cousins (EWHC): Voluntary payment from third party received by real estate agency

97. In *McGowan v Brown and Cousins*, the taxpayer company ran a real estate agency business.⁵⁰ The taxpayer negotiated the purchase of a site for a building company to develop. The taxpayer did not receive adequate remuneration for this work because it expected the building company would engage it later for the more lucrative work of selling the developed properties. However, the building company on-sold the undeveloped site to another developer who refused to engage the taxpayer. However, to preserve the other developer’s business standing and image the other developer agreed to make a voluntary payment to the taxpayer. The amount of the payment was increased after the taxpayer protested at the amount first proposed.
98. The taxpayer argued the payment was not the direct product of the taxpayer’s business activities because it was a voluntary payment from someone that was not a client. The Crown argued the payment was compensation for the loss of an opportunity to make future profits and, therefore, was business income.
99. Templeman J considered whether the payment could be attributed to specific work the taxpayer carried out. He stated:⁵¹

As a result of all the authorities it seems to me that the broad line of distinction, so far as taxability on this kind of voluntary gift is concerned, is a distinction which takes its origin in the question of whether the payment is attributable to specific work carried out by the recipient. If work is carried out then the payment, although voluntary, is made because payment has been earned. If the payment does not relate to specific past work, then the payment is made, not because payment has been earned by work, but because the payment is intended for a deserving recipient.

100. In conclusion, Templeman J considered the payment was earned:⁵²

In the present case it seems to me that the gift was plainly earned and not merely deserved. It was earned because the gift was compensation for the loss of an opportunity to earn selling profits and the taxpayers were morally entitled to that opportunity because their past services as purchasing agents had been inadequately remunerated. The gift was not unexpected and was not unsolicited. The gift was in fact,

⁵⁰ *McGowan (Inspector of Taxes) v Brown and Cousins (trading as Stuart Edwards)* [1977] 3 All ER 844 (EWHC).

⁵¹ At 850–851.

⁵² At 852.

although via [the other developer], ultimately referable to the work which the taxpayers carried out in the acquisition of the site. ...

In my judgment, the important question is not who pays the gift but whether the estate agents had earned the gift by virtue of work which had been carried out or whether they had deserved the gift. Earning in this sense cannot mean a legal obligation because it is the nature of a gift that there is no legal obligation. If they earned a gift, then the gift is taxable, no matter who pays it. On the other hand, if they deserved a gift then the gift is not taxable, no matter who paid it. Once one comes to the conclusion that in the present case the taxpayers earned the gift, they were entitled to look to somebody for some remuneration for their work which had been inadequately paid for in the first instance, then it follows that the £2,500 is taxable... [Emphasis added]

101. On this reasoning, Templeman J's criterion was to decide if the gift was earned or deserved. A gift earned is assessable as business income while a gift merely deserved is not. Also, earning a payment did not require a legal obligation for the recipient to be paid for the work it had carried out. In this case, the taxpayer had earned the gift because of its earlier work for which it was not adequately remunerated at the time and, therefore, the receipt was business income. Another factor that the court considered relevant was that the taxpayer expected and asked for the payment.

***Commissioners of Inland Revenue v Falkirk Ice Rink Ltd (Ct Sess (Scotland))*: Gift to operator of commercial ice-rink**

102. In *Commissioners of Inland Revenue v Falkirk Ice Rink Ltd* the taxpayer owned and operated an ice rink on a commercial basis, which included providing facilities for playing curling.⁵³ The taxpayer leased rooms at the ice rink to a curling club and incurred the additional costs of ensuring the ice was of sufficient quality for the sport. Club members were entitled to discounted admission fees to the facilities.
103. Members of the curling club made a gift of £1,500 to the taxpayer for the purpose of helping the taxpayer to continue to provide, and to improve, the curling facilities available to the club. They imposed no obligation on the taxpayer to do so.
104. The court held that the gift was income arising as a product of the taxpayer carrying on their business. Lord President Emslie said:⁵⁴

In spite of the fact that there was no agreement between the Respondent and the club requiring the club to make any such payment to the Respondent and that the payment was not in respect of services rendered by the Respondent to the club in the past and that the Respondent gave no undertaking in return for the donation, I am of opinion that

⁵³ *Commissioners of Inland Revenue v Falkirk Ice Rink Ltd* (1975) 51 TC 42 (Ct Sess (Scotland)).

⁵⁴ At 49–50.

the payment was made in order that the Respondent might use it in their business and that in substance and in form it was a payment made to a trading company artificially to supplement its trading revenue from curling and in order, in the interests of the club and its members, to preserve the Respondent's ability to continue to provide curling facilities in the future. In its quality and nature this payment was of a business nature. It was accordingly a trading receipt in the hands of the Respondent and the question of law should be answered in the negative.

105. Lord Avonside considered that the club made the payment in its own interests in view of the close connection between the club and the continued existence of the trading activities of the recipient.⁵⁵

In my opinion, in this case, the payment was made by the club in the interest of its members in view of the close connection between the continued existence of activities of the club and the continued existence of the trade of the Respondent and, in particular, in the hope and expectation that the payment of £1,500 would enable or encourage the Respondent to continue to carry on one of its trading activities, the provision of ice for curling, which was proving at the date of payment to be unprofitable. The payment was made because it was believed that there was danger of the Respondent ceasing to carry on that trading activity and its purpose clearly was designed to supplement the trading receipts derived by the Respondent from that branch of its trade and to assist in enabling the Respondent to carry on that branch of its trade to its advantage.

106. The court considered the voluntary nature of the payment “was neutral”. That is, it carried no weight in deciding whether the payment was, or was not, business income. When it considered the whole of the relevant facts and the circumstances of the making of the payment, however, the court concluded that the gift was business income. The following specific facts were influential:

- The activities of the club and the business activities were closely connected. Notably, the club or its members were both customers and potential customers of the taxpayer for the purpose of curling.
- The taxpayer was making a loss on supplying curling facilities.
- The club was concerned that the taxpayer would not continue to supply curling facilities in the absence of a gift.
- The circumstances showed the club made the gift to a trading company to supplement the company's trading revenue that it gained from providing curling facilities. Its purpose in doing so was to help the trading company to continue to provide those facilities.
- Business income could arise although the payer was not making the payment for services that the recipient provided to the payer.

⁵⁵ At 56.

***British Commonwealth International Newsfilm Agency Ltd v Mahany* (HL): Promoters' contribution to a company**

107. In *British Commonwealth International Newsfilm Agency Ltd v Mahany*, the taxpayer was a company that the Rank Organisation and the BBC formed (together 'the promoters').⁵⁶ They formed the company for the non-commercial purpose of supplying visual news suitable for British viewers at a time when America was the only source of visual news.
108. As part of the process of forming the company, a trust deed was established to run for an initial 5 years and then at will. The deed included various matters governing the taxpayer's operations. These arrangements catered for the expectation that the taxpayer's early activities would not be profitable. In anticipation of this, the promoters agreed that each would pay to the company an additional subscription equal to one-half of the amount of the deficit.
109. The case concerned one such payment the Rank Organisation made. The taxpayer company considered the payment was not a trade receipt and emphasised that it was paid without conditions or stipulations or in return for any consideration.
110. The House of Lords decided that the payment was business income. It considered the following facts were among those supporting this view:
- The payer and the taxpayer were both traders.
 - The taxpayer could not continue to carry on its business without the payment.
 - The taxpayer was not carrying on a charitable venture.
 - Although the aim of the promoters was not commercial gain, the trust deed had an expiry date, and the parties could modify it.

***G v CIR* (SC): Individual taxpayer's evangelical activities were a business**

111. In *G v CIR*, the taxpayer was wholly engaged in evangelical activity and supported himself and his family from the voluntary and unsolicited gifts that the activity generated.
112. Despite this finding, the court did distinguish some gifts on the basis that it considered them to be personal gifts made purely as a mark of affection, esteem or respect. The court said:⁵⁷

⁵⁶ *British Commonwealth International Newsfilm Agency Ltd v Mahany* (HM Inspector of Taxes) [1963] 1 All ER 88 (HL).

