

Case No. D54/11

Salaries tax – whether a sum paid to a charitable institution in return for a grave space an approved charitable donation and hence be allowed for deduction – sections 2(1), 26C and 68(4) of the Inland Revenue Ordinance (‘the Ordinance’).

Panel: Chow Wai Shun (chairman), Liu Kin Sing Alex and Pang Melissa Kaye.

Date of hearing: 12 January 2012.

Date of decision: 23 March 2012.

The Appellant claims deduction for approved charitable donations of \$500,000 for the year of assessment 2009/10.

In support, the Appellant furnished:

- A copy of a letter from a Senior Pastor of the Church to the Cemetery Department of the Union that four family members, including the Appellant, were willing to offer a sum of \$2 million to the Union for the purpose of maintaining and developing the graveyard in return for a Zion type permanent grave space to them.
- A completed application form for grave space from the Church to the Union.
- A copy receipt issued by the Union confirming the receipt of \$2 million ‘donation’ from the Appellant and three other payers.

The Appellant further contends that ‘donation’ should be re-defined to mean or include ‘a common exchange of gifts’ or in Chinese ‘禮尚往來’.

Held:

1. The Union is ‘a charitable institution or trust of a public character’ within the meaning of section 2(1) of the Ordinance.
2. The Appellant and others paid \$2 million to the Union only after ensuring that there was a grave space that they would select and such selection had been made.

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3. The Appellant and others would have been willing to ‘purchase’ if such a grave space had been available for ‘sale’. On the other hand, if no such grave space could have been made available, they would not be willing to make any payment at all.
4. The principal object of the Appellant, and others, for the payment is to secure a permanent Zion type grave space as selected, not to donate money to the Union.
5. The payment, no matter what it is called, ‘donation’ or otherwise, is just a means to achieve that end. The Appellant and others had no intent to donate.
6. In terms of both its nature and value, a Zion type permanent grave space is an advantage of material character received in return which deprives the payment of any donatory character. The payment is thus not a donation.
7. A church is open for anyone. Blessings from God and from a pastor does not come or go because of a donation or absence of an offering. The Board rejects the Appellant’s analogy of donation being ‘a common exchange of gifts’.

Appeal dismissed.

Cases referred to:

Sanford Yung-tao Yung v CIR 1 HKTC 1081
Federal Commissioner of Taxation v McPhail 10 AITR 552

Taxpayer represented by her brother.

Fung Ka Leung for the Commissioner of Inland Revenue.

Decision:

1. The Appellant appeals against the Determination of the Deputy Commissioner of Inland Revenue dated 2 June 2011 in respect of the salaries tax assessment raised on her for 2009/10 (‘the Determination’).

2. The Appellant chose not to appear in person; instead, she was represented by Mr A, her brother. Mr A raised no dispute to the facts upon which the Determination was arrived at and gave no further oral evidence. No further documentary evidence was adduced by Mr A other than those already submitted before the hearing. On such bases, and having considered all documentary evidence sent to the Board before the hearing, we find the

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following facts as facts relevant to this appeal:

- (a) In her Tax return – Individuals for the year of assessment 2009/10 ('the Return'), the Appellant declared the following information:
- i. Her salaries income for the year ended 31 March 2010 was \$554,760.
 - ii. She wished to claim deduction for approved charitable donations of \$500,000 ('the Sum').
- (b) In support of her claim for deduction for approved charitable donations, the Appellant furnished a copy of the following documents together with the Return:
- i. A letter in Chinese of May 2009 from a Senior Pastor of Hong Kong Baptist Church ('the Church') to the Cemetery Department of The Hong Kong Chinese Christian Churches Union ('the Union'). In the letter, the Senior Pastor informed the Union that four family members, including the Taxpayer, of a recently deceased church member, the late Mr B ('the Deceased'), were willing to offer a sum of \$2 million to the Union for the purposes of maintaining and developing the graveyard and that the offerors requested the Union to give a particular type of grave space known as the Zion type in return. The relevant part of the letter was reproduced verbatim below:

