GSTR 2005/D8 - Goods and services tax: making supplies and analysing multi-party arrangements

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There is an Erratum notice for this document.
This document has been finalised.

Draft Goods and Services Tax Ruling

Goods and services tax: making supplies and analysing multi-party arrangements

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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 taxpayers and practitioners, as it is not a ruling or advice for the purposes of section 37 of the **Taxation Administration Act 1953**. The final Ruling will be a public ruling for the purposes of section 37 and may be relied upon by any entity to which it applies.*

What this Ruling is about

1. The 'Background' section of this Ruling outlines the meaning of the term 'supply' in the *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act'); its relevance to input tax credit entitlements; and its use in the United Kingdom Value Added Tax, and New Zealand GST regimes to the extent it relates to the interpretation of the GST Act.

2. The 'Ruling with explanation' section of the Ruling is divided into three parts:

- Part 1 examines the meaning of 'supply' in section 9-10 and how the meaning is qualified by some other provisions of the GST Act.
- Part 2 focuses on the characteristics of 'supply' in a two party transaction.
- Part 3 builds on these characteristics. It discusses propositions for analysing more complex arrangements involving more than two entities. These multi-party arrangements are commonly known as tripartite arrangements.

The Ruling concludes with a case study which we use to illustrate several of the propositions relating to multi-party arrangements.

3. This Ruling does not discuss in depth:

- subsection 38-190(3) which is about supplies to non-residents;
- Subdivision 40-A which is about financial supplies;
- Division 78 which is about insurance;
- Division 100 which is about vouchers; and

- Division 153 which is about agents.

These provisions are the subject of other GST public rulings.[1]

4. Unless otherwise stated in this Ruling:

- all legislative references are to the GST Act; and
- all explanatory memorandum references are to the Explanatory Memorandum to the A New Tax System (Goods and Services) Bill 1998 ('the EM').

Date of effect

5. This draft Ruling represents the preliminary, though considered view of the Australian Taxation Office. This draft may not be relied on by taxpayers or practitioners. When the final Ruling is officially released, it will explain our view of the law as it applies from 1 July 2000.

6. The final Ruling will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to which it applies. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

7. If the final public ruling conflicts with a previous private ruling that you have obtained, the public ruling prevails. However, if you have relied on a private ruling, you are protected in respect of what you have done up to the date of issue of the final public ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the date of effect of the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Background

8. Section 2-1 of the GST Act gives an overview of the GST Act and what each Chapter of the GST Act covers.

[1] See GSTR 2005/6 Goods and services tax: the scope of subsection 38-190(3) and its application to supplies of things (other than goods or real property) made to non-residents that are GST-free under item 2 of the table in subsection 38-190(1) of the *A New tax System (Goods and Services Tax) Act 1999*; GSTR 2002/2 Goods and services tax: GST treatment of financial services and related supplies and acquisitions; GSTR 2000/36 Goods and services tax: insurance settlements by making supplies of goods and services; GSTR 2003/5 Goods and services tax: vouchers; and GSTR 2000/37 Goods and services tax: agency relationships and the application of the law (as amended).

9. Section 2-5 notes that Chapter 2 has the basic rules for the GST, including rules for when and how GST arises, who is liable to pay GST and how input tax credits arise. Fundamental to the basic rules is the term 'supply'. GST does not arise without there being a supply. Supply is defined in section 9-10:

> 9-10 Meaning of *supply*
>
> (1) A *supply* is any form of supply whatsoever.
>
> (2) Without limiting subsection (1), *supply* includes any of these:
>
> (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;
>
> (ii) to refrain from an act;
>
> (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).
>
> (3) It does not matter whether it is lawful to do, to refrain from doing or to tolerate the act or situation constituting the supply.
>
> (3A) For the avoidance of doubt, the delivery of:
>
> (a) livestock for slaughtering or processing into food; or
>
> (b) game for processing into food;
>
> under an arrangement under which the entity making the delivery only relinquishes title after food has been produced, is the supply of the livestock or game (regardless of when the entity relinquishes title). The supply does not take place on or after the subsequent relinquishment of title.
>
> (4) However, a supply does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money.

10. We discuss each element of the section 9-10 meaning of supply in Part 1 of this Ruling (see paragraphs 19 to 83).

11. The basic rules in Chapter 2 of the GST Act also deal with how input tax credits arise. Supply is important here because without there being a supply an entity cannot acquire anything for a creditable purpose as required by paragraph 11-5(a). Making an acquisition of something is the first step in determining whether you make a creditable acquisition under section 11-5. The meaning of acquisition is given in section 11-10. The second step is the requirement in paragraph 11-5(b) that the supply of the thing to you is a taxable supply. The requirements for a taxable supply are stated in section 9-5.