⁵⁷ At 999.

Though I have held that the appellant was carrying on a business for pecuniary profit, it does not follow that every gift received by him was assessable. Each gift must be considered on its own facts, the test being whether on the one hand the gift was made in relation to the activities of the appellant of the income producing character that I have discussed, or whether it was a personal gift made purely as a mark of affection, esteem or respect.

113. In this respect the court was expressing the same test discussed in the previous section that arises when an individual receives gifts in the context of an employment relationship. Accordingly, in the Commissioner's view, where the taxpayer is an individual and is undertaking a business activity, the question as to whether a gift is income involves much the same considerations as those that arise where the taxpayer is an employee. This includes considering whether the gift was made in relation to the activities of the recipient or as a mark of personal affection, esteem or respect (ie, is a "mere gift").

The Squatting Investment Co Ltd v FCT (HCA) and FCT v Squatting Investment Co Ltd (PC): A wool grower receives a lump-sum

114. In *FCT v Squatting Investment Co Ltd* the High Court of Australia considered that a single lump-sum receipt by the company was not income in the hands of the taxpayer company.⁵⁸ It received the lump-sum as a result of a series of events that originated in arrangements made during World War 2 between the United Kingdom and Commonwealth countries, including Australia. Under these arrangements, the United Kingdom bought each country's export wool clip at a fixed rate.
115. The taxpayer was involved in the business of wool growing and had wool subject to these arrangements. At the end of the war, the arrangement was unwound generating a surplus that the Australian government voluntarily passed back to wool growers. The majority of the High Court considered the portion of the surplus the taxpayer received was not assessable to the taxpayer because it was nothing more than a gift.
116. The Federal Commissioner of Taxation successfully appealed to the Privy Council.⁵⁹ The Privy Council determined the receipt was income under s 25(1)(a) of the Income Tax Assessment Act 1936 (Cth) (the Australian equivalent of s CA 1(2) (income under ordinary concepts)). The Privy Council said:⁶⁰

It is well settled that a voluntary payment may be subject to income tax in the hands of the recipient. ... What, then, is the nature of the payment now in question, and in what capacity did the respondents receive it? Having regard to the whole history of the matter, beginning with the Wool Purchase Arrangement and the

⁵⁸ *The Squatting Investment Co Ltd v FCT* (1953) 10 ATD 126 (HCA).

⁵⁹ *FCT v Squatting Investment Co Ltd* (1954) 10 ATD 361 (PC).

⁶⁰ At 370–371.

Regulations of 1939, continuing with the submission of wool for appraisalment by the respondents and the classification of that wool as participating wool, and ending with the payment of the sum in question pursuant to s. 7 of the Act of 1948, **their Lordships come to the conclusion that the payment must be regarded as an additional payment voluntarily made to the respondents for wool supplied** for appraisalment or, if the compulsory acquisition can properly be described as a sale, a voluntary addition made by the Commonwealth to the purchase price of the wool. ...

The respondents were in business as wool suppliers at all material times, and the payment was made to them, not because of any personal qualities, but because they, among others, supplied participating wool. They supplied the wool in the course of their trade and this further payment was made to them because they supplied it. In the present case the respondents were still trading when the payment was made. **It was in their hands a trade receipt of an income nature.** [Emphasis added]

117. The Federal Commissioner of Taxation had argued in the alternative that the payment was income under s 26(a) (the Australian equivalent of s CB 3 (profit-making undertaking or scheme)). The Privy Council, having found the payment was income under s 25(1)(a), did not address s 26(a). However, the Privy Council considered the payment was a trade receipt, so it seems likely that if it had found the receipt was not income under s 25, the Federal Commissioner of Taxation may have succeeded with the alternative argument.
118. As this case shows, the Privy Council considered it was well settled that a voluntary payment can be subject to income tax in the recipient's hands. It also determined the matter by considering the whole of the circumstances relating to the payment, including the history and background under which the payment arose, the nature of the payment and the capacity in which the taxpayer received it.

Cases where courts considered receipts were not income

Murray v Goodhews (EWCA): Voluntary payment received following termination of tenancies

119. In *Murray v Goodhews*, the taxpayer company carried on the business of running licensed premises comprising several public houses with restaurants.⁶¹ It held most of these premises under tied tenancies with a brewery company. The brewery company decided to terminate some of the leases within the terms of the tenancy agreements. It made several unsolicited voluntary payments after terminating the leases, even though it was not under any obligation to do so.

⁶¹ *Murray (Inspector of Taxes) v Goodhews* [1978] 2 All ER 40 (EWCA).

120. The court held the payments to the taxpayer were not trading receipts. Buckley LJ considered that certain facts were crucial to this conclusion:⁶²
- The taxpayer was unaware of how the brewery company calculated the amounts of the payments.
 - The brewery company and the taxpayer undertook no correspondence, bargaining or negotiations over the payments.
 - The amounts of the payments had no connection with any profits earned by the taxpayer's businesses run from the properties where the leases were terminated.
 - The calculation of the payment was not linked to any future trading relations between the brewery company and the taxpayer. The parties continued to have an ongoing business connection in respect of other properties.
121. In assessing the character of a voluntary payment, Buckley LJ considered:⁶³
- All the relevant circumstances must be considered.
 - Each case must be considered on its own facts.
 - Whether an amount is income depends on the nature of the receipt in the recipient's hands.
 - The purpose for which the payer makes the payment and the terms on which they made the payment are relevant considerations.
 - The motive of the payer is only significant to the extent that it bears, if at all, on the character of the payment in the recipient's hands.

Federal Coke Co Pty Ltd v FCT (FCA): Receipt from cancellation of supply contract

122. In *Federal Coke Co Pty Ltd v FCT* the taxpayer received payments following the cancellation of a supply contract between the taxpayer's subsidiary and a third-party. The court considered the payments were "broadly in the nature of a gift being a sum received without compensation".⁶⁴ The court concluded the payments were not business income as they were not "a product of" the taxpayer's own business or income producing activities.⁶⁵
123. The court also said that where the recipient of a payment provides consideration for the receipt, that consideration will be the "touchstone" for ascertaining whether the receipt is on revenue account or not. However, when there is no consideration, the

⁶² At 42.

⁶³ At 46.

⁶⁴ At 460.

⁶⁵ At 461.

“how and why” of the receipt may reveal the matter, particularly if there is a consensus between the payer and recipient. The motive or intention of the payer alone is not determinative but, depending on the circumstances, may have some significance.⁶⁶

Simpson v John Reynolds (Insurances) Ltd (EWCA): Voluntary payment received following termination of business relationship

124. In *Simpson v John Reynolds & Co (Insurances) Ltd* a company was operating the business of an insurance broker.⁶⁷ A long-standing client company had been forced to end its business relationship with the brokerage when another company took over the client company. The client company paid the brokerage a gift of £5,000 in five annual instalments.

125. The Crown argued the receipts were trading receipts because, among other things, the taxpayer was a limited liability company and the client company had not made the gift merely out of personal affection or regard. The court concluded that the payments were not business income based on a number of relevant factors summarised at [129] below. In reaching that conclusion, Walton J discounted to some degree the fact that the gift was made to a company, saying:⁶⁸

Counsel for the Crown, however, relied on six indicia which he said showed that [the gifts] were trading receipts: ... (6) the fact that the gift was to a limited liability company. ...

So far as (6) is concerned, the fact that the gift was to a limited liability company, the force of that, which in other circumstances I can readily envisage might be very considerable, is removed when once it is understood that this company was, in popular parlance, Mr Shaw's family company.

126. Accordingly, Walton J at least does not discount entirely the possibility that a family-owned company might receive a gift that the payer makes out of personal affection or respect for the individual owners of the company.

