GSTR 2000/D23 - Goods and Services Tax: GST consequences of court orders and out-of-court settlements

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Draft Goods and Services Tax Ruling
Goods and Services Tax: GST consequences of court orders and out-of-court settlements

Contents	Para
What this Ruling is about	**1**
Date of effect	**6**
Context	**7**
Ruling with explanations	**14**
Detailed contents list	**133**
Your comments	**134**

Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered, views of the Australian Taxation Office. This draft may not be relied on by taxation officers, taxpayers and practitioners. When officially released it will be a public ruling for the purposes of section 37 of the ***Taxation Administration Act 1953*** *and may be relied upon by any person to whom it applies.*

What this Ruling is about

1. This Ruling considers the goods and services tax (GST) consequences resulting from court orders and out-of-court settlements. It explains how a payment (or act or forbearance) that is made in compliance with a court order or out-of-court settlement should be treated for the purposes of *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act).

2. The Ruling explains the circumstances in which, because there is a link or nexus between a payment (or act or forbearance) and a supply, the payment represents consideration for a supply.

3. The Ruling also explains:

- how the GST treatment of a court order or out-of-court settlement is affected by events relevant to the order or settlement having occurred before 1 July 2000, or if the order or settlement itself occurred before 1 July 2000; and
- when an increasing or decreasing adjustment for a taxable supply or creditable acquisition is required as a result of a court order or out-of-court settlement.

4. This Ruling does not deal with settlements of insurance claims. Division 78 of the GST Act deals specifically with settlements of this nature[1].

[1] See also Goods and Services Tax Ruling GSTR 2000/36, titled 'Insurance settlements by making supplies of goods or services'.

5. Unless otherwise stated, all legislative references in this Ruling are to the GST Act.

Date of effect

6. This Ruling, when finalised, will apply on and from 1 July 2000.

Context

7. This Ruling analyses the concepts of supply, when a payment becomes consideration, and the nexus that must exist between payment and supply in order to establish the relationship of a 'supply for consideration'. As explained later in the ruling, a payment will not necessarily represent consideration for a supply.

8. The ruling begins by analysing the concept of 'supply'. It does this by examining the statutory definition of the term in section 9-10, and comparing this definition with the meaning the term has in overseas jurisdictions, namely the United Kingdom, New Zealand and Canada. Similarities and differences are highlighted. This analysis is found at paragraphs 24 to 61.

9. The Ruling then analyses 'payment' and when a payment becomes 'consideration'. A similar approach is taken as with 'supply'. This analysis is found at paragraphs 62 to 67.

10. The Ruling then analyses the critical 'nexus' requirement that must be satisfied to establish the 'supply for consideration' relationship. This analysis is found at paragraphs 68 to 88.

11. In each of the above analyses, the Ruling looks at the concepts in a general sense, then more specifically within the context of court orders and out-of-court settlements.

12. Commencing at paragraph 89, the Ruling then gives the Commissioner's views on where and if a sufficient nexus exists between payment and supply, in the context of a court order and out-of-court settlement.

13. The Ruling then explains the need for apportionment of undissected payments (paragraphs 97 to 107), the GST consequences of establishing a supply for consideration relationship (paragraphs 108 to 119), transitional issues (paragraphs 120 to 123), and the award or negotiation of costs (paragraphs 124 to 132).

Ruling with explanations

14. Matters in dispute may be resolved either by the judgment of the court, or (at a time prior to the court delivering its judgment) by agreement between the parties. An agreement between the parties is referred to in this Ruling as an out-of-court settlement. Out-of-court settlements will include any form of dispute resolution in which the terms of the resolution are agreed between the parties, rather than imposed by the court. Some examples of this are:

(i) the parties obtain a consent order, the draft of which has been agreed to in a settlement deed;

(ii) they may agree to have the action struck out without a consent order;

(iii) they enter into an agreement settling their differences before court action commences.

15. In this Ruling, a court order refers to the terms laid down by a court in accordance with its judgment in respect of a dispute.

16. A reference to a court in this Ruling includes a reference to a tribunal or other body that has the power to make orders.

17. A reference to a payment in this Ruling includes a reference to an act or forbearance. A payment will not necessarily be consideration. It will become consideration if it fits within the definition in section 9-15. Discussion of this commences at paragraph 62.

GST consequences

18. The GST consequences of a court order or out-of-court settlement will depend on whether payment made under the order or settlement is characterised as consideration for a supply, and if so, whether that supply is in the nature of a taxable, input taxed[2], or GST-free supply[3].

19. The GST consequences may be the attribution of GST payable or input tax credits, or adjustments required in respect of attribution in earlier tax periods. Alternatively, no GST would be payable if the payment is not characterised as consideration for a supply. GST consequences are discussed more fully from paragraphs 108 to 119.

[2] Division 40 deals with input taxed supplies.
[3] Division 38 deals with GST-free supplies.

What is a taxable supply?

20. Subdivision 9-A is about taxable supplies. Section 9-5 sets out the requirements of a taxable supply. The section provides:

You make a taxable supply if:

(a) you make the supply for consideration;

(b) the supply is made in the course or furtherance of an enterprise that you carry on;

(c) the supply is connected with Australia; and

(d) you are registered or required to be registered.

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.

21. In considering the GST consequences of court orders or out-of-court settlements, this Ruling focuses on the 'supply for consideration' requirement. However, a supply for consideration will not be a taxable supply unless the other requirements set out in section 9-5 are also satisfied. For example, many settlements will not result in a taxable supply because the entity making the supply will not be doing so in the course or furtherance of an enterprise.

22. Likewise, if a supply is not connected with Australia, no taxable supply will result. Finally if the entity making the supply is neither registered, nor required to be registered for GST, the supply will not be a taxable supply.

23. A 'supply for consideration' is the first step towards there being a taxable supply, an input taxed supply or a GST-free supply. However, for there to be a supply for consideration, three fundamental criteria must be met:

(i) there must be a supply (see paragraph 24 onwards);

(ii) there must be consideration (see paragraph 62 onwards); and

(iii) there must be a sufficient nexus between the supply and the consideration for it to be a supply for consideration (see paragraph 89 onwards).

What is a 'supply'? [4]

24. Essentially, a supply is something which passes from one entity to another. The supply may be one of particular goods, services or something else.