12. You make an acquisition if you are the recipient of a supply. That is, the supply is made to you. In most transactions concerning GST the recipient of a supply is the entity who is also provided with that supply. In contrast, some supplies are made to the recipient, but provided to another entity. An entity must have made an acquisition of a thing to satisfy the requirements of section 11-10. It is not sufficient that an entity has merely been provided with the supply.

13. The propositions for characterising supplies and analysing more complex transactions in Parts 2 and 3 of this Ruling assist in determining who the recipient of a supply is (see paragraphs 84 to 143 for Part 2 and 144 to 288 for Part 3). The section 195-1 dictionary gives the meaning of recipient:

> ***recipient***, in relation to a supply, means the entity to which the supply was made.

14. Section 2-10 refers to Chapter 3 which covers the exemptions from GST, being those particular supplies that are GST-free or input taxed. These are the first type of exception to the basic rules. Section 2-15 explains Chapter 4 has special rules that can apply in particular cases to modify the basic rules; these are the second type of exception to the basic rules. In this Ruling we deal with some of the basic and the special rules that qualify or affect the supply or its status.

15. The miscellaneous matters contained in Chapter 5 and referred to in section 2-20 are not discussed in this Ruling.

16. Section 2-25 takes us to Chapter 6 which contains the dictionary. We draw on several of the terms contained in the dictionary.

The United Kingdom and New Zealand

17. The concept of supply is also fundamental to value added tax regimes in other countries. In relevant places in this Ruling we explain the effect some of the differences contained in the United Kingdom *Value Added Tax Act 1994* (the UK VAT Act) and the Sixth VAT Directive of the European Council (the Sixth Directive);[2] and the New Zealand *Goods and Services Tax Act 1985* (the NZ GST Act) have on supply under those regimes. We recognise the context in which these differences appear and their relevance to our GST Act.

[2] 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.

18. As the characteristics of supply in two party situations and in tripartite arrangements have been the subject of extensive judicial consideration in the United Kingdom and New Zealand, we discuss several of their cases in the Ruling. We also consider some relevant Australian decisions.

Ruling with Explanation

Part 1: The concept of 'supply' in the GST Act

Subsection 9-10(1)

19. The words 'A ***supply*** is any form of supply whatsoever' in subsection 9-10(1) catch all supplies regardless of whether they concern goods or services. This obvious breadth of the concept of supply is confirmed by the EM, which states (in reference to subsection 9-10(1)):

> This is defined broadly and is intended to encompass supplies as widely as possible.[3]

20. Though labelled a definition by the EM, subsection 9-10(1) gives no insight into what a supply is. The intended scope of the term is illustrated more fully in subsection 9-10(2), of which the EM states:

> (It) provides a list of things that are included as supplies. It is not an exhaustive list. It does not limit the possible breadth of the definition of supply in subsection 9-10(1)[4]

21. Subsection 9-10(2) neither qualifies nor constrains subsection 9-10(1). It is illustrative of the things that can be a supply. The subsection 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.[5] Something that is not listed in subsection 9-10(2) but falls within subsection 9-10(1) will be a supply.[6]

Subsection 9-10(2)

Paragraph (a) – a supply of goods

22. This paragraph focuses on what is supplied. There is no reference to the activity that constitutes making the supply. 'Goods' is defined in section 195-1 as:

> ***goods*** means any form of tangible personal property.

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[3] Paragraph 3.6 of the EM.
[4] Paragraph 3.6 of the EM.
[5] This is explained in paragraph 21 of GSTR 2000/11 Goods and services tax: grants of financial assistance.
[6] See *Coles Supermarkets Australia Pty Ltd v. Westley Nominees Pty Ltd & Anor* 2005 ATC 4484 at 4506; [2005] FCA 839 at paragraph 114.

23. 'Tangible' connotes a physical existence and has the effect of excluding intangibles. This means that a supply of goods is a supply of any form of personal property that has a physical existence, but does not include a supply of intangible personal property such as things in action. Things in action are personal proprietary rights that are enforceable by legal action and are not capable of transfer by delivery. Debts, insurance contracts, shares, patents, trade marks and copyrights are examples of things in action.