127. Also, Russell LJ rejected as a general proposition that where the taxpayer's business continued and a gift arose because of a business connection, the gift must be business income because the payer did not make it merely out of personal affection or regard.⁶⁹

The Crown contended, as I understand it, as a general proposition, that in the case of a business connection that was a trade connection, and the trade of the donee as a whole continued with persons other than the donor, a gift made for the reasons given in the present case must be caught; for it was not made merely out of personal affection or

⁶⁶ At 472–474.

⁶⁷ *Simpson (Inspector of Taxes) v John Reynolds & Co (Insurances) Ltd* [1975] 2 All ER 88 (EWCA).

⁶⁸ At 92–93.

⁶⁹ At 91.

regard. Or, the Crown submitted, that viewed as a whole the circumstances of this case showed that this sum did accrue or arise from the trade. For my part, I am unable to accept this.

128. The fact that the company was a family company was just one of several relevant factors or components that the court and Walton J, in particular, considered. The case does suggest, however, that a gift to a non-individual could be considered a “mere gift”.
129. Primarily, the court found that the gifts in this case were not business income based on the following factors:
- The payment was unsolicited.
 - The payment was made after a business connection had ended.
 - The payment was made in recognition of past services that had been fully remunerated for at the time.
 - The payment was made as consolation for the fact that the recipient would provide no future services.
 - There was no suggestion that the business connection might resume in the future.

***Epping Forest* (HL): Contributions to a charitable fund**

130. The *Epping Forest* case involved a charitable fund set up under the Epping Forest Act 1878.⁷⁰ The City of London Corporation regulated and managed the fund in its capacity as the Conservators of Epping Forest (the conservators). The Epping Forest Act 1878 also required the City of London Corporation, in its own capacity (the corporation), to contribute such amounts as were necessary to the income of the fund.
131. The case concerned the question of whether the payments the corporation made to the conservators were “annual payments” under Case III of Schedule D of the Income Tax Act 1918. If so, the conservators were entitled to a tax refund for the payments. Other payments Schedule D included as assessable income were amounts from carrying on a trade (Case I) and income from carrying on an enterprise analogous to a trade (Case VI). If the payments came under Case I or Case VI as trade or trade-like receipts, the taxpayer was not entitled to a tax refund.
132. The court analysed the nature of the payments with reference to the circumstances of how and why the payments arose. For instance, Lord Normand canvassed in detail the history leading to the passing of the Epping Forest Act 1878, analysed provisions of

⁷⁰ *Inland Revenue Commissioners v City of London Corporation (as the Conservators of Epping Forest)* (1953) 1 All ER 1075 (HL) (*Epping Forest*).

that Act and considered the case largely hinged on the proper construction of that Act.⁷¹

133. Lord Reid considered that the payments were not trade receipts because no consideration passed from the conservators to the corporation. Lord Reid stated:⁷²

But, in my judgment, the payments in this case are not trading receipts in the hands of the conservators, even if they are carrying on a trade or something in the nature of a trade. Trading receipts are generally received in return for something done or provided by the recipient for the payer, but, as I have said, that does not appear to me to be the case here.

134. The Crown submitted that, even if the court found that the conservators had not supplied services to the corporation, the payments could still be trade receipts. In this regard, the Crown cited two cases that it considered as decisive in its favour.⁷³ Both cases involved subsidy payments made to commercial traders. Neither taxpayer in those cases was a charity and there was no consideration of annual payments under Case III. Both Lord Normand and Lord Reid distinguished these cases on their facts. After reviewing the cases, Lord Reid contrasted them with the facts of the case before him, saying:⁷⁴

In my opinion, the payments in the present case were not of a business nature—they were of a benevolent nature—and they were not primarily made to assist in carrying on any trade or business—they were made primarily to achieve a public benefit of a charitable nature.

135. Lord Reid also considered that, if the conservators, as a charity, were subject to tax on the basis that all receipts were trading receipts, regardless of whether consideration was provided to the payer (ie, including subscriptions or gifts, as contended by the Crown) anomalous results could arise. He said:⁷⁵

If the appellants are right, the result would be far-reaching and, in my opinion, anomalous. Many, if not all, subscriptions to a charity which achieves its charitable object by trading could properly be described as intended to supplement its trading receipts, or to assist it in carrying on its trade, but if that were the sole criterion, the result would be an unreal distinction between charities which do not trade and those which do:

⁷¹ At 1,077 and 1,083.

⁷² At 1,087.

⁷³ *Lincolnshire Sugar Co Ltd v Smart* [1937] 1 All ER 413 (HL) and *Pontypridd & Rhondda Joint Water Board v Ostime* [1946] 1 All ER 668 (HL).

⁷⁴ At 1,089.

⁷⁵ At 1,089.

136. Lord Reid considered that, where a charity obtained its charitable object by trading, any gift the charity received might be seen as supplementing its trading receipts. But, if the sole criterion were the mere presence of a trading activity, the same receipt would be treated differently in the hands of a charity, depending on whether the charity carried on a trade or trade-like activity. For this reason, where a charity trades to achieve its charitable object receives a gift, that gift is not necessarily business income simply because a business activity exists.
137. The court considered the payments were not business income. It reached this conclusion because not all receipts of a business are necessarily income from that activity, rather than because a charity could not derive business income. This is particularly so where the recipient provides no services or consideration to the payer.

Summary of the relevant factors to consider

138. To decide whether a gift is income from a business or profit-making activity carried on by the recipient, it is necessary to consider all the relevant circumstances.⁷⁶ Each gift must be considered on its own facts.⁷⁷
139. It is relevant to consider whether the gift was made as a mark of affection, esteem or respect for an individual:
- If the taxpayer that is carrying on a business or profit-making activity is an individual and the payer makes the gift as a mark of affection, esteem or respect for that individual (ie, it is a “mere gift”), the gift is not income.⁷⁸
 - Where a non-individual carrying on a business or profit-making activity receives a gift, that fact does not necessarily exclude them from receiving a “mere gift”.⁷⁹
140. If there is no consideration involved that can be used to decide the character of the receipt, as usually arises with gifts, the collective understanding of the parties as to how and why the payment was made may be determinative.⁸⁰ However, the motive of the payer is relevant, but only to the extent that it bears on the character of the payment in the recipient’s hands.⁸¹

⁷⁶ *Murray v Goodhews* (EWCA) per Buckley LJ at 46, *G v CIR* (SC) at 1,001, *FCT v Stone* (HCA) per Kirby J at 4,251, *Federal Coke Co Pty Ltd v FCT* (FCA) per Brennan J at 472, *FCT v Squatting Investment Co Ltd* (PC) at 371 and *Commissioners of Inland Revenue v Falkirk Ice Rink Ltd* (Ct Sess (Scotland)) per Lord President Emslie at 47–48.

⁷⁷ *G v CIR* (SC) at 999.

⁷⁸ *G v CIR* (SC) at 1,000, *McGowan v Brown and Cousins* (EWHC) at 850–851.

⁷⁹ *Simpson v John Reynolds & Co (Insurances) Ltd* (EWCA) per Walton J at 93.

⁸⁰ *Federal Coke Co Pty Ltd v FCT* (FCA) per Brennan J at 472–474.

⁸¹ *Murray v Goodhews* (EWCA) at 46.

141. The courts have referred to the relevant concern in this context in terms of considering whether the receipt is:
- in relation to the activities of the taxpayer of an income-producing character;⁸² or
 - a financial product of that activity.⁸³
142. The following factors support a conclusion that a gift is business income or income from a profit-making activity:⁸⁴
- The payment is made with the intent of benefiting the business or activity.
 - The payer has an interest in the recipient continuing the business or activity they are carrying out.
 - The payer and recipient are both carrying on a business or profit-making activity.
 - The recipient could not continue to carry on the activity without the payment.
 - The recipient is not a charity (see, however, *Epping Forest* (HL), and the view that the recipient's status as a charity may be a neutral factor).
143. The following factors support the view that a gift is not business income or income from a profit-making activity:⁸⁵
- The gift is unexpected or unsolicited.
 - The gift is made in recognition of past services that had been fully remunerated for at the time.
 - The gift is made in recognition of, or as consolation for, the severance of a business connection that has no prospect of resuming. However, where the payer promises a gift while a business connection is current and that gift would otherwise be assessable income, it does not cease to be assessable income solely because it is paid after the connection is severed.
 - The business or activity ended at the time of the payment.
 - The recipient is unaware of how the payer calculated the amount of the gift.
 - The calculation of the payment is not linked to any past or future trading relations between the parties.
 - The parties undertook no correspondence, bargaining or negotiations about the payment.