[4] The following analysis is based largely on Goods and Services Tax Ruling GSTR 2000/11, titled 'Grants of financial assistance'.

25. 'Supply' is defined in subsection 9-10(1) as 'any form of supply whatsoever'. In the UK the term 'supply' has been held to take its ordinary and natural meaning, being 'to furnish or to serve'.[5] Similarly, the definition of 'supply' in the Macquarie Dictionary is 'to furnish or provide (something wanting or requisite: *to supply electricity to a community*)'. The term refers to things passing from one party to another.

26. Without limiting these general meanings, subsection 9-10(2) provides a non-exhaustive list of activities or occurrences that are included within the meaning of supply. The list is as follows:

(a) a supply of goods;

(b) a supply of services;

(c) a provision of advice or information;

(d) a grant, assignment, or surrender of real property;

(e) a creation, grant, transfer, assignment or surrender of any right;

(f) a financial supply;

(g) an entry into, or release from an obligation:

  (i) to do anything; or

  (ii) to refrain from an act; or

  (iii) to tolerate an act or situation;

(h) any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).

27. Subsection 9-10(2) refers to two aspects of a supply; the thing which passes, such as goods, services, a right or obligation; and the means by which it passes, such as its provision, creation, grant, assignment, surrender or release.[6]

Supplies of rights and obligations in other jurisdictions

28. In other jurisdictions, supply is also broadly defined, by first defining the term 'goods' and then treating services as anything that is not goods. For example, in the Sixth VAT Directive of the European Council[7] ('the Sixth Directive'), a supply of services is defined as 'any

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[5] *Carlton Lodge Club Ltd v. C & E Commrs* [1974] 3 All ER 798, at 801; *C & E Commrs v. Oliver* [1980] 1 All ER 353, at 354-355.

[6] This distinction is particularly important in applying *A New Tax System (Goods and Services Tax Transition) Act 1999.*

[7] *EC Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes—Common system of value added tax: uniform basis of assessment.*

transaction which does not constitute a supply of goods', and the term includes 'obligations to refrain from an act or to tolerate an act or situation'.[8]

29. In the UK, 'supply' includes all forms of supply, but not anything done otherwise than for a consideration. Anything which is not a supply of goods but is done for a consideration (including the granting, assignment or surrender of any right) is a supply of services.[9]

30. In Canada, supply is defined to mean 'the provision of property or a service in any manner, including sale, transfer, barter, exchange, license, rental, lease, gift or disposition'. A right or interest of any kind and a chose in action are included within the definition of 'property'.[10]

31. In New Zealand, GST is imposed on supplies of goods and services.[11] Services is defined as 'anything which is not goods or money'.[12] The term supply is defined as 'all forms of supply'[13], and the succeeding subsections of the New Zealand legislation specify particular rules relating to supplies of goods or services.

32. The Australian GST Act deals with 'supply' in a similar way, but not identically, to these overseas jurisdictions. Therefore, while there is useful guidance to be obtained from an analysis of relevant overseas court decisions, some caution must also be exercised.

Transactions which are supplies of rights or obligations

33. It has been found in overseas cases that the surrender of a right or the entering into of an obligation does not, without more, constitute a supply of services. This is despite the term 'services' being defined to include them.

34. For example, in the Court of Justice of the European Community (ECJ) case *Landboden-Agrardienste GmbH & Co. KG v. Finanzamt Calau* [1998] BVC 70, the issue was whether the 'supply of services', within the meaning given by the Sixth Directive, extended to an undertaking given by a farmer to reduce its harvest of a potato crop[14]. The undertaking appeared to constitute 'an obligation

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[8] Sixth Directive, Article 6(1).
[9] Subsection 5(2) *Value Added Tax Act 1994*.
[10] *Excise Tax Act 1985* subsection 123(1).
[11] *Goods and Services Tax Act 1985* (NZ), section 8.
[12] *Goods and Services Tax Act 1985* (NZ), subsection 2(1).
[13] *Goods and Services Tax Act 1985* (NZ), subsection 5(1).
[14] Article 6(1) of the Sixth Directive provides that a supply of services means any transaction that does not constitute a supply of goods. It also provides that such transactions could be obligations to refrain from an Act or to tolerate an Act or situation.

to refrain from an act' and so fit within the definition of a 'service' in terms of the Sixth Directive. However, the Court ruled:

> *'an undertaking given by a farmer under a national compensation scheme not to harvest at least 20% of his potato crop does not constitute a supply of services for the purposes of [the Sixth] Directive.'*[15]

35. In the opinion of Advocate General Jacobs, it did not amount to a service. He commented that:

> *'any payment, except perhaps a gift, will have conditions attached to it whose performance might, by creative use of language, be described as a service.'*[16]

36. *Mohr v. Finanzamt Bad Segeberg* [1996] BVC 293 was another ECJ case in which such a finding was made. In this case, an undertaking by a farmer to refrain from milk production was found not to constitute a supply within the meaning of the Sixth Directive.

37. In *Landboden*, it was held that for an undertaking to be covered by the common system of VAT, it must imply consumption[17], and that by undertaking to reduce production the farmer did not provide either services to an identifiable consumer, or some benefit capable of being a cost component of another person in the commercial chain.[18]

38. In both *Mohr* and *Landboden* the end result was that there was no consumption and hence no supply. In terms of the Australian legislation they would be supplies. Furthermore, in Australia, the GST Act [subsection 9-10(2)] does not rely on characterising surrender of rights or entering into an obligation as a 'service' in order to bring them within the definition of 'supply'. They are listed independently within the definition, thus requiring no 'creative use of language'[19] for a supply to result.

Agreement which is binding where the transaction is a supply of a right or obligation

39. For there to be a supply of a surrender of any right or entering into an obligation, such rights or obligations must be binding on the

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[15] *Landboden* Ruling.
[16] Opinion of Advocate General paragraph 24, *Landboden*.
[17] Judgment, paragraph 20. Article 2 of the First VAT directive (*Directive 67/227/EEC* : *First Council Directive of the European Economic Community of 11 April 1967 on the harmonisation of legislation of member states concerning turnover taxes*) provides that the common system of value added tax involves the application to goods and services of a general tax on consumption.
[18] Judgment, paragraph 23.
[19] Opinion of Advocate General paragraph 24, *Landboden.*

parties. The creation of expectations among the parties does not, in itself, necessarily establish a supply.