‘...茲本會會友...剛於日前逝世，其家人有感親人安息主懷中，願意奉獻港幣貳百萬元給...聯會作為發展墳場事工之用，並懇請 貴會回贈錫安葬位一穴以安葬其家人...’
 - ii. A certificate in Chinese named '墳地證明書' issued by the Union certifying that a Zion type grave space was allocated to the Deceased in respect of a 'donation' (the Chinese characters '領用' in the original text, meaning 'apply, take and use' or 'subscribe' as used by the Assessor – see below, were crossed out and replaced by hand-written Chinese characters '捐款' representing 'donation') of \$2 million made in June 2009. In the certificate, there was a remark stating that the grave space was allocated in return for a large offering from church members. The relevant parts of the certificate were reproduced verbatim below:

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.....
捐款[原作為:‘墳地領用’]金額	港幣...貳佰萬...元正
捐款[原作為:‘領用’]日期	2009年06月X日
.....
備註	信徒大額奉獻，聯會回贈錫安葬位壹穴。

- (c) The Assessor raised on the Appellant the following Salaries Tax Assessment for the year of assessment 2009/10:

	\$
Income [as per paragraph 2(a)i]	554,760
<u>Less: Basic allowance</u>	<u>108,000</u>
Net chargeable income	446,760
Tax payable thereon (after tax reduction)	<u>57,949</u>

Assessor’s note: subscription for purchase of a grave space was not allowable.

- (d) The Appellant objected to the assessment and attached to her notice of objection, among others, a copy of a \$2 million cashier order of May 2009 made payable to the Union.
- (e) In response to the Assessor’s enquiries, the Church advised that the payment of \$2 million was made directly to the Union without passing through accounts of the Church.
- (f) The Assessor also verbally informed the Appellant that:
- i. Letters of enquiries had been issued to the Church and the Union to gather further information in relation to her claim but the Union had not given a reply by then.
 - ii. The maximum amount of approved charitable donation was limited to 35% of one’s income under the Inland Revenue Ordinance (‘the Ordinance’).
 - iii. There should not be any benefit or advantage in return for donations.
 - iv. Pending the result of the Appellant’s objection, part of the Salaries Tax demanded would be held over.

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- (g) The Union then furnished, among others, a copy of the following documents:
- i. A notification in Chinese named ‘信徒大額捐款可享免費回贈錫安葬位辦理手續通知書’ of May 2009 from the Cemetery Department of the Union to the Senior Pastor of the Church. In the notification, the Union advised the Senior Pastor that the Appellant was willing to ‘donate’ a sum of \$2 million to the Union; that a free grave space would be given in return; and that the Appellant had chosen a particular grave space for the Deceased. The Church was requested to issue an application form for grave space named ‘信徒領用墳地申請書’ together with a cashier order for processing the interment procedures. The relevant part of the notification was reproduced verbatim below:

‘...茲有 貴堂離世教友... 其親屬...願意捐款港幣貳佰萬圓作為本聯會聖工之用，而本聯會免費回贈錫安葬位一穴，以便安葬離世者...之用，親屬亦代選擇...段...級...穴，...並請 貴堂簽發「信徒領用墳地申請書」及銀行本票... 辦理有關安葬手續...’
 - ii. A completed application form for grave space of May 2009 from the Church to the Union. In the section filled out by the Cemetery Department of the Union, the part for payment (‘葬位領用費’) was marked with two triangular marks. There was also a hand-written remark stating that the grave space was allocated in return for a large offering from church members.
 - iii. A copy receipt issued by the Union confirming the receipt of \$2 million from the Appellant and three other payers being ‘donation’. There was again a hand-written remark stating that it was a large offering from church members from the Church with the name of the Deceased. There was also a standard print that for donors the receipt can be used for a claim of tax deduction which in Chinese is ‘凡捐款者，則保留此收據，可作減免稅項憑證’.
- (h) In response to the Assessor’s enquiries, the Union provided the following information:
- i. The normal charges for a grave space ranged from \$2,200 to \$500,000 depending on the location, the type of grave (for land burial, remains or ashes), the period of burial, and whether the deceased was a Christian of a member church or a non-member church.