24. 'Personal property' embraces all forms of property other than interests in land (the exception being leasehold interests that are classified as personal property). Chattels are things that are personal property. Chattels are divided into chattels real and chattels personal. Leaseholds are called chattels real to distinguish them from moveables which are called chattels personal. Leaseholds are personal property and are recognised interests in land but, as they are intangible personal property, they are not goods for GST purposes.

Overseas jurisdictions

25. In New Zealand 'goods' is defined under subsection 2(1) of the NZ GST Act to mean 'all kinds of personal or real property; but does not include choses in action or money or a product that is transmitted by a non-resident to a resident by means of a wire, cable, radio, optical or other electromagnetic system or by means of a similar technical system'. This definition in embracing real property is much wider than the definition in our GST Act.

26. In the United Kingdom a supply of goods is defined under subparagraph 1(1) of Schedule 4 to the UK VAT Act as 'any transfer of the whole property in goods', with the exceptions that the transfer 'of any undivided share of property' or 'of the possession of goods' is a supply of services. The transfer of possession of goods is further qualified in that there will be a supply of goods if possession is transferred under an agreement for sale or an agreement that provides that at some point in the future (no later than when the goods are paid for) ownership will transfer (see subparagraph 1(2) of Schedule 4 to the UK VAT Act).

27. Under article 5(1) of the Sixth Directive the supply of goods is 'the transfer of the right to dispose of tangible property as owner'. Both this and the UK VAT definition of the supply of goods are more restricted than the definition in our GST Act.

Paragraph (b) – a supply of services

28. This paragraph also focuses on what is supplied. There is no definition of 'services' in section 195-1. This is different from the meaning given to the term 'services' in the UK VAT Act, the Sixth Directive, and the NZ GST Act.

Overseas jurisdictions compared

29. Under subsection 5(2) of the UK VAT Act 'anything which is not a supply of goods but is done for consideration (including, if so done, the granting, assignment or surrender of any right) is a 'supply of services''. Under article 6(1) of the Sixth Directive a supply of services is defined as 'any 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'.

30. Under subsection 2(1) of the NZ GST Act 'services' means 'anything which is not goods or money'. In *Case S65*[7] Willy DJ warned that there are limits to this definition in that a service can only be so wide as to include activities that benefit the recipient of a supply.

31. As explained in paragraph 28 of GSTR 2000/11,[8] subsection 9-10(2) places supplies of goods and services alongside things like rights and obligations. The wider definition of supply under our GST Act and the structure of our GST Act reduce the need to resort to 'creative use of language'[9] in analysing a transaction as a supply of services. The differences in the structure of our legislation mean that overseas cases should be considered with some caution where they characterise a supply as a supply of services.

Paragraph (c) – a provision of advice or information

32. If a supply is the provision of advice or information and the supply involves work to create, develop or produce that information or advice for the recipient, the supply is the performance of services.[10] In contrast, the instantaneous provision of advice or information is a supply of that advice or information.[11] This distinction has relevance for certain purposes, such as in determining if the thing (services, or a provision of advice or information) is done in Australia and is connected with Australia.

'Provided' may not be making a supply

33. 'Provided' is used in the GST Act in a number of different contexts, for example:

- 'provision' as the action by which advice or information is supplied (paragraph 9-10(2)(c));
- consideration being 'provided' (subsection 11-30(3));

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[7] (1996) 17 NZTC 7408.
[8] GSTR 2000/11 Goods and services tax: grants of financial assistance.
[9] See Advocate General Jacobs' opinion at paragraph 24 in *Landboden - Agrardienste GmbH & Co. KG v. Finanzamt Calau* [1998] BVC 70.
[10] This is explained at paragraphs 71 to 73 and 195 to 201 of GSTR 2000/31 Goods and services tax: supplies connected with Australia.
[11] As stated in paragraph 90 of GSTR 2000/11 Goods and services tax: grants of financial assistance, 'a grant will not be consideration for such a supply unless the grantor derives some benefit from the information or the grant is made for the purpose of obtaining such information'.

- legislative provisions 'provided for' (subsection 151-20(3));
- fringe benefits 'provided' (Division 71); and
- information to be 'provided' (subsection 31-10(2)).

34. 'Providing' a thing is not necessarily synonymous with making a supply of the thing. In some cases it requires care to determine to whom a supply is provided and to whom it is made because, as we indicated in paragraph 12, some supplies are made to one entity but provided to another entity. For example, subsection 38-190(3) deals with supplies (other than goods or real property) that are 'made' to one entity, but 'provided' to another.