40. An agreement that does not bind the parties in some way would not be sufficient to establish a supply by one party to the other unless there is something else, such as goods or some other thing, passing between the parties.

41. This requirement was emphasised by the New Zealand Court of Appeal in *C of IR v. New Zealand Refining Co. Ltd.*[20] The case concerned certain payments made by the New Zealand Government to the New Zealand Refining Company that were only to be made on condition that the refinery remained operational.

42. Blanchard J's reference to Richardson J's dictum in *Marac Finance Ltd v. Virtue*[21] regarding the nature of the legal arrangements being entered into needs to be considered. Blanchard J noted there was an expectation among the parties that the refinery would continue to operate, but that there was no contractual requirement to that effect.[22] The government's only recourse in the event that the refinery ceased to be operational was to stop making payments. In *New Zealand Refining*, the court held:

> *'In terms of any binding commitment between the parties, there was to be little or no linkage between the Crown's payments and the making of particular (or any) supplies of goods or services.'*[23]

43. This requirement that a transaction bind the parties in some way before it will involve a supply, is considered to have application in Australia where the transaction is the supply of a right or obligation.[24]

What 'supplies' may be related to an out-of-court settlement?

44. As noted at paragraph 25, the statutory definition of 'supply' is very broad. In the context of an out-of-court settlement, a supply referred to under any of the paragraphs within subsection 9-10(2) could be related to an out-of-court settlement.

45. A supply related to an out-of-court settlement may have occurred prior to the settlement (and in fact have been the subject of the dispute in the first place), or it may be created by the terms of the settlement itself. There may be more than one supply that is related to

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[20] *C of IR v. New Zealand Refining Co. Ltd* (1997) 18 NZTC 13187.
[21] *Marac Finance Ltd v. Virtue* [1981] 1 NZLR 586
[22] (1997) 18 NZTC 13187, at page 13192, per Blanchard J.
[23] (1997) 18 NZTC 13187, at page 13193, per Blanchard J.
[24] Paragraph 35 of Goods and Services Tax Ruling GSTR 2000/11.

a settlement. In addition, the subject of the dispute may not be a supply at all.

46. For the purposes of this Ruling, supplies that may be related to an out-of-court settlement may fall within the three categories of supply analysed below. This characterisation is to assist in the subsequent analysis of payment for a supply, which commences at paragraph 89. The existence of a particular supply in relation to a given settlement will not necessarily mean a sufficient nexus exists between that supply and a payment made under the settlement.

Earlier supply

47. The GST Act requires the identification of a supply before there is any GST payable. Each and every supply is subject to GST provided the requirements for a taxable supply are met. The GST Act does not prescribe any sequencing or hierarchy of supplies for taxing purposes. GST becomes payable on the relevant supply.

48. In these circumstances, where the subject of the dispute is an earlier transaction in which a supply was made involving the parties, that supply is referred to in this ruling as an 'earlier supply'. For example[25], Widget Co. enters into an out-of-court settlement with a retailer for recovery of amounts outstanding for the supply of toys. The supply of the toys is an earlier supply because it occurred before the dispute arose.

Current supply

49. Where, pursuant to the terms of the settlement, one party agrees to provide another party with something of substance, a new supply is created out of the settlement. In this Ruling, such a supply is referred to as a 'current supply'.

Example 1

50. A dispute arises over a claim by Beaut Enterprises Pty Ltd that Plagiariser Pty Ltd is using their trade name. Negotiations between the parties follow, resulting in Beaut allowing Plagiariser to use its trade name in the future. This would constitute the transfer of a right from Beaut to Plagiariser, amounting to a 'current' supply.[26]

[25] The example of Widget Co. is used throughout the draft ruling at paragraphs 94, 113 and 121.
[26] *Cooper Chasney Ltd* (1990) 5 BVC 677.

Supply related to discontinuance of action

51. Even without an earlier supply or a current supply, the very wide range of things that can constitute a 'supply' means that one or more new supplies will probably crystallise on the settlement being reached.

52. Generally (it is suggested in most if not all cases), the terms of an out-of-court settlement will include undertakings by one or more of the parties to discontinue action in relation to the dispute. This entry into an obligation to refrain from further action would constitute a supply under paragraph (g) of subsection 9-10(2), or alternatively under paragraph (e) if the process were to be viewed as the surrender of a right to pursue further action.

What supplies may be related to settlement by a court order?

53. An earlier supply may be the subject of a dispute resolved either by court order[27] or out-of-court settlement. Equally, a current supply, as explained in paragraph 49 in the context of an out-of-court settlement may occur under a court order. An example of this would be the court ordering specific performance. Where this specific performance was previously attributed it would relate to that earlier supply otherwise the specific performance will relate to a current supply.

54. When a matter in dispute between two parties is ultimately resolved in court, it is the judgment of the court in the matter, and its associated orders, that 'settles' the dispute. Where this happens, the terms are imposed by the court, not reached by agreement between the parties. Where the terms of a court order resolving a dispute include an order to one party to do (or not to do) something, that party has been placed under an obligation.

55. In these circumstances, the court itself has not made a supply, although there may be a resultant supply between the parties.

The Interchase decision

56. The reported decision of Justice White in *Interchase Corporation Ltd v. ACN 010 087 573 Pty Ltd & Ors* [28] concerned the GST consequences resulting from payments made in compliance with court orders. The plaintiff *(Interchase)* in this case applied to vary an order against the third defendant *(ACN 010 087 573 Pty Ltd)* to

[27] The Widget Co. example (see paragraph 48) could equally have been resolved by a court entering judgment against the retailer.
[28] [2000] QSC 013; 2000 ATC 4552.

include an indemnity for any future liability to pay GST on the judgment sum.

57. The judge dismissed the application. The potential liability to pay the GST was not reasonably foreseeable at the time when the breach which gave rise to the judgment occurred.

58. In examining the provisions of the GST Act, Justice White made the following observations:

> *'It is not easy to see how a court giving judgment or the payment of a judgment sum or the granting of a stay of execution could constitute a 'supply' within the meaning of those expressions[s. 9-10]'*[29]

59. The Commissioner respectfully agrees with Her Honour's views to the extent they relate to the court itself not making a supply for the purposes of the GST Act. However, this does not mean that the supplies between the parties in *Interchase* in a post-1 July 2000 case would not create any GST liability. These supplies need to be considered in light of this Ruling.