⁸² *G v CIR* (SC) at 999.

⁸³ *FCT v Stone* (HCA) at [61].

⁸⁴ *Commissioners of Inland Revenue v Falkirk Ice Rink Ltd* (Ct Sess (Scotland) and *British Commonwealth International Newfilm Agency v Mahany* (HL).

⁸⁵ *Simpson v John Reynolds & Co (Insurances) Ltd* (EWCA) and *Murray v Goodhews* (EWCA).

144. Where a charity achieves its charitable object by carrying on a business, gifts it receives may be described as intended to supplement its trade receipts or helping it to carry out its business activity. However, this alone is not determinative of whether the gifts are income of the business activity.⁸⁶

Examples | Taurira

Example | Taurira 2: Business – individuals

Kelly and his partner have recently invested all their life savings and borrowed extensively to set up, in partnership, a state-of-the-art kitchen joinery business. The business operates from premises constructed on land next to the couple's home on a rural property located close to a major city.

After the business has been in operation for just a few months, a severe weather event causes widespread flooding, destroying property in the entire valley where the couple lives. Their home, business premises and all the expensive joinery machinery are severely damaged.

The local media cover the young couple's story sympathetically, describing the damage they experienced and the resulting emotional and economic impact on their lives and their business aspirations. This prompts many offers of help and the couple receives gifts of money from family, friends, complete strangers and former clients.

In many instances the gifts are made anonymously. Some gifts come with no message or have a message that expresses a general desire to help the couple. No message states that the main reason for making the gift is to help with the couple's business.

The media coverage also prompts the supplier of kitchen hardware to the couple's business to offer a discount on the amount due on the couple's latest order that was in transit at the time of the flood. The supplier usually only offers this discount to more high-volume customers.

The gifts from family and friends are not business receipts because they are "mere gifts" made out of personal affection, esteem and regard and do not have the character of income.

Gifts from strangers and former clients are also "mere gifts" made out of esteem and regard. The gifts from former clients were not linked to providing any further business goods or services and it is presumed that those former clients fully remunerated the couple for any earlier business transactions at the time. Where people make gifts

⁸⁶ *Epping Forest* (HL).

because some service they have received inspires their goodwill and gratitude, those gifts may still be “mere gifts”.

The supplier discount is not income because the character of income is that it is something that comes in. Income does not include a savings in an amount of an outgoing.

Example | Taura 3: Business – unregistered charity

A: Trading activity related to charitable object

XDenta Charitable Trust Board (XDenta) is a charitable trust registered under the Charitable Trusts Act 1957. XDenta is not a registered charity under the Charities Act 2005. As an unregistered charity, XDenta’s income is not exempt from income tax under the Income Tax Act 2007.

XDenta’s object is to contribute to the relief of poverty through helping to improve the dental health of the community in a defined geographical area of Aotearoa New Zealand. It achieves this object by running a dental practice aimed at providing affordable dental treatment for low-income working families, older people and welfare beneficiaries. After assessing the needs of its customers, it then charges them for dental services at usual commercial rates or discounted rates or makes no charge.

Under XDenta’s business model, it must regularly top-up its business income by soliciting additional funds through grants, bequests and gifts. It solicits gifts at an annual gala event and street appeal. XDenta receives gifts from:

- members of the public who have no association with XDenta (ie, they have never been clients);
- former clients who may have received free or discounted dental services in the past; and
- current clients who voluntarily donate towards dental services XDenta intends to provide at a discounted rate or for no charge at the time it provides those services.

The gifts from members of the public are unlikely to be business income as they are unrelated to the business activity and are not a product of that activity. Although the gifts could be described as supplementing the business income of XDenta or as helping it to carry on its trade, this is not the sole criterion. Either of these descriptions alone do not establish that the gifts are business income.

Gifts from former clients are also unlikely to be business income. However, this depends on the exact circumstances of each gift. For instance, if XDenta provided the

free or discounted dental services immediately before the client made the gift, that gift may fall within business income. A number of factors may then be relevant in these circumstances. Such as, the delay between the treatment and the gift, the relative values of the treatment and gift and whether the services were free or discounted.

Gifts that current clients make because of current services XDenta is providing are business income.

B: Trading activity unrelated to charitable object

In this variation on the facts, XDenta conducts a business activity of providing wholesale dental products and supplies to dental practices in Aotearoa New Zealand. This activity is unrelated to its charitable object. XDenta carries on this activity aiming to generate a trading surplus to use to achieve its object.

XDenta distributes the surplus to fund the dental treatment of the needy in its community on a case-by-case basis. As before, XDenta solicits additional funds, including gifts.

Gifts XDenta receives are unlikely to be business income where the business is unrelated to the charity's object. This is because it is more likely that the payer of a gift will make the gift because they intend to help XDenta's charitable objects than because they want to promote the business activity. In other words, the circumstances surrounding how and why the gift arose are more likely to show that the gift is not a product of the unrelated business activity.

However, each gift needs to be considered on its own facts. Gifts will be income in this variation if XDenta receives the payments in relation to, or as a product of, the business activity.

Analysis | Tātari – Income from voluntary activities

145. The question of when a gift can be assessable from a voluntary activity arises if the circumstances surrounding the making of the gift includes the existence of some activity undertaken by the person receiving the gift.

Legislation

146. An amount is income from a voluntary activity if it comes within s CO 1:

CO 1 Income from voluntary activities

Income

- (1) An amount derived by a person in undertaking a voluntary activity is income of the person.

Relationship with section CW 62B

- (2) This section is overridden by section CW 62B (Voluntary activities).

147. Section CW 62B overrides s CO 1:

CW 62B Voluntary activities

Exempt income

- (1) When a volunteer, in undertaking a voluntary activity, derives an amount that is a reimbursement payment to cover actual expenses incurred by them, the amount is exempt income of the volunteer.

Estimated expenditure

- (2) For the purposes of subsection (1)—
- (a) a person may make a reasonable estimate of the amount of expenditure likely to be incurred by the volunteer for which reimbursement is payable; and
 - (b) the amount estimated is treated as if it were the amount incurred.

Payments partly reimbursement and partly honorarium

- (3) If the person paying the amount to the volunteer makes a payment to them that is only partly a reimbursement of expenses, the person must identify the portion of the amount that is the reimbursement, and treat the remainder as an honorarium, being a schedular payment to which the PAYE rules apply.

Who is a volunteer?

- (4) For the purposes of this section, a **volunteer** means a person who freely undertakes an activity in New Zealand—
- (a) chosen either by themselves or by a group of which they are a member; and
 - (b) that provides a benefit to a community or another person; and
 - (c) for which there is no purpose or intention of private pecuniary profit for the person.

Honoraria

- (5) For the purposes of this section, an **honorarium** means an amount that a person receives for providing services that—
- (a) is paid at a rate that is less than the market rate for providing the services; and
 - (b) is an amount for which, in the normal course, no payment is fixed for the services provided.

Nature of reimbursement payment

- (6) For the purposes of this section, it does not matter whether—
- (a) an amount of a reimbursement payment is paid in 1 sum or not:
 - (b) the amount is paid during an income year or at the end of an income year.

Relationship with section RD 8(3)

- (7) A determination made by the Commissioner under section RD 8(3) (Schedular payments) may apply to modify an amount of expenditure under this section.