35. Subsection 38-190(3) concerns supplies (other than goods or real property) made to non-residents outside Australia. The GST-free status of these supplies under item 2 of the table in subsection 38-190(1) is negated under subsection 38-190(3) if, amongst other things, the supply is provided, or the agreement requires it to be provided to another entity in Australia. This means that a supply may be 'made' to one entity, but 'provided' to another entity.

36. 'Provided' is used in subsection 38-190(3) to contrast with 'made' in item 2 of the table in subsection 38-190(1). It focuses on the actual flow of the supply as opposed to the contractual flow established by the agreement made between the supplier and the non-resident.

37. In Part 3 we give examples of supplies that are made to one entity but provided to another entity (see Examples 3 to 6 beginning at paragraph 187).

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

38. Section 195-1 defines 'real property' as:

(a) any interest in or right over land; or

(b) a personal right to call for or be granted any interest in or right over land; or

(c) a licence to occupy land or any other contractual right exercisable over or in relation to land.

39. A supply of real property may be made by granting, assigning or surrendering any of the interests or rights that form the definition of real property.

40. GSTR 2003/7[12] explains that the definition of real property in section 195-1 has a broad ambit as it extends the general law meaning of real property. For example, under the general law, 'a licence to occupy land' is a personal right and not real property. A licence to occupy land falls short of creating a legal or equitable interest in land. It merely legalises occupation that would otherwise be a trespass.

41. The meaning of real property needs to be examined in the context in which it arises under the GST Act. The potential application of the margin scheme under subsection 75-5(1) only covers taxable supplies of real property by selling a freehold interest in land, selling a stratum unit, or granting or selling a long-term lease. The sale of real property is input taxed under section 40-65 but only to the extent that the property is residential premises to be used predominantly for residential accommodation (the sale is not input taxed to the extent that the residential premises are commercial residential premises or new residential premises other than those used for residential accommodation before 2 December 1998). The sale of real property in section 40-65 refers to the transfer of the full and complete ownership of land, that is, the maximum interest that the Crown has alienated.[13]

Paragraph (e) – a creation, grant, transfer, assignment or surrender of any right[14]

42. Not every right will give rise to a supply. A right may be a term or condition of a larger transaction. It is only where the right is the substance of the transaction that it will be a supply.

Paragraph (f) – a financial supply

43. Section 195-1 defines 'financial supply' as:

> ***financial supply*** has the meaning given by the regulations made for the purposes of subsection 40-5(2).

44. Regulation 40-5.01 states the object of the subdivision is to identify a supply that is or is not a financial supply. Regulation 40-5.08 then states that 'a supply is a financial supply if the supply is mentioned as a financial supply in regulation 40-5.09 or an incidental financial supply in regulation 40-5.10'.

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[12] GSTR 2003/7 Goods and services tax: what do the expressions 'directly connected with goods or real property' and 'a supply of work physically performed on goods' mean for the purposes of subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*?

[13] See paragraph 18 of GSTR 2003/3 Goods and services tax: when is a sale of real property a sale of new residential premises?

[14] Paragraph (e) appears broader in scope than paragraph (d). This is because paragraph (d) does not include 'creation' or 'transfer' in relation to interests and rights that make real property. However, paragraph (d) is not narrower than paragraph (e) because in the real property context, 'creation' is covered by 'grant' and 'transfer' by 'assignment'.

45. Regulation 40-5.09 deals with provision, acquisition and disposal of interests. These three things are financial supplies if they meet the requirements of regulation 40-5.09.

46. While the provision and/or disposal of an interest may be a supply within the ordinary meaning of supply, the word 'supply' does not ordinarily contemplate the acquisition of something. For the purposes of the GST regulations and the GST Act, a supply includes a financial supply and a financial supply includes the acquisition of a financial interest.[15]

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

(i) *to do anything;*

(ii) *to refrain from an act;*

(iii) *to tolerate an act or situation*

47. None of the terms in this paragraph are defined in section 195-1. The supply is 'entering into' an obligation or 'releasing from' an obligation.

48. Not every entry into an obligation will give rise to a supply. The entry into the obligation may be a term or condition of a larger transaction. It is only where the entry into the binding obligation is the substance of the transaction that it will be a supply.[16]

Paragraph (h) – any combination of any two or more of the matters referred to in paragraphs (a) to (g)

49. This paragraph means that a supply may have more than one component drawn from the other forms of supply included in the list. As subsection 9-10(2) is not exhaustive, one (or more) of the matters in the list can combine with something not included in the list to be a supply. As we stated in paragraph 21, something that is not listed in subsection 9-10(2) that falls within subsection 9-10(1) will be a supply.