Where the subject of a claim is not a supply

60. A court order or out of court settlement may finalise a claim for damages or compensation that one or more parties has caused one or more other parties to suffer, or allegedly suffer. Some examples are property damage, loss of profits, personal injury, inconvenience, and wrongful use of property

61. The damage or loss, being the substance of the dispute, cannot in itself be characterised as a supply. This is because the damages or loss, being the subject of the dispute, in itself does not constitute a supply under section 9-10 of the GST Act. This will be the case even though a supply arises out of a settlement agreement. The supply would be the obligation the aggrieved party has entered into to refrain from taking further action in relation to the dispute.

What is 'consideration'?

62. A supply is a taxable supply, if, among other things, the supply is made for *consideration.*[30] The definition of consideration in section 9-15 extends beyond payments to include such things as acts and forbearances to act.[31] It may include voluntarily made payments, and payments made by persons other than the recipient of a supply.[32]

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[29] See paragraph [54] of the judgment.
[30] Paragraph 9-5(a) of the GST Act.
[31] Subsection 9-15(1) of the GST Act.
[32] Subsection 9-15(2) of the GST Act.

63. A payment will be consideration for a supply if the payment is 'in connection with', 'in response to' or 'for the inducement' of a supply[33]. Thus, there must be a sufficient nexus or connection between a particular supply and a particular payment, act or forbearance which is provided for that supply.

64. It follows that there are two elements to the definition of consideration. The first is the transfer of value from one entity to another, being the payment. The second element is the nexus that must be established between the payment and a supply.

65. The definition of consideration in the New Zealand GST Act[34] is similar to the Australian definition. In *C of IR v. Databank Systems Ltd* (1989) 11 NZTC 6093, at 6102, Richardson J commented that the New Zealand definition of consideration 'breathed comprehensiveness'.

66. In *New Zealand Refining Co. Ltd v. C of IR* (1995) 17 NZTC 12307, at 12314, Henry J commented that the definition was wide, and that 'in response to' and 'for the inducement of' added little to 'in respect of', given the breadth of the latter term.

67. In Australia, the definition of consideration is similarly wide. To the extent that 'in connection with' may be narrower in scope than 'in respect of', the phrases 'in response to' and 'for the inducement of' may assume added stature.

Is the supply made for consideration?

68. The general theme of a 'supply for consideration' is as much a cornerstone of the VAT and GST regimes in the UK, NZ and Canada as it is under our GST.

The need for nexus

69. It will not be sufficient for there to be a supply and a payment, act or forbearance. GST is not payable on supplies unless they are made *for* consideration[35], and the other tests in section 9-5 are satisfied. There must be a sufficient nexus between the supply and the payment, act or forbearance. In *C of IR v. New Zealand Refining Co. Ltd* (1997) 18 NZTC 13187, at 13193 Blanchard J commented:

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[33] Subsection 9-15(1) of the GST Act.

[34] Subsection 2(1) of the *Goods and Services Tax Act 1985* (NZ) Definition:- "Consideration", in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body.

[35] Paragraph 9-5(a) of the GST Act.

> *'It can be seen that … a linkage between supply and consideration is requisite to the imposition of the tax … There is a practical necessity for a sufficient connection between the payment and the supply. The mechanics of the legislation will otherwise make it impossible to collect the GST.'*

The nexus test in Canada and the European Community

70. The Canadian legislation uses the expression 'consideration for the supply'.[36] The VAT law in the European Community uses the expression 'supply effected for consideration'[37], with no elaboration on what 'for' means in this context. The Courts in the UK have adopted a 'direct link' test in determining whether consideration is 'for' a supply in those jurisdictions[38].

The nexus test in New Zealand

71. While European and Canadian authorities demonstrate the need for a link between supply and consideration for a VAT or GST liability to arise, in New Zealand the definition of consideration itself describes the link. The term 'consideration' is defined in relation to supplies of goods and services. The definition includes any payment, act or forbearance in respect of, in response to, or for the inducement of, the supply of any goods and services.[39]

72. In the High Court of New Zealand decision of *New Zealand Refining*, Henry J commented in relation to the application of European Authorities to New Zealand's GST Act:

> *'I do not think there is any principle of construction relevant to the present issue to be discerned from a review of the authorities cited in argument. It can be said they demonstrate the need for a link or nexus between a payment and the identified service, but I doubt whether there is any call to go beyond an application of the statutory words defining the term "consideration" in reaching a decision in any particular case.'*[40]

73. In the Court of Appeal decision of *New Zealand Refining*, Blanchard J noted the absence of a binding commitment to make particular supplies, and stated that a 'sufficient connection' between

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[36] In Canada, tax is payable on 'the value of the consideration for the supply' *Excise Tax Act. R.S., c.E-13* subsection 165(1).
[37] Sixth Directive, article 2(1).
[38] See, for example, *Apple and Pear Development Council v. Customs and Excise Commissioners* [1988] BTC 5116.
[39] *Goods and Services Tax Act 1985 (NZ)*, subsection 2(1).
[40] (1995) 17 NZTC 12307, at 12314.

the payment and a supply was necessary. The court concluded that the payments which were made conditional on the refinery remaining operational were not consideration for any supply, as there was no binding commitment to make particular supplies.

74. The only recourse the government had was to cease making payments once the condition failed to be met. The payments were directed to maintaining the structural framework within which supplies of services were expected to be made. The purpose that the refinery remain operational was distinct from any supply of services to be made. Thus, on the particular facts of this case the requisite link between a supply of particular services and consideration was not established.[41]

75. The nexus requirement was further emphasised in the *Chatham Islands* decision of the New Zealand Court of Appeal.[42] There, the court considered whether an amount settled on a trust by the New Zealand Government could be construed as consideration for a supply of services made by the trustee either to the settlor or the beneficiaries.

76. Tipping J, in supporting the view that there must be a 'sufficient' nexus, commented:

> *'I therefore have difficulty in seeing how it can be said that the payments made by the Crown were in respect of, or for the inducement of, any services. Clearly the payments were not in response to the supply of services.'*

The nexus test in Australia

77. A supply is not subject to GST in Australia unless it is made *for consideration.*[43] Consideration 'for a supply or acquisition' is defined in section 195-1 as any consideration, within the meaning given by section 9-15, which is 'in connection with the supply or acquisition'.