- ii. Usual donations to the Union would not entitle the donors to a grave space for their relatives. However, if the donation was \$2 million or over, the Union would allot a grave space to his or her deceased free of normal charges upon the donor's request.
 - iii. Even if there was no donation, eligible deceased Christian could still be allocated a grave space upon payment of the usual charges.
 - iv. The documents submitted to the Inland Revenue Department indicated that the relatives of the Deceased had made a request for a grave space when making the donation and was allocated a grave space free of normal charges.
- (i) At the request of the Assessor, the Union provided a copy of its Cemeteries Management Regulations (香港華人基督教聯會墳場管理條例), a document in Chinese which contained, among others, the following rules:
- i. The Zion type grave space is for coffin burial and permanent use.
 - ii. The Zion type grave space allows the human remains or cremated human ashes of relatives (including spouse and children) of the deceased first buried in the grave to be buried in the same grave site.

The relevant provisions of the Regulations were reproduced verbatim below:

‘ ...

第二章 領地及安葬

...

第二條 墳地種類

...

乙、錫安葬位－葬棺用，長期性。

...

第四條 附葬

錫安葬位...葬用後，原葬人直系親屬（即父母、夫妻、子女）或親兄弟或親姊妹（以上包括其配偶）或翁姑或岳父母之遺體或骨殖或骨灰，得附葬入該墳...’

- (j) The Assessor considered the Sum not a donation even though the Union is a charitable institution exempt from tax under section 88 of the Ordinance. As a result, the Assessor invited the Appellant to consider withdrawing her objection. The Appellant refused and hence the Determination.

3. The issue for the Board to decide is whether the Sum, being the Appellant’s share of the \$2 million payment to the Union during the year of assessment 2009/10, should be regarded as an approved charitable donation and hence be allowed for deduction.

The law

4. The relevant provisions of the Ordinance are set out below:

- (a) Section 26C provides:

‘(1) *Subject to the other provisions of this section, where a person... makes any approved charitable donations during any year of assessment, a deduction in respect of the aggregate amount of the approved charitable donations shall be allowable to the person for that year of assessment, if in any case such aggregate amount is not less than \$100.*

(2)(a) *Subject to paragraph (b), where a person is chargeable to tax under Part 3, no deduction shall be allowable to the person under subsection (1) for any year of assessment in respect of –*

...

(ii) *any sum by which the aggregate amount of the approved charitable donations within the meaning of subsection (1) is in excess of the percentage specified in subsection (2A) of –*

(A) *... the assessable income of the person for that year of assessment as reduced by the deductions provided for under section 12(1)(a) and (b) for that year of assessment;*

(2A) *The percentages specified for the purposes of subsection*

(2)(a)(ii)... shall be –

...

(c) *for any year of assessment commencing on or after 1 April 2008, 35%.*

(b) Section 2(1) defines ‘*approved charitable donation*’ to mean ‘*a donation of money to any charitable institution or trust of a public character which is exempt from tax under section 88 or to the Government, for charitable purposes*’.

(c) Section 68(4) provides:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’

5. The Respondent cited Sanford Yung-tao Yung v CIR 1 HKTC 1081 as the authority to support that the Sum was not a ‘donation’. In Sanford, the taxpayer purchased ten tickets for a Gala Premiere of a film, which had been arranged to raise funds for the purposes of the Community Chest. The Court of Appeal, having considered the approaches adopted by the English courts and the Australian courts in deciding whether a particular payment was a gift or a voluntary contribution, preferred the Australian approach that any advantage of a material character would prevent a payment from being a donation. The Court of Appeal held that the purchase of the cinema seats was an advantage of a material nature and that the amount paid by the taxpayer for the tickets was not a donation for tax purposes. Roberts, CJ stated at page 1086:

‘We are thus presented with two choices. If we followed the English authority, we would probably come to the conclusion that the benefits accruing to the taxpayer were incidental advantages such as would not take away from the payment its characteristic of being a donation. If we followed the Australian cases, we would have to find that no advantage of a material character was received by the taxpayer in return for his payment, otherwise it would cease to be a donation.

The legislation in Australia is very similar to our own. In addition the test applied there is more likely to lead to a general certainty of decision than its counterpart in England. For these reasons we prefer the Australian approach. We express no opinion as to whether the fact that a payment to an approved institution is in pursuance of a contractual obligation is in itself sufficient to deprive that payment of its donor character. But we are satisfied that this is the consequence whenever any advantage of a material character is received in return. ...’