50. A simple application of paragraph (h) is a supply of labour and materials. Other applications may include an entry into an obligation to do a thing with actually doing it, or granting a right to have a thing supplied with actually supplying the thing.

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[15] For further discussion on financial supplies see GSTR 2002/2 Goods and services tax: treatment of financial supplies and related supplies and acquisitions.

[16] This is explained in paragraphs 30 to 36 of GSTR 2000/11 Goods and services tax: grants of financial assistance, and in paragraphs 84 to 85 of GSTR 2001/6 Goods and services tax: non-monetary consideration.

51. Section 9-80 recognises that a supply can be partly taxable and partly GST-free or input taxed.[17] Such a supply may result from the operation of paragraph 9-10(2)(h), being a combination of two other listed supply matters. It may also result from the specific provisions dealing with GST-free and input taxed supplies. An example of this is a supply of services that is consumed partly in Australia and partly outside Australia.[18]

A 'thing'

52. As well as the specific types of supply listed in subsection 9-10(2), the GST Act recognises the concept of a 'thing'. 'Thing' is defined in section 195-1 as:

> ***thing*** means anything that can be supplied or imported.

53. 'Thing' is used to refer to goods, services or other supplies covered by section 9-10. For example, paragraph 11-5(b) uses the words: 'the supply of a thing to you is a taxable supply'. The formal use of the term 'thing' gives further emphasis to the breadth of subsection 9-10(1) and is a clear illustration of this breadth being greater than the sum of the parts listed in subsection 9-10(2).

Subsection 9-10(3)

54. Subsection 9-10(3) states:

> It does not matter whether it is lawful to do, to refrain from doing or to tolerate the act or situation constituting the supply.

55. Under subsection 9-10(3) the lawfulness of making a supply is not a relevant factor in establishing a 'supply' for GST purposes. For example, a second hand car dealer who sells cars at auction, which the dealer has either stolen or has received knowing they have been stolen, is making supplies of goods.[19]

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[17] This is discussed in GSTR 2001/8 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts.

[18] For example, see paragraph 27 of GSTR 2003/7 Goods and services tax: what do the expressions 'directly connected with goods or real property' and 'a supply of work physically performed on goods' mean for the purposes of subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*?

[19] See the UK VAT Tribunal case *Customs and Excise Commissioners v. Oliver* (1979) 1 BVC 314.

56. In interpreting the Sixth Directive, the European Court of Justice (ECJ) has held that the principle of fiscal neutrality precluded a generalised differentiation between lawful and unlawful transactions 'except in special circumstances where because of the characteristics of particular goods, all competition between the lawful economic and unlawful sector was prohibited'.[20] The ECJ has held that there was no liability to VAT on the illegal distribution of prohibited drugs because their supply was subject to a total prohibition in the member states (except within strictly controlled economic channels for medical and scientific purposes).[21]

57. Under the GST Act all supplies of things that are made through an illegal act are potentially a supply. For example, in applying subsection 9-10(3), we consider that the illegal distribution of prohibited drugs or the sale of 'fake' brand name handbags, or clothing in breach of copyright would constitute supplies for our GST purposes.

Subsection 9-10(3A)

58. Subsection 9-10(3A) is an 'avoidance of doubt' provision. It provides that the delivery of livestock for slaughtering or processing into food, or of game for processing into food under an arrangement under which title does not pass until after food has been produced, is the supply of livestock or game.

59. In identifying the thing in the transaction that constitutes the supply, and in emphasising that the supply does not take place on or after the subsequent relinquishment of title, subsection 9-10(3A) clarifies the time when the supply is made and what constitutes the supply.

Subsection 9-10(4)

60. Subsection 9-10(4) provides that a supply does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money.[22]

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[20] See *Lange v. Finanzamt Furstenfeldbruck* [1993] ECR 1-4677.

[21] See *Mol v. Inspecteur der Invoerrechten en Accijnzen* (1988) 4 BVC 205 and *Vereniging Happy Family Rustenburgerstraat v. Inspecteur der Omzetbelasting* (1988) 4 BVC 216.

[22] For further discussion on the application of subsection 9-10(4) see paragraphs 37 to 42 and 99 to102 of GSTR 2002/2 Goods and services tax: GST treatment of financial services and related supplies and acquisitions.