78. The Commissioner considers that, in the context of the GST Act, the expression 'you make the supply for consideration' in paragraph 9-5(a) means the same as 'there is consideration for the supply that you make'.[44]

79. The references in the GST Act to 'supply for consideration'[45] and more commonly to 'consideration for a supply'[46] underscore the

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[41] (1997) 18 NZTC 13187, at 13193 - 13194 per Blanchard J.
[42] *Chatham Islands Enterprise Trust v. Commissioner of Inland Revenue* (1999) 19 NZTC 15075.
[43] Paragraph 9-5(a) of the GST Act.
[44] Compare paragraph 11-5(c), which provides that a creditable acquisition is one where you provide consideration for the supply. In addition, the definition of 'supply' itself adopts the expression 'consideration for a supply'.
[45] For example paragraph 9-5(a) of the GST Act.

close coupling between the supply and the consideration that is necessary before a payment will be consideration for a supply that will make the supply subject to GST.[47]

80. In a similar fashion to the New Zealand GST Act, the nature of the link required between supply and consideration is specified in the definition of consideration. A payment will be consideration for a supply if the payment is 'in connection with', 'in response to' or 'for the inducement' of a supply.[48]

81. In determining whether a payment is in connection with a supply, the test is whether there is a sufficient link or nexus between the substance of the supply and the payment made.

82. This test may establish a link between consideration and supply in a broader range of cases than the 'direct link' test which applies in the European Community and in Canada. While caution needs to be exercised in applying decisions on connective terms in other contexts, the term 'in connection with' has been held to be broader in scope than 'for'.

83. The meaning given to the term 'in connection with' in *Berry's Case*[49] is similar to that which was described by the Court of Appeal in *New Zealand Refining*[50], but needs to be applied with regard to the structure of the definition of supply in the GST Act. In *Berry's Case*, Kitto J held that 'in connection with' was a broader test than 'for'. At page 659 he commented that consideration will be in connection with property where:

> *'the receipt of the payment has a substantial relation, in a practical business sense, to that property'.*

84. Consideration for a supply need not be *in connection with* the supply. It may be 'in response to' or 'for the inducement of' a supply.[51] A nexus between supply and consideration which demonstrates these elements will be a sufficient nexus.

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[46] The term 'consideration for a supply' appears in, for example, paragraph (a) of the definition of 'price' in subsection 9-75(1), in subsection 9-85(2) in relation to the value of a supply, and in paragraph 11-5(c) in defining a creditable acquisition.

[47] Subject to the other requirements of the GST Act, particularly the requirements in section 9-5.

[48] Subsection 9-15(1) of the GST Act.

[49] In the High Court decision in *Berry v. FC of T* (1953) 89 CLR 653, Kitto J considered the meaning of consideration 'for or in connection with' in the context of former section 84 of the *Income Tax Assessment Act 1936*, a provision which included consideration for or in connection with goodwill in a lease premium. Kitto J held that 'in connection with' was a broader test than 'for'.

[50] (1997) 18 NZTC 13187, at 13193-13194 per Blanchard J.

[51] This does not mean that consideration that seeks to induce a supply is taxed. There must be a supply induced by the consideration for the tax liability to crystallise.

85. In determining whether a sufficient nexus exists between supply and consideration, regard needs to be had to the true character of the transaction. An arrangement between parties will be characterised not merely by the description which parties give to the arrangement, but by looking at all of the transactions entered into and the circumstances in which the transactions are made.[52]

Can a settlement or court awarded payment be consideration?

86. Subsection 9-15(2A) makes it clear that the fact that a payment is made in compliance either with a court order, or with a settlement relating to proceedings before a court will not, without more, prevent it from being consideration for a supply.

87. Subsection 9-15(2A) states:

> (2A) It does not matter:
>
> (a) whether the payment, act or forbearance was in compliance with an order of a court, or of a tribunal or other body that has the power to make orders; or
>
> (b) whether the payment, act or forbearance was in compliance with a settlement relating to proceedings before a court, or before a tribunal or other body that has the power to make orders.

88. This provision negates any argument that the characterisation of a payment according to section 9-15 either as consideration for a supply or otherwise could be affected by the payment being made in compliance with a court order or settlement relating to proceedings before a court.

Which supply has the nexus with the consideration?

89. As discussed above, a sufficient nexus between a payment made in compliance with a court order or out-of-court settlement and a supply must exist to create the 'supply for consideration' relationship. Our views on where such a relationship exists are set out below.

Earlier supply

90. Where the only supply (other than a 'discontinuance' supply[53]) in relation to a court order or out-of-court settlement is an earlier supply and a sufficient nexus exists between payment made in

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[52] *Marac Finance Ltd v. Virtue* [1981] 1 NZLR 586.
[53] See paragraph 51.

compliance with that order or settlement and the earlier supply, the payment will be consideration for that supply.

Current supply

91. Where the only supply (other than a 'discontinuance' supply) in relation to a court order or out-of-court settlement is a current supply and a sufficient nexus exists between the payment and that supply, the payment will be consideration for that current supply.

Discontinuance supply

92. Where the only supply in relation to an out-of-court settlement is a 'discontinuance' supply, no sufficient nexus will be taken to exist between the payment and that supply, where the subject of the dispute clearly relates either to an earlier supply, or to a claim which does not have the character of a supply.

93. In most instances, a 'discontinuance' supply will not have a separately ascribed value and will merely be an inherent part of the legal machinery to add finality to a dispute which does not give rise to additional payment in its own right.

94. An example of this may be a dispute over non-payment for an earlier supply of services, as discussed in paragraph 48 for Widget Co. Clearly in this instance the payment relates to the earlier supply and not to the commitment to discontinue further action in relation to the dispute.

95. However, where settlement is finalised on the basis that the subject of the dispute is not clearly identified, payment made will be taken to have a sufficient nexus with the discontinuance supply. An example of this may be settlement of an action brought by a vexatious litigant. In this case, such a payment is consideration for a discontinuance supply.

Damages

96. Where the subject of the dispute is a claim (for example) for property damage, negligence causing loss of profits, wrongful use of trade name, breach of copyright, or personal injury, and payment made in compliance with the settlement or court order that is wholly in relation to this claim, the payment will not be consideration for a supply. This is because the subject of the claim itself does not constitute a supply under section 9-10 of the GST Act.