6. The leading Australian case referred to in Sanford is Federal Commissioner of Taxation v McPhail 10 AITR 552. In McPhail, a building fund was established by a private school under a deed of trust to assist in the maintenance and development of the school which the taxpayer's son attended. Parents were invited by the school to pledge themselves to donate a suggested sum each term to the fund and so become eligible to be charged school fees on a lower scale. In accordance with the scheme, the taxpayer paid £ 15 to the fund and claimed the amount as a deductible gift. It was held that the payment was not a gift. Owen J said at pages 555 to 556:

'But it is, I think, clear that to constitute a "gift", it must appear that the property transferred was transferred voluntarily and not as the result of a contractual obligation to transfer it, and that no advantage of a material character was received by the transferor by way of return. In my opinion, neither of these conditions was fulfilled in the present case. The taxpayer gave an undertaking to the school council to contribute £15 per term to the fund and coupled with that undertaking a request to be charged fees at the [lower scale of] rates... The school council granted his application and charged him accordingly. In the result, it seems to me, there came into existence a contractual obligation on the taxpayer's part to pay those fees and to contribute to the fund, and on the part of the school council an obligation to provide education facilities for the taxpayer's son for the appropriate fee... The payment of £15 was not a voluntary payment. In the events that happened it was a payment made pursuant to a contract between the taxpayer and the school council. If, however, the payment should be regarded as a voluntary payment, the taxpayer made it in the expectation that in return he would receive, and he did in fact receive, a substantial concession in the fees charged for the education of his son. In neither event did he make a "gift" within the meaning of [the relevant deduction provision of the Australian equivalent to the IRO].'

The Appellants' grounds of appeal and the issue for the Board

7. The Statement of the Grounds of Appeal runs for about three pages long. Having regard also to Mr A's oral submission and his responses to the questions raised by members of this panel during the hearing, the arguments for the Appellant can be summarized as below.

- (a) In Mr A's submission, the focus should be on the legal intent initiated by the Deceased. It is the Appellant's case that the Deceased, before his death, asked his direct relatives, including the Appellant, to bury his body after death permanently in the Union's graveyard. The Appellant took charge of the communication with the Church and the Union and went to the management office of the graveyard to enquire. The Appellant was told that the particular Zion type grave space was not for sale. Instead, they were advised to 'donate' \$2 million and in return the Union would

‘give back’ such a grave space for burial after the Deceased’s death. As such, the Deceased asked his direct relatives, including the Appellant, to ‘donate’ for him. What they, including the Appellant, did was to follow the Deceased’s intention so that his wish could be fulfilled.

- (b) Regarding the definition of ‘donation’, Mr A disputed the reliance on the Sanford case. In particular:
- i. According to Mr A, ‘donation’ in the Hong Kong culture means ‘common exchange of gifts’. In this regard, he elaborated by saying that because one donates something to another, in the Chinese culture the recipient donates back because they ‘have the personal obligation’ to do so. Mr A confirmed that the phrase ‘common exchange of gifts’ equates to the Chinese idiom ‘禮尚往來’ that had been repeatedly used in the Appellant’s previous correspondence and objection. What he meant was that he considered the payment of \$2 million to the Union on the understanding that in return the Union would give back a Zion type grave space for the Deceased to be buried still a ‘donation’ since it is an ‘exchange of gifts’ which means in Chinese ‘禮尚往來’.
 - ii. The Appellant also argues that she and the Union had ‘no intent to finally engage in contractual relationship.’ In any event, it is the Appellant’s case that she had not received any incidental or material advantage from the Union. It was because the grave space was given for the Deceased’s use but not for the use of the Appellant and the Appellant cannot foresee (1) when she would die; (2) whether she would die as a Christian; and (3) whether at that point in time the Regulations might have changed, such that her entitlement to be buried in the same grave space might be affected. Indeed, according to Mr A, since the grave space cannot be freely transferred, it is ‘not of any significant value’.
 - iii. Further, Mr A raised in his oral submission that if the Australian authority, and hence Sanford, would be followed, an absurd result, being that no donation to church would ever be allowable deduction because the intangible good blessing from God or the pastor and the seat made available would be considered material consideration received by the donor, would occur.