148. Any amount of income arising under s CO 1 is treated as exempt income where the amount is a reimbursement payment to cover actual expenses a volunteer incurred in line with s CW 62B. As this statement focuses on when gifts may be assessable income, it does not consider the application of s CW 62B other than to the extent that it relates to the interpretation of s CO 1.
149. In that regard, ss CO 1 and CW 62B do not refer to each other and, apart from the term "income", share no other defined terms. For this reason, a person deriving assessable income under s CO 1 need not be a "volunteer" as defined in s CW 62B(4) or receive an "honorarium" as defined in s CW 62B(5).
150. In addition, while the tone of s CW 62B implies that a "person" for the purposes of the income tax exemption is a natural person, such a limitation, if it exists for s CW 62B, does not apply to s CO 1. A "person" is defined in s 13 (Definitions of terms for all legislation) of the Legislation Act 2019 as including "a corporation sole, a body corporate, and an unincorporated body". Section AA 3(2) of the Income Tax Act 2007 refers to the Legislation Act 2019, particularly in relation to the use of the term "person".⁸⁷
151. While both provisions refer to a "voluntary activity", this term is not defined in the legislation. The *Concise Oxford English Dictionary* defines "voluntary" as:⁸⁸

voluntary ► **adj.** **1** done, given, or acting of one's own free will ... **2** working or done without payment.

152. Further, the *Concise Oxford English Dictionary* defines "activity" as:

activity ► **n.** ... **1** a condition in which things are happening or being done. ... **2** an action taken in pursuit of an objective.

⁸⁷ See also "New legislation, Income Tax Act 2004" *Tax Information Bulletin* Vol 16, No 5 (June 2004): 46 at 70–71.

⁸⁸ *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011).

153. From these dictionary definitions, a “voluntary activity” is some action or actions that a person freely undertakes to achieve something that is not in response to any legal obligation and without expectation of payment. However, it does not necessarily have to be an activity that would qualify a person to be a “volunteer” under s CW 62B(4). That is, for the purposes of s CO 1 a voluntary activity need not be carried out only within Aotearoa New Zealand. Nor does it need to be an activity that provides a benefit to a community or another person.
154. However, according to these dictionary definitions, an activity that someone is required to undertake would not be a voluntary activity. This would include an activity someone must undertake to fulfil the conditions of an employment contract. It would not include an activity someone undertakes to generate a trade receipt as part of a business or profit-making activity based on the reasoning that commercial transactions would normally be undertaken under contract requiring some activity to ensure the contract is performed. For the same reason, a voluntary activity would not include an activity someone undertakes as part of a profit-making undertaking or scheme. In any event, a person would usually undertake any of these activities with the expectation of payment.
155. Sections CO 1 and CW 62B were added to the Act in 2009.⁸⁹ They have not been the subject of any decided court cases. However, the Commissioner considers for a gift to be income under s CO 1 it needs to have a sufficient connection to the activity of the person receiving the gift. This is based on a plain reading of the words of s CO 1 that refer to an amount derived “in undertaking” (ie, taking on or carrying out) a voluntary activity. That is, there must be a causal link between the amount derived and the carrying out of the voluntary activity.
156. This means s CO 1 requires considerations similar to those involved in addressing the question of whether gifts are “a product of” or “in connection with” an employment activity as discussed above from [83] to [85].
157. As mentioned at [44] an “amount” is defined as including “an amount in money’s worth” meaning income under s CO 1 can include non-cash amounts.

Summary of the relevant factors to consider

158. By adapting the factors relevant to the employment situation to the context of a voluntary activity and s CO 1, the following factors support a conclusion that a gift is income under s CO 1:
- The amount of the gift reflects the amount of the recipient’s personal exertion in undertaking the voluntary activity.

⁸⁹ Taxation (International Taxation, Life Insurance, and Remedial Matters) Act 2009: ss 27 and 50.

- The payer makes the gift as a quid pro quo in the hope that the recipient will undertake future activities or to encourage them to make further efforts.
- The gift has recurred or has a foreseeable element of recurrence rather than being a one-off payment.
- Such gifts are expected or asked for or are commonplace as a matter of practice in undertaking the voluntary activity.

159. The following factors support a conclusion that a gift is not income under s CO 1:

- The receipt is expressed in terms of being a mere personal gift inspired by personal goodwill rather than as consideration for the voluntary activities the recipient has undertaken.
- The recipient is not undertaking the voluntary activity at the time the gift is made.

Examples | Tauria

Example | Tauria 4: Voluntary activities – individual

James works in paid employment 4 days a week and works 1 day a week as an unpaid volunteer in a youth counselling service run by his church. Occasionally, he receives gifts of money. His church, individuals and other organisations in the community that he is in contact with through his volunteer work make some of these gifts, expressing them in terms of recognising him for his services. James also occasionally receives gifts of money from his parents because of their respect and admiration for what he is doing.

James should include the gifts he receives from the church, individuals and other organisations in the community as part of his assessable income each year. They are his assessable income under s CO 1 because they are amounts he derives from undertaking a voluntary activity.

The gifts from James's parents are not assessable income. Those gifts are not sufficiently connected to his voluntary work and are "mere gifts" that his parents make as marks of personal affection, esteem or regard.

Example | Tauria 5: Voluntary activities – unregistered charity

Nala Charitable Trust Board (Nala) is a charitable trust registered under the Charitable Trusts Act 1957. Nala is not a registered charity under the Charities Act 2005. As an

unregistered charity, Nala's income is not exempt from income tax under the Income Tax Act 2007.

Nala's overall object is to act as a Christian-based humanitarian aid organisation in Africa. It does not carry out any activities within Aotearoa New Zealand other than soliciting gifts by promoting its overseas activities at regular fundraising events held at various venues around the country.

Nala's activities in Africa and New Zealand means it is carrying out a "voluntary activity" for the purposes of s CO 1. It is a "person", as defined, and it is deriving amounts as a result of undertaking that activity. Under s CO 1, it is not required to carry out the voluntary activity within any particular country.

Accordingly, the gifts Nala receives are assessable income under s CO 1.

Analysis | Tātari – Income under ordinary concepts

160. As noted at [39], s CA 1(2) applies as a catch-all provision to include items of income that do not necessarily fall within another specific provision in Part C. For this reason, it is necessary to consider the question of whether a gift can be assessable as income under ordinary concepts in all cases.

Legislation

161. An amount is income if it is income under ordinary concepts as s CA 1(2) provides:

CA 1 Amounts that are income

Amounts specifically identified

- (1) An amount is income of a person if it is their income under a provision in this Part.

Ordinary meaning

- (2) An amount is also income of a person if it is their income under ordinary concepts.

162. The role of s CA 1(2) is to be a residual or catch-all provision:⁹⁰

[It] ensures that where any transaction gives rise to an amount that is of an income nature, that amount will be gross income even where that amount would not otherwise fall within the scope of any other specific gross income provision.

⁹⁰ Taxation (Core Provisions) Act 1996 *Tax Information Bulletin* Vol 8, No 9 (November 1996): 2 at 14 (concerning s CD 5 of the Income Tax Act 1994, a predecessor of s CA 1(2)).

163. In *Reid v CIR* (CA), Richardson J considered that an amount was assessable income under s 65(2)(l) of the Income Tax Act 1976 (a predecessor of s CA 1(2)) if the amount was income under ordinary concepts and no other specific provision in Part C of the Act applied.⁹¹
164. As mentioned at [44] an “amount” is defined as including “an amount in money’s worth” meaning income under s CA 1(2) can include non-cash amounts.

A selection of examples from the courts

165. There are a few examples where the courts overseas have considered whether a voluntary payment or a gift is income under ordinary concepts. In several cases, this has been an alternative argument to more specific income provisions applying.