Apportionment

Payment for more than one supply

97. Where payment made in compliance with a court order or out-of-court settlement has a sufficient nexus with more than one supply, or in addition to the supply or supplies, it relates to an item of damages which is not a supply, the payment will be treated as the sum of individual payments made for each of the relevant items.

98. Where a court order (issued in accordance with the court's judgment on the case) itself dissects and itemises the payment into the heads of claim relating to the individual supplies and / or item of damages, that itemisation will be accepted as representing the amounts of these 'individual payments'.

99. In the case of an out-of-court settlement, where the terms of the settlement include a dissection and itemisation of the payment into the heads of claim, that itemisation will be accepted as representing the amounts of these 'individual payments' to the extent that it is made on a reasonable and objective basis.

100. Where no dissection is made, even though the payment has a sufficient nexus with more than one supply, or to a supply and an item of damages which is not a supply, the payment should be apportioned into amounts representing these individual components.

101. Where an undissected payment has a sufficient nexus with a supply and item of damages which is not a supply, the payment must be apportioned in order that the correct GST consequences result.

102. The apportionment should be determined by the parties on a reasonable and objective basis. Where a payment is apportioned in a manner that cannot be justified in terms of reasonableness and objectivity, the general anti-avoidance provisions of the GST Act[54] may have application.

Example 2

103. Triple dot, an Australian based provider of music services on the internet, is sued by Ozy Rockers, a local rock group, for breach of contract for $50,000 and an undisclosed amount for use of copyright in relation to its material. Triple dot has achieved unparalleled success in attracting 'surfers' to the site.

104. Prior to the matter being considered by the courts Ozy Rockers and Triple dot enter into negotiations in an attempt to resolve the dispute. During the discussions a settlement is reached which provides that Triple dot will make a one off payment of $200,000 to

[54] Division 165.

Ozy Rockers. The payment is for the breach of contract and use of copyright.

105. Apportionment is necessary for the correct GST consequences to attach to the supply of the right to use the copyright. A reasonable approach is required for calculating the necessary apportionment. In the absence of any further information a reasonable basis for apportionment would attribute $50,000 to damages for the breach of contract (which would not attract GST) and $150,000 to the use of the copyright (a taxable supply). An alternative might include using industry standards for calculating copyright fees as the basis for apportioning the amount.

Example 3

106. Flowerbox, a GST registered gift shop, receives a supply of wilted flowers for which it has paid $5,500 and claimed an input tax credit of $500. The supplier refuses to refund any part of this amount. Flowerbox sues for the return of its money plus $6,000 in damages for loss of business during Valentine's day celebrations. The court awards an amount of $9,900 in respect of both claims.

107. To apportion this amount it is reasonable that $5,500 is applied to the reduction in the price of the flowers and the balance ($4,400) to the damages for loss of business.[55] Flowerbox has an increasing adjustment because its previously attributed input tax credit amount is greater than the corrected input tax credit amount as a result of the court award. This means Flowerbox returns the $500 input tax credit claimed under the original transaction. No GST is payable on the amount for damages for loss of business.

GST consequences

108. Where it is established that the payment is consideration for either an earlier supply, or a current supply (or both), the GST consequences must be considered. Presuming that the supply has been made in the course or furtherance of an enterprise that you carry on[56], the supply is connected with Australia[57], and you are registered or required to be registered[58], the supply will be taxable except to the extent that it is GST-free or input taxed.

109. An earlier supply, or a current supply may be taxable, GST-free or input taxed. In addition, it may be a partly taxable or partly GST-free or input taxed supply.

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[55] In different circumstances a proportionate approach would also be acceptable.
[56] Section 9-5(b).
[57] Section 9-5(c).
[58] Section 9-5(d).

Attribution of GST payable and input tax credits

110. Where the supply for consideration is a current supply, basic GST principles will determine the GST payable. For example, for an entity that accounts for GST on a basis other than cash the GST payable on a taxable supply should be attributed on the consideration for the supply in the tax period in which an invoice is issued, or any consideration received whichever is the earlier.

111. Where the supply for consideration is an earlier supply, GST payable will already have been attributed in an earlier tax period for an entity that accounts for GST on a basis other than cash. The GST payable would be attributed on the receipt of the consideration where an entity accounts on a cash basis for GST. Attribution of input tax credits would likewise be done in accordance with basic GST principles.[59]

Adjustment events

112. Where attribution occurred in a previous tax period because the supplier issued an invoice in that period, but payment is now made in connection with that earlier supply, an adjustment event may be triggered. However, if the earlier supply had been GST-free, then there would be no attribution as a result of the settlement because the earlier supply was a GST-free supply.

113. If the payment received is less than the amount in respect of which GST was previously attributed, the supplier has a decreasing adjustment. Continuing the Widget Co. example (see paragraph 48), if the parties agree that only 80% of the outstanding amount has to be paid this is a change to the consideration for the earlier supply and Widget Co. has a decreasing adjustment. The same result occurs if some of the toys are returned and a lesser amount paid.

114. Where all or part of the consideration had been overdue for 12 months prior to the settlement being reached, the supplier would have been entitled to a decreasing adjustment in respect of its taxable supplies.[60] If the supplier attributes on a cash basis, this entitlement does not apply.

115. If the supplier had processed a decreasing adjustment for that reason in respect of the entire amount not received, then it must do an increasing adjustment for the amount of the consideration when it receives the payment.[61]

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[59] Division 29.
[60] Section 21-5. Also see Goods and Services Tax Ruling GSTR 2000/2 'Adjustments for bad debts'.
[61] Section 21-10.

Example 4

116. ABC Pty Ltd makes a taxable supply to Grant Co. Both entities attribute monthly on a basis other than cash. ABC Pty Ltd issues a tax invoice in September 2000 for $110,000 for this supply.

117. The entities account for their September 2000 GST liability as follows:

(i) ABC Pty Ltd has a GST liability for $10,000 to be included in its net amount calculation;

(ii) Grant Co. has an input tax credit entitlement of $10,000.

118. On 2 December 2000 a dispute arises. Grant Co. disputes the quality of the product supplied and insists on a reduction of the price to $99,000. A negotiated settlement is reached in January 2001. ABC Pty Ltd agrees to reduce the consideration from $110,000 to $99,000 for the previous taxable supply. Grant Co. agrees not to proceed with the dispute.