Our analysis and decision

8. While it is common ground that the Union is ‘a charitable institution or trust of a public character’ within the meaning of section 2(1) of the Ordinance, the Sum does not qualify as an ‘approved charitable donation’ if it is not a ‘donation’ at all.

9. Despite that the Appellant, the Church and the Union in all correspondence and documentary evidence adduced referred the \$2 million, of which the Sum forms a part, as ‘donation’, we do not find those references conclusive. We are bound to go beyond the label and consider the substantive nature of the Sum.

10. The Ordinance does not define ‘donation’. Sanford is so far the only authority in Hong Kong. The Court of Appeal, as a higher court, has examined the meaning of ‘donation’ with reference to English dictionaries and both the English and the Australian authorities. We do not see it appropriate not to follow Sanford except for very strong reasons.

11. The Appellant equates ‘donation’ with ‘a common exchange of gifts’ or in Chinese ‘禮尚往來’. Both Mr A and the representative of the Respondent, however, could not assist this panel further in identifying the source of this Chinese idiom. It is, nevertheless, Mr A’s understanding and interpretation that the Chinese character ‘禮’ in this idiom means ‘gift’.

12. According to our own research, the idiom originates from the Book of Rites (‘禮記’). It is a phrase in Qu Li (‘曲禮’), the very first article of the Book, which summarizes daily etiquettes and manner. The relevant part of the original Chinese text which includes the idiom is reproduced below:

‘...大上貴德，其次務施報。禮尚往來...’¹

13. The Commentaries on the Book of Rites (‘禮記正義’) by two scholars, Zheng Xuan (‘鄭玄’) of the Han (‘漢’) Dynasty and Kong Ying-da (‘孔穎達’) of the Tang (‘唐’) Dynasty, explain the passage in the following way:

‘... 三皇五帝之世...其時猶淳厚其德，不尚往來之禮，所貴者在於有德... 德主務施其事，但施而不希其反...三王之世，獨親其親，獨子其子，貨力為己，施則望報，以為恒事...三王之世，其禮主尚往來...’²

14. A Taiwanese scholar, Wang Meng’ou (‘王夢鷗’), interpreted and explained the passage in contemporary Chinese in the following way:

‘上古時代，人心很淳樸，凡事、想做就做，只重老實，沒有什麼準則。到了文明進步，就講究行為效果，凡是受到別人恩惠，就要報答別人的恩惠。因此行為的準則中便含‘施’與‘報’的作用...’³

¹ Qu Li (Part 1), the Book of Rites (‘禮記·曲禮上’)。

² Li ji zheng yi (‘禮記正義’), Beijing : Beijing University Press, 2000.

³ Li ji jin zhu jin yi (‘禮記今註今譯’), Taipei: Taiwan shang wu yin shu guan gu fen you xian gong si, 2009.

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15. We cannot find any authentic English translation of the passage. To our best understanding of the commentaries and interpretation above, it indicates that people in pre-historic times put emphasis on ‘virtue’ (‘德’) by which one gives without expecting anything in return (‘施而不希其反’) but it was subsequently considered rites (‘禮’) as granting and returning favors in reciprocity (‘務施報’).

16. In our view, the idiom ‘禮尚往來’ must be understood from and in its context. The phrase is used to describe the phenomenon at the times when rites were advocated. Although ‘rites’, providing a summary of etiquettes and manner, may be reflected by the act of returning favours to others, that can still be achieved without necessarily through ‘gifts’.

17. In the authentic Chinese version of the Ordinance, ‘approved charitable donation’ in Chinese is ‘認可慈善捐款’ and in its definition, ‘donation’ in Chinese is ‘捐贈’. In our view, the Chinese character ‘捐’ in the context embraces the meaning of ‘giving away’ (‘捨棄’). It resembles another Chinese character ‘施’ which has the meaning of ‘give’, ‘grant’ or ‘bestow’. This is also consistent with the word ‘donation’ as defined in the Shorter Oxford Dictionary: a ‘donation’ is a gift and a ‘gift’ is ‘a transfer of property in a thing voluntarily and without any valuable consideration’. The element of ‘return’ (‘報’) does not appear in any of these terms.