Cases where the courts considered receipts were income

FCT v Blake (QSC): Ex-gratia payments to retired bank employee

166. In *FCT v Blake* the Queensland Supreme Court considered the income tax treatment of regular ex-gratia payments that a retired bank employee received from his former employer. The bank made the payments to subsidise its superannuation scheme payments as compensation for cost-of-living increases. The bank included the subsidy payments with its regular fortnightly payments to the taxpayer from its superannuation fund.
167. The taxpayer argued that the subsidies were personal gifts. The Federal Commissioner of Taxation successfully argued the subsidies were income according to ordinary concepts. The court considered the payments were designed to protect the standard of living of retired employees, noting that the bank’s superannuation fund rules apparently did not allow for inflation-indexed payments. Carter J said:⁹²

Therefore, the directors of the Bank voluntarily took a series of decisions which were designed to protect to some extent the standard of living of those former employees now living in retirement. There was no attempt to discriminate between them. Irrespective of their individual financial status, those in receipt of a pension payment from the Fund had that payment increased or supplemented by an increment, the measure of which was selected by their former employer. **As a result of it, the amount of money available to the taxpayer for his daily living was increased. In my view it accords with ordinary concepts and usages to include it in that which one normally regards as one’s income and at the same time it accords with modern day usages to say that the payment in this case was, in the tax year in question, a regular increment to**

⁹¹ At 136.

⁹² At 4,664.

that which was admittedly the taxpayer's income and was itself income. The payment is in my view income "according to ordinary principles" and falls "within the natural understanding of gross income" (per *Dixon C.J.* and *Williams J.* in *F.C. of T. v. Dixon* (1952) 86 C.L.R. 540 at p. 555). It falls within "the general conception of income" (per *Fullagar J.* in *Hayes v. F.C. of T.* (1956) 96 C.L.R. 47 at p. 53). It was "income according to ordinary concepts" (per *Deane J.* in *F.C. of T. v. Harris* 80 ATC 4238 at p. 4244). It is a receipt "which by reasonable understanding might fairly be regarded as income" (per *Starke J.* in *Resch v. F.C. of T.* (1941-1942) 66 C.L.R. 198 at p. 213). **The test is fundamentally an objective one** (per *Fullagar J.* in *Hayes v. F.C. of T.* (*supra*) at p. 55). [Emphasis added]

168. Accordingly, Carter J considered the payment was income under ordinary concepts on the strength of several authorities, including cases discussed from [173] below. Carter J also confirmed the test is an objective one.
169. Consistent with these other authorities, Carter J considered the fact that the payment was voluntary was relevant, but not decisive. Carter J continued, saying:⁹³

What factor will have greater relevance in one case and what may be seen as being more relevant in another will vary from case to case. **I do not understand the authorities taking collectively to establish a fixed set of criteria against which a particular receipt has to be measured in order to determine whether it qualifies as income or not. The cases identify some of the considerations which have been referred to and which will be useful in arriving at a result, such as, the periodical nature of the payment, the recipient's reliance or otherwise on the payment for regular expenditure on himself and his dependants, the expressed object of the payment and its effect in the hands of the recipient, the relationship, if any, between the payment and the taxpayer's employment or former employment. These considerations form part only of the litany of useful criteria.** [Emphasis added]

170. Carter J considered there was no fixed set of criteria against which a particular receipt was measured to decide if the receipt is income under ordinary concepts. But he noted the courts have identified several matters as being useful to consider, including:
- whether the receipts were regular;
 - the effect of the receipts in the recipient's hands, including whether the recipient relied on them for living expenses;
 - the purpose of the payments; and
 - the relationship between the recipient and the source of the payments (including whether the payer made them voluntarily).

⁹³ At 4,664.

171. Carter J considered the factors did not have equal weight or relevance and that one factor alone will not be determinative.
172. Carter J also distinguished the case before him from *FCT v Harris* (FCA) which involved similar facts but the court in that case considered the payment was not income. He made this distinction because the factors mentioned at [170] above were absent in that case.⁹⁴

Dixon's case (HCA): Payments to former employee serving in armed forces

173. This statement covered *Dixon's case* above in relation to employment income (from [73]). The High Court of Australia rejected the Federal Commissioner of Taxation's argument that the payments were income from employment under s 26(e) of the Income Tax Assessment Act 1936 (Cth). However, the court agreed the payments were income derived from all sources under s 25(a) (ie, income under ordinary concepts).
174. The majority of the court considered that the amounts were income under ordinary concepts because they were an expected periodic payment that the taxpayer could depend on for living expenses.⁹⁵
175. Fullagar J said:⁹⁶

It seems to me that the appellant's receipts from [his former employer] must be regarded as having the character of income. They were regular periodical payments — a matter which has been regarded in the cases as having some importance in determining whether particular receipts possess the character of income or capital in the hands of the recipient, see eg *Seymour v Reed* (1927) AC 554, at p 570 and *Atkinson v Federal Commissioner of Taxation* (1951) 84 CLR 298. This consideration, while not unimportant, is not decisive. What is, to my mind, decisive is that the expressed object and the actual effect of the payments made was to make an addition to the earnings, the undoubted income, of the respondent. What the employing firm decided to do, and what it really did, in relation to the respondent and others in the same position, was "to make up the difference between their present rate of wages and the amount they will receive". What is paid is not salary or remuneration, and it is not paid in respect of or in relation to any employment of the recipient. But it is intended to be, and is in fact, a substitute for — the equivalent pro tanto of — the salary or wages which would have been earned and paid if the enlistment had not taken place. As such, it must be income, even though it is paid voluntarily and there is not even a moral obligation to continue making the payments. It acquires the character of that for which it is substituted and that to which it is added. [Emphasis added]

⁹⁴ At 4,665.

⁹⁵ At 86.

⁹⁶ At 92.

176. The court appears to assume that the taxpayer relied on the payments for financial support on the basis that the payments kept his income at its former level.⁹⁷ Accordingly, the express objective of the payments and the actual effect of the payments (in maintaining the taxpayer's former income) were important additional facts, along with the periodic nature of the payments.
177. Earlier in his judgment, Fullagar J considered that income under ordinary concepts could arise from personal exertion, even though the income was not employment income under s 26(e).⁹⁸ Fullagar J saw the payments as income under ordinary concepts because they, in effect, took the place of employment income that would have arisen from the taxpayer's personal exertions, if he had not enlisted.
178. The majority (Dixon CJ, Williams and Fullagar JJ) considered the payments were income under ordinary concepts because:
- the payments were expected, regular and periodic;
 - the former employer made the payments for the purpose of adding to the earnings of the taxpayer and so they financially supported the taxpayer;
 - the recipient could rely on the payments for financial support and the court assumed he did rely on them in this way;
 - the payments substituted for income from employment and acquired the character of that income; and
 - the payments arose from the taxpayer's personal exertion that would have taken place, if he had not enlisted (Fullagar J).
179. *Dixon's case* suggests that regular periodic gifts can be income under ordinary concepts where the recipient expects them, the payer pays them for the purpose of adding to the recipient's earnings and the recipient relies on the payments (or such reliance can be inferred). However, in the Commissioner's view, the circumstances surrounding the taxpayer's present and previous employment also have a bearing on the outcome of the case and any proposition that may be extracted from it.
180. In the Commissioner's view, it is unlikely that a court in Aotearoa New Zealand would consider the periodicity of a series of gifts by itself means the gifts are income where the recipient does not undertake some activity or personal exertion. As the next case shows, there is authority for the view that a series of gifts can each be seen as a "mere gift" and not assessable, despite the element of periodicity.

⁹⁷ At 85.

⁹⁸ At 90.