119. The reduction in the consideration resulting from the settlement is an adjustment event. ABC Pty Ltd provides Grant Co. with an adjustment note based on the reduced consideration of the previous taxable supply. ABC Pty Ltd will have a decreasing adjustment for its supplies of $1,000. Grant Co. will have an increasing adjustment for its creditable acquisitions of $1,000.

Transitional Issues

120. A court order or out-of-court settlement, the subject of which is a dispute that arose before 1 July 2000, with a payment under the order or settlement being finalised on or after 1 July 2000, may give rise to GST consequences depending on the relevant facts. A similar issue may arise where the court order or out-of-court settlement arises before 1 July 2000, but where there may be current supplies occurring on or after 1 July 2000.

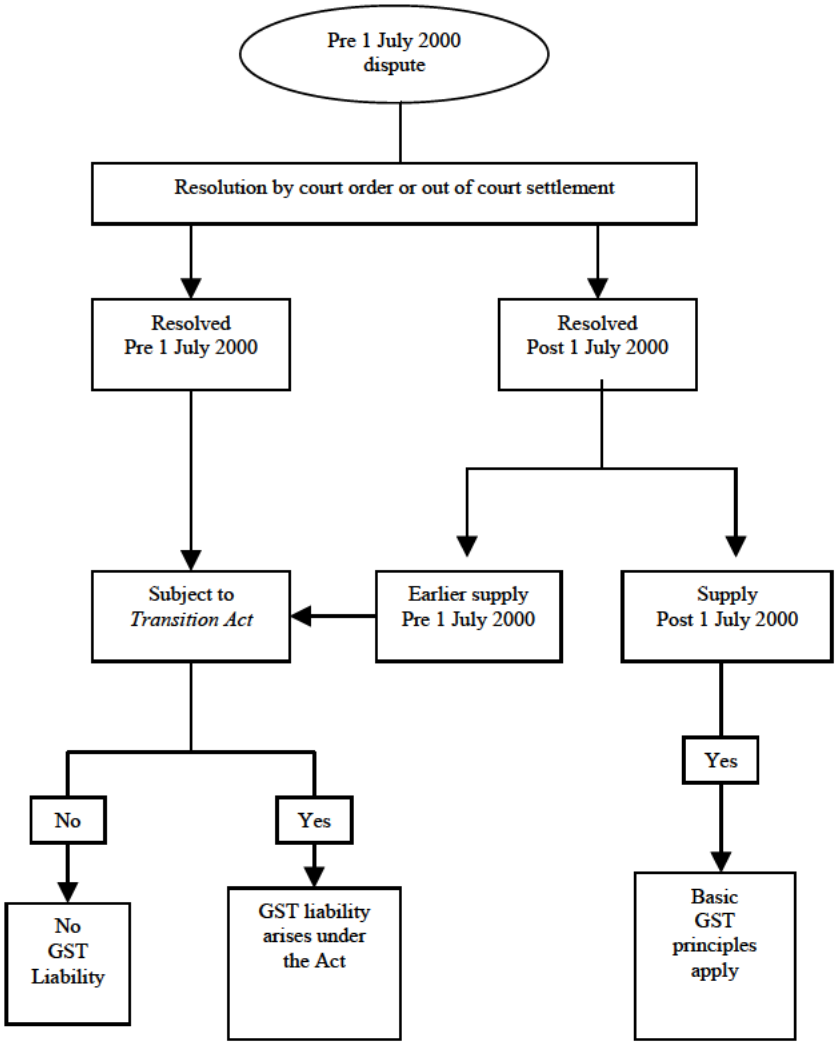
121. Where the dispute in question involves an earlier supply, and a sufficient nexus exists between the payment and that supply, subject to the provisions of *A New Tax System (Goods and Services Tax Transition) Act 1999* (the Transition Act), there will be no GST payable and no input tax credit entitlements. This is because under the Transition Act, GST is only payable on a supply to the extent that it is made on or after 1 July 2000. In the Widget Co. example[62], if the toys were sold to the retailer in May 2000 and the settlement occurs in November 2000 there will be no GST payable or input tax credits.

[62] see also paragraph 48, 94 and 113.

This is because the supply was an earlier supply that occurred before 1 July 2000 and was not subject to the Transition Act.

122. Where there is a current supply arising from the court order or out-of-court settlement, the supply would be made on or after 1 July 2000. Where a sufficient nexus exists between the payment and that supply, the current supply will be a supply for consideration for the purposes of section 9-5 (about taxable supplies).

123. Flowchart of transitional effects:



Costs

124. At the end of a court action, the unsuccessful party in the case may be ordered by the court to pay the costs or part of the costs that have been incurred by the successful party in having the matter brought before the court. These costs could include, for example, barristers fees, solicitors costs and fees for various expert reports.

125. In any legal action the parties concerned are required to pay their legal advisers the costs incurred and these amounts for payment of legal services will attract GST and will be GST inclusive sums assuming they are not GST-free. The paying party in the case may be entitled to an input tax credit for a creditable or partly creditable acquisition.[63]

126. For the purposes of this Ruling, we are concerned with the subsequent stage when the successful party is able to recover costs wholly or partly through an order or award for costs.

127. As we have seen for a supply to be a taxable supply the conditions under section 9-5 of the GST Act must be met. In the instance of the payment of costs under the court order there is no supply for consideration from the successful party to the unsuccessful party. This is essentially paying compensation for costs or losses incurred in the dispute and will be treated in the same manner as damages under paragraph 96.

128. Accordingly, the payment of court ordered or awarded costs in the circumstances described will not be consideration for an earlier or current supply.

Example 5

129. Matthew, a part-time artist not registered for GST, is sued by another more prominent artist in a defamation action. The matter proceeds to court but the judge dismisses the case against Matthew and costs are awarded in his favour.

130. GST would have been included in the fees Matthew was charged by his legal representatives. As Matthew is unregistered he is unable to claim an input tax credit for the GST he was charged. Therefore the actual cost to him is a GST inclusive amount.

Example 6

131. ABC Co., a registered transport company, sues for compensation for damages arising out of a breach of contract it has with a major retailer. Prior to the matter proceeding to court a settlement is reached whereby the retailer agrees to pay the estimate of damages and a percentage of the costs incurred by ABC Co.