18. As a result, we cannot agree with Mr A to re-define ‘donation’ to mean or include ‘a common exchange of gifts’ or in Chinese ‘禮尚往來’. As such, we find no valid reason for us to depart from Sanford.

19. The Court of Appeal in Sanford accepts beyond doubt that the principal object of the taxpayer was to give money to the Community Chest and that the purchase of the tickets for the cinema seats had been incidental to his primary motive. Even so the purchase of the cinema seats was held to deprive the payment of its donator character. Was the principal object of the Appellant to give the Sum to the Union and the purchase of the Zion type grave space for the Deceased just incidental? That addresses the point of ‘intention’ raised by Mr A.

20. The sequence of events has been summarized above in paragraph 7(a). What needs to be added here is that indeed before forwarding the cashier order in the amount of \$2 million to the Union, a grave space had been selected by the direct relatives of the Deceased, including the Appellant.

21. During his reply, Mr A said:

‘... [Mr Fung is] also saying that we have already select the grave space before our father died. However, it is a form of administration because our father told us he want to bury in – in the graveyard so all our family members had to go to the grave space to inspect the site and determine that there is a grave space available **before** we donate. So our original intent is to donate and **on the**

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understanding that the Union will donate back this certain item, we call it a grave space. ...

[Mr Fung is] also saying that we donate the Union HK\$2 million with expectation, right. That is correct. ... Also in terms of value you are saying that HK\$2 million is a huge amount, ... if not for the grave space we are not willing to pay.' [Emphases underlined and in bold]

22. It is clear that the Appellant, and others, agreed to pay the Union in return for a Zion type permanent grave space as selected by them be made available for the burial of the Deceased's body after his death. They paid after ensuring that there was a grave space that they would select and such selection had also been made. The payment was made pursuant to the oral exchange of promises.

23. It has also been made clear to us that they would have been willing to 'purchase' if such a grave space had been available for 'sale'. On the other hand, if no such grave space could have been made available, they would not be willing to make any payment at all and hence they only paid after inspection and ensuring that there was a grave space that they would select. Therefore, on the facts made available to us, we find that the principal object of the Appellant, and others, for the payment is to secure a permanent Zion type grave space as selected to bury the Deceased, not to donate money to the Union. In other words, neither the Deceased nor his direct relatives, including the Appellant, had the intent to donate. Their intention was to have a Zion type grave space for the burial of the Deceased after his death. The payment, no matter what it is called, 'donation' or otherwise, is just a means to achieve that end.

24. As seen from paragraphs 22 and 23, it is a case worse than Sanford.

25. Even if we were wrong as per our analysis in paragraphs 22 and 23 above, the Sum is still not a donation since according to Sanford an advantage of material character received in return deprives the Sum of any donatory character.

26. The advantage received in return for the Sum is, in our view, obvious. In Sanford, the same film was shown to members of the general public at much lower prices (\$7, \$5 and \$3.70) compared with that at the Gala Premiere (\$300 by the taxpayer while tickets were also available at \$20 and \$10 for the same performance). The Court of Appeal held that the purchase of the cinema seats was an advantage of a material nature that took the transaction as a whole outside the definition of 'donation'. In the present case, the normal range of charges for a grave space other than the particular Zion type was much lower (from \$2,200 to \$500,000) compared with the Zion type grave space selected by the Appellant and others for the burial of the Deceased. Further, the human remains or cremated human ashes of the Deceased's close relatives could also be buried in the same grave space afterwards. The selected grave space meets the wishes of the Deceased which the Appellant, and others, felt obliged to accomplish for him. Certainly at no time would they anticipate any second-handed value which might attach to the grave space. The restriction on alienation is

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therefore completely irrelevant. We conclude therefore that in terms of both its nature and value, the advantage is material.

27. The analogy drawn by Mr A can be rejected swiftly. A church is understood to be open for anyone. One does not have to donate in order to have a seat there. On the other hand, one donates not because, or in expectation, of a seat in a church always being reserved for him or her. With regard to blessings from God and from a pastor, the same line of response can apply. Such blessing does not come or go because of a donation or absence of an offering.

28. For the aforesaid reasons and analysis, the appeal must fail. Accordingly, we dismiss the appeal of the Appellant and confirm the Determination.