Cases where the courts considered receipts were not income

FCT v Harris (FCA): Ex-gratia payments to retired bank employee

181. In *FCT v Harris* a retired bank employee received the first of what was intended to be annual ex-gratia payments from his former employer to top-up his pension.⁹⁹ The taxpayer did not expect or ask for the payment and the bank made the payment because it was concerned about the effects of inflation on its retired employees. Therefore, the bank made the payment with the intention of supplementing the pension and to help pensioners with their living costs. The taxpayer, however, had other employment and did not need the payment to support himself.
182. The majority of the court held that the payment was not of an income nature for three main reasons. First, the bank made the payment in a lump sum. The payment was not a regular amount the taxpayer received as a periodic supplement to income that the taxpayer relied on to meet regular expenses. Second, the bank did not make the payment in consideration for any income-producing activity. Third, it did not make the payment as a substitute for lost salary or wages. The taxpayer had no expectation of receiving the payment or receiving similar payments in the future.
183. The payment could not, in any relevant sense, be said to be the product of the taxpayer's earlier employment. Instead, the payment was in the nature of a gift and was of a capital nature. This was the case even though the payment was a supplement to income. Bowen CJ considered it was not a case where the motives of the bank were influential in deciding the quality of the payment in the recipient's hands. He stated:¹⁰⁰

In this case, the payment made to Mr Harris by the Bank was not designed to bring the pension up to any particular figure; it was simply an ex gratia payment made in accordance with the bounty of the Bank as one lump sum during the income year to assist him because of the effects of inflation.

It appears to me that the circumstances of this case are insufficient to lead to the conclusion that a gift, not normally to be regarded as being of an income nature, should be so regarded because the Bank as payer intended it to be, and it in fact was, a supplement to the taxpayer's pension.

184. Fisher J dismissed the Federal Commissioner of Taxation's argument that the payment in issue was not a single lump sum but the first of a series:¹⁰¹

However, we were pressed with a further submission, namely that we should not consider the payment as a single lump sum but rather, in the light of the payments in subsequent

⁹⁹ *FCT v Harris* (1980) 30 ALR 10 (FCA).

¹⁰⁰ At 17.

¹⁰¹ At 25–26.

years, as the first of a series of payments. **If this contention is acceptable, then I would agree that there are cogent arguments to the effect that as the first of a series of periodical and regular payments it falls, in the light of other circumstances, into the category of income rather than capital. ...**

In the present case the payments in subsequent years can, in my opinion, only be taken into account to confirm any suggestion made or indication given in relation to the first payment that the taxpayer could expect to receive in the future annual supplementations of his pension to compensate for the impact of inflation. In my opinion, after reading carefully the memoranda of March and April 1976 there was no such suggestion or indication from which the taxpayer could anticipate receipt of a like payment each year thereafter. In particular there was nothing which could reasonably suggest to him that the payment in question was the first of a series of annual payments. [Emphasis added]

185. On this reasoning, Fisher J would have been inclined to treat the payment as having the character of income on the basis that it was periodic considering the other circumstances of the payment. However, this view depended on the facts establishing that, at the time the payment was made, it was to be the first in a series of periodic payments. In this case, the facts did not establish this.
186. As mentioned at [172] above, this case was distinguished in a later case involving similar pension top-up payments (*FCT v Blake* (QSC)).

Scott v FCT (HCA): Gift to lawyer from client

187. In *Scott v FCT*, the High Court of Australia considered whether a gift that a solicitor received from one of his long-standing clients was assessable. At [69] above, this case is mentioned in connection with gifts and employment income. The court considered the gift was not assessable either as employment or service income, or as income under ordinary concepts.
188. In relation to the concept of income under ordinary concepts, the court stated:¹⁰²

I return to the general concept of income. Whether or not a particular receipt is income depends on its quality in the hands of the recipient. It does not depend upon whether it was a payment or provision that the payer or provider was lawfully obliged to make. The ordinary illustrations of this are gratuities regularly received as an incident of a particular employment. On the other hand, gifts of an exceptional kind, not such as are a common incident of a man's calling or occupation, do not ordinarily form part of his income. Whether or not a gratuitous payment is income in the hands of the recipient is thus a question of mixed law and fact.

¹⁰² At 293–294.

The motives of the donor do not determine the answer. They are, however, a relevant circumstance.

... **An unsolicited gift does not, in my opinion, become part of the income of the recipient merely because generosity was inspired by goodwill and the goodwill can be traced to gratitude engendered by some service rendered.** It was said for the Commissioner that if a service was such as the recipient was ordinarily employed to give in the way of his calling, and the gift was a consequence, however indirect, of the donor's gratitude and appreciation of that service, then it must necessarily be part of the donee's income derived from the practice of his calling, and caught by s 26(e). But as thus expressed, this proposition is, I think, a mistaken simplification. It was based upon the fact that in *Hayes v Federal Commissioner of Taxation* (1956) 6 AITR 248 at p 255; 96 CLR 47 at p 56, Fullagar J regarded as decisive that it was impossible to relate the receipt of the shares there given to any income-producing activity on the part of the recipient. In the present case the taxpayer was engaged in an income-producing activity, his practice as a solicitor, to which it was said the gift could be related. **But because the absence of a particular element was decisive in favour of the taxpayer in one case it does not follow that the presence of that element is decisive in favour of the Commissioner in another case. The relation between the gift and the taxpayer's activities must be such that the receipt is in a relevant sense a product of them.** ... [Emphasis added]

189. Accordingly, the court considered:

- The inquiry is into the quality of the receipt in the recipient's hands.
- The fact that the payer makes the payment voluntarily is not determinative.
- The motives of the payer are relevant, but not determinative.
- The question of whether a receipt is income must depend on a consideration of the whole of the circumstances as to how and why the payment came about.
- An unsolicited gift does not have the character of income just because the payer is inspired to make it out of gratitude for some service the recipient has provided.
- A number of factors influence the answer in a particular case and the absence of a particular factor that was decisive in favour of the taxpayer in one case does not mean the presence of that factor in another determines that case against the taxpayer.
- A mere connection with an income-earning activity is not enough. The relationship between the payment and the income-earning activity must be sufficiently strong.

Hayes v FCT (HCA): Gift of shares

190. In *Hayes v FCT*, the High Court of Australia considered the income tax treatment of a gift of shares from an individual (the payer) to the taxpayer. This case was mentioned

at [33] above, in relation to “mere gifts” and, at [75] above, in relation to employment income. The payer had a personal relationship and a previous professional relationship with the taxpayer. The taxpayer had been, at various times, an employee of, a professional advisor to, or a director or a shareholder of, a company the payer owned.

191. The Federal Commissioner of Taxation argued the receipt was income under ordinary concepts or, alternatively, it was income from employment or services. The court found the value of the gift was not assessable income on either ground.
192. Fullagar J noted the history of the taxpayer’s involvement in various roles with the payer’s company. He noted that, apart from some services of a trifling nature that the taxpayer performed without reward for a period, there was no suggestion that he had not been fully remunerated for his services at the time he performed them. Fullagar J concluded the receipt of the shares was “a simple gift of property” and not a receipt of income.¹⁰³
193. The court considered the role of the payer’s motive in making the payment was relevant, but not determinative because the test was an objective one.¹⁰⁴
194. The following points can be taken from Fullagar J’s comments:
 - The conclusion on whether a voluntary payment or transfer of property is income will depend on the strength of the relationship between the payment and the income-earning activity. There must be a real relationship between the receipt and the employment or services.
 - The test to be applied is an objective one.

***Stedeford v Beloe* (HL): Voluntary pension payments to retired school principal**

195. *Stedeford v Beloe* concerned the assessability of payments that a retired principal received from his former employer. The governing body of the school granted the principal a pension out of school funds on his retirement. The school had no formal pension scheme in place and the payments were not made under any contract. They could have been stopped at any time.
196. The House of Lords concluded the payments were not assessable as employment income under Schedule D of the Income Tax Act 1918. Viscount Dunedin concluded that for the payments to be income they needed to be a “real profit” and a mere voluntary gift is not such a profit. Viscount Dunedin said:¹⁰⁵

¹⁰³ At 70–71.

¹⁰⁴ At 72–73.

¹⁰⁵ At 390.