132. ABC Co. is able to claim an input tax credit for the GST included in the fees charged by its legal representatives. The actual cost to ABC Co. is a GST exclusive amount.

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[63] Section 11-20 and 11-30.

Detailed contents list

133. Below is a detailed content list for this draft Ruling:

	Paragraph
What this Ruling is about	**1**
Date of effect	**6**
Context	**7**
Ruling with explanations	**14**
GST consequences	18
What is a taxable supply?	20
What is a 'supply'?	24
Supplies of rights and obligations in other jurisdictions	28
Transactions which are supplies of rights or obligations	33
Agreement which is binding where the transaction is a supply of a right or obligation	39
What 'supplies' may be related to an out-of-court settlement?	44
Earlier supply	47
Current supply	49
Example 1	50
Supply related to discontinuance of action	51
What supplies may be related to settlement by a court order?	53
The Interchase decision	56
Where the subject of a claim is not a supply	60
What is 'consideration'?	62
Is the supply made for consideration?	68
The need for nexus	69
The nexus test in Canada and the European Community	70
The nexus test in New Zealand	71
The nexus test in Australia	77
Can a settlement or court awarded payment be consideration?	86
Which supply has the nexus with the consideration?	89
Earlier supply	90
Current supply	91
Discontinuance supply	92

Damages 96
Apportionment 97
Payment for more than one supply 97
Example 2 103
Example 3 106
GST consequences 108
Attribution of GST payable and input tax credits 110
Adjustment events 112
Example 4 116
Transitional Issues 120
Flowchart of transitional effects 123
Costs 124
Example 5 129
Example 6 131
Detailed contents list **133**
Your Comments **134**

Your comments

134. If you wish to comment on this Draft Ruling, please send your comments promptly by 19 February 2001 to:

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BRISBANE QLD 4001

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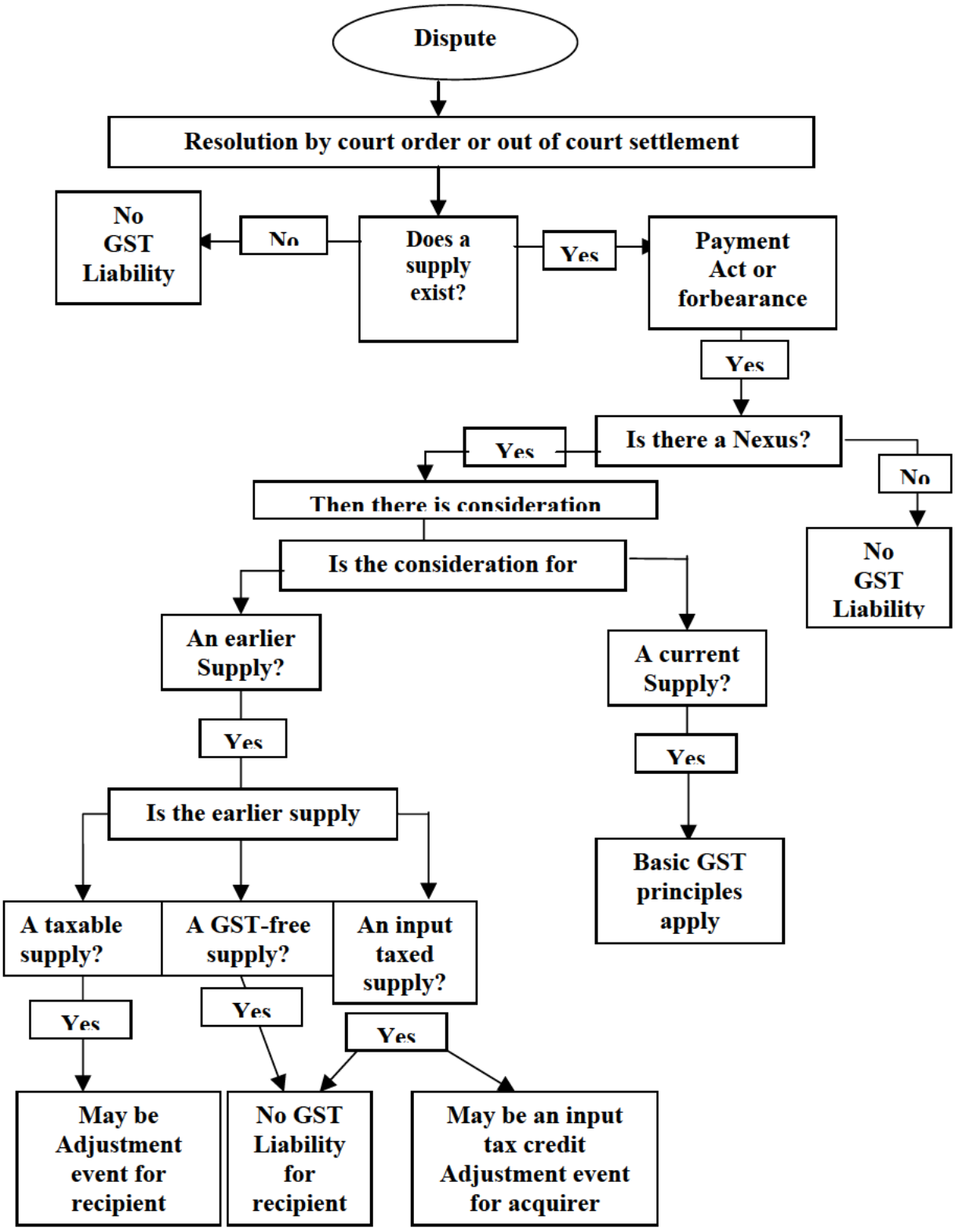
Subject references:
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- adjustment events
- adjustment notes
- creditable acquisition
- discretionary payments
- grants
- GST
- GST bad debts
- GST consideration
- GST-free
- GST invoices
- GST registration
- GST supply
- Input tax credit
- Input taxed supplies
- Input taxed
- taxable supply
- tax invoices

Legislative references:
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- ANTS(GST)A99 9-15(2)
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- New Zealand Refining Co. Ltd v. C of IR (1995) 17 NZTC 12307
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Appendix 1: Overview



Appendix 2: How to categorise a supply