61. Money is defined by section 195-1 to mean:

(a) currency (whether of Australia or of any other country); and

(b) promissory notes and bills of exchange; and

(c) any negotiable instrument used or circulated, or intended for use or circulation, as currency (whether of Australia or of any other country); and

(d) postal notes and money orders; and

(e) whatever is supplied as payment by way of:

(i) credit card or debit card; or

(ii) crediting or debiting an account; or

(iii) creation or transfer of a debt.

However, it does not include:

(f) a collector's piece; or

(g) an investment article; or

(h) an item of numismatic interest; or

(i) currency the market value of which exceeds its stated value as legal tender in the country of issue.

Special rules relating to supply

62. Some provisions of the GST Act determine that a supply:

- is not a taxable supply;
- is not a supply; or
- is deemed to be made.

We discuss these in paragraphs 63 to 83.

GST groups

63. A supply that a member of a GST group makes to another member of the same group is treated by subsection 48-40(2) as if it were not a taxable supply. The subsection provides for two exceptions to this treatment. The first deals with certain offshore supplies that are a taxable supply because of Division 84. The second deals with an acquisition of a thing by an entity that is a participant in a GST joint venture[23] and the thing was supplied from a joint venture operator for the joint venture.

GST religious groups

64. A supply that a member of a GST religious group makes to another member of the same group is treated by subsection 49-30(1) as if it were not a taxable supply.

[23] GST joint venture has the meaning given by section 51-5.

GST Branches

65. Paragraph 54-40(2)(c) deems for Division 17 purposes[24] that all transfers of anything by the GST branch to the parent entity, that would have been supplies made by the branch if it were an entity, to be supplies made by the branch as a separate entity. Paragraph 54-40(2)(a) also deems for Division 17 purposes that all supplies, acquisitions and importations made through the GST branch to be made by the GST branch as a separate entity.

Insurance settlements

66. Subsection 78-25(1) states that a supply that an insurer makes in settlement of a claim under an insurance policy is not a taxable supply.

67. A supply of goods is not a taxable supply under subsection 78-60(1) if it is solely made under an insurance policy to an insurer in the course of settling a claim under the policy.

68. Under subsection 78-65(2) the making of a supply by an insurer to an entity is not treated as a taxable supply to the extent that the supply is made in settlement of a claim under an insurance policy under which the entity is not insured and the supply is to discharge a liability owed to that entity by the entity insured.

69. Where the insured entity makes a supply to another entity it is not treated as a taxable supply under subsection 78-70(2) if it is to discharge a liability of the insured entity to the other entity and the supply is covered by settlement of a claim under an insurance policy under which the entity was insured against that liability.

Compulsory third party schemes

70. Under subsection 79-85(1) a supply of goods is not a taxable supply if it is solely made under a compulsory third party scheme to an operator of the scheme in the course of settling a claim for compensation made under the scheme.

Australian tax, fee or charge

71. Under subsection 81-5(1) the payment of any Australian tax, fee or charge (other than GST) is treated as the provision of consideration for a supply made by the entity to which the tax, fee or charge is payable (unless the tax, fee or charge is specified in the Treasurer's determination). The effect of subsection 81-5(1) is to deem both a supply and provision of consideration for that supply.

[24] For purposes of working out an additional net amount (relating to the branch) for the parent entity under Division 17.

72. Subsection 81-5(2) provides that the payment of taxes, fees, and charges that are specified in a written determination of the Treasurer is not the provision of consideration. The subsection only reverses the status of the payment as consideration, not the fact that the payment is for a supply made to the payer by the entity to which the tax, fee or charge is payable. The effect of subsection 81-5(2) is that the supplies, for which there is payment of the taxes, fees and charges specified in the Treasurer's written determination, are not taxable supplies.

Company amalgamations

73. Division 90 removes certain supplies and acquisitions from the GST system when two companies, say A and B, amalgamate to form another company, say C. It does this by treating the supplies as not being taxable supplies and treating the related acquisitions as not being creditable acquisitions. Company C must be registered immediately after the amalgamation.

Supplies partly connected with Australia

74. In deciding whether a supply is connected with Australia a distinction is made in section 9-25 between supplies of:

- goods;
- real property; and
- things other than goods or real property.

75. A supply may be a mixture of these three things, such as a mixture of goods and services. This can mean that part of a supply is connected with Australia under section 9-25 and another part of the supply is not connected with Australia. Division 96 covers such circumstances