Now it must be a real profit under Schedule D, and it has been held again and again that a mere voluntary gift is not such a profit because it is not, in the true sense of the word, income. It is merely a casual payment which depends upon somebody else's good will.

197. Lord Warrington of Clyffe stated:¹⁰⁶

Then is it a profit or gain under Schedule D? This question can, in my opinion, be answered in only one way. Here each payment is wholly voluntary. The case is only an instance of a succession of voluntary payments, each of which is voluntary and none of which need necessarily be continued.

198. On this basis, the House of Lords considered that a series of gifts the payer made out of goodwill and that had no certainty of continuing, is not a "real profit" (ie, not "income"). As discussed from [173] above in relation to *Dixon's case*, however, there may be circumstances in which a series of gifts is income under ordinary concepts.

Summary of the relevant factors to consider

199. "Income" does not have a precise meaning in tax law. It is not a "term of art" and must be determined in accordance with the "ordinary concepts and usages of mankind".¹⁰⁷ As a result, the courts have not provided a comprehensive judicial definition of the term or any rigid test to apply to determine if a particular receipt is income. Instead, the courts have usually adopted a process of "characterisation" in which they weigh up a number of factors to decide whether an amount constitutes income in a particular case.

200. To decide whether a voluntary payment or gift is assessable to the recipient, it is necessary to consider all the circumstances of how and why the gift was made.¹⁰⁸ The issue is decided on a case-by-case basis and some factors may have greater relevance in some cases than in others.¹⁰⁹ Some factors point in one direction, and some in another.¹¹⁰ If the presence or absence of a particular factor is determinative in one case, this does not mean the same factor will be determinative in other

¹⁰⁶ At 391.

¹⁰⁷ *Scott v C of T* (1935) 35 SR (NSW) 215 (NSWSC) per Jordan CJ at 219 and as cited by Richardson J in *Reid v CIR* (CA) at 136.

¹⁰⁸ *Scott v FCT* (HCA) at 293. See also *The Squatting Investment Co Ltd v FCT* (HCA) per Kitto J at 146, *Reid v CIR* (CA) per Richardson J at 138 and *Murray v Goodhews* (EWCA) per Buckley LJ at 46.

¹⁰⁹ *FCT v Blake* (HCA) at 4,664.

¹¹⁰ See *Reid v CIR* (CA) per Richardson J at 138.

circumstances.¹¹¹ Several factors can influence the answer in a particular case. The test is an objective one.¹¹²

201. The case examples above and others confirm that the following factors support a conclusion that a gift will be “income under ordinary concepts”:

- The gift is something that comes in (ie, does not include a savings in expenditure).¹¹³
- The gift is ascertained and judged in relation to the recipient (as opposed to the payer).¹¹⁴ However:
 - consideration of the relationship between the payer and recipient is still needed;¹¹⁵
 - the motive of the payer and whether a receipt is paid voluntarily or not is relevant, but not determinative;¹¹⁶ and
 - the motive of the payer is only significant to the extent that it bears on the character of the payment in the recipient’s hands.¹¹⁷
- Receipts are periodic, regular or they recur.¹¹⁸ Where payments are periodic, regular or they recur they can become part of the funds the recipient may expect to depend on for meeting living expenses just as with a salary or wages, annuities or beneficiary income.¹¹⁹ However, a lump-sum payment may be income under ordinary concepts if the circumstances show that at the time of the payment it was the first of a series of periodic and regular payments the recipient could expect to receive.¹²⁰ If a taxpayer anticipates that, as a result of their activity, they would receive voluntary payments that would provide for the maintenance of the taxpayer and their family, this may indicate the payments will be income.¹²¹ In the Commissioner’s view, a taxpayer is more likely to anticipate

¹¹¹ *Scott v FCT* (HCA) at 293.

¹¹² *Hayes v FCT* (HCA) at 73. See also *FCT v Blake* at 4,664.

¹¹³ See *Tennant v Smith* [1892] AC 150 (HL) per Lord Macnaghten at 164.

¹¹⁴ *Scott v FCT* (HCA) at 293 and *Hayes v FCT* (HCA) at 73. See also *Reid v CIR* (CA) per Richardson J at 138, *G v CIR* (SC) at 999, *Temperley (Inspector of Taxes) v Smith* [1956] 3 All ER 92 (EWHC) at 96, *Moorhouse v Dooland* (EWCA) per Evershed MR at 99 and *Herbert v McQuade* (EWCA) per Collins MR at 649.

¹¹⁵ See *Reid v CIR* (CA) per Richardson J at 136.

¹¹⁶ *Scott v FCT* (HCA) at 293 and *Hayes v FCT* (HCA) at 72.

¹¹⁷ See *Murray v Goodhews* (EWCA) per Buckley LJ at 46.

¹¹⁸ See *FCT v Myer Emporium Ltd* 87 ATC 4363 (HCA) at 4,370, *Reid v CIR* (CA) per Richardson J at 136 and *A Taxpayer v CIR* (1997) 18 NZTC 13,350 (CA) per Richardson P at 13,355.

¹¹⁹ See *Reid v CIR* (CA) per Richardson J at 136.

¹²⁰ *FCT v Harris* (FCA) per Fisher J at 4,248–4,249.

¹²¹ See *G v CIR* (SC) at 999.

their activity will result in gifts that they can rely on as “an income” where the likelihood that the gifts will recur is greater. For example, gifts are more likely to recur where:

- multiple payers are involved; or
- the recipient (or someone on their behalf) is actively soliciting the gifts, from multiple prospective payers.
- The taxpayer derives the receipts beneficially.¹²²
- The gift is a gain from the taxpayer carrying on an organised activity.¹²³ A mere connection with an organised activity is not enough. The relationship between the gain and the taxpayer’s activities must be such that the gain is in a relevant sense a product of those activities.¹²⁴

202. It follows that the absence of these factors will support a conclusion that the gift is not income under ordinary concepts.

203. The following factors are also relevant:

- Whether the receipts are expected periodic payments. That is, is it reasonable in the circumstances to presume the recipient expected to rely on them for their living expenses?¹²⁵
- Whether the payments are made for the purpose of supporting the recipient’s living costs.¹²⁶

204. In the Commissioner’s view, a series of gifts may be income under ordinary concepts under s CA 1(2) where:

- The series of gifts fulfils the notion of “an income”. That is, the payments have the necessary periodicity, and the payer makes them for the recipient to rely on, or intends the recipient to rely on them, for regular living expenses and the recipient does rely on them in this way.
- The necessary periodicity of the payments refers to the requisite dimensions of regularity, recurrence, amount and frequency so that they amount to “an income”.
- The payments are periodic and made with the intention of providing an income when they began (or this has been established over the passage of time) to the

¹²² See *A Taxpayer v CIR* per Richardson P at 13,359.

¹²³ See *A Taxpayer v CIR (CA)* per Richardson P at 13,359, *CIR v Buis* (2005) 22 NZTC 19,278 (HC) at 19,285–19,286 and *Wattie v CIR* (1997) 18 NZTC 13,297 (CA) per majority at 13,306.

¹²⁴ *Scott v FCT* (HCA) at 293.

¹²⁵ See *Dixon’s case*.

¹²⁶ *FCT v Blake* (QSC) at 4664. See also *Dixon’s case*.

extent that the recipient could reasonably have expected to rely on the payments for their living costs.

- The recipient relies on the payments for their financial support.
- The circumstances show the payments are connected with some activity or personal exertion of the recipient, even though that exertion or activity does not necessarily arise in the context of an employment relationship (past, present or future) and does not amount to a business or a profit-making activity.

205. In the Commissioner's view, it may be possible for a gift to be income under ordinary concepts because of some activity carried on by the recipient that does not involve an employment relationship or a business or a profit-making activity (meaning certain other provisions of Part C do not apply). However, in these circumstances the activity is most likely a voluntary activity with the gift being income under s CO 1. In other words, there may be few circumstances that a gift is income under ordinary concepts under s CA 1(2) and another provision of Part C does not apply.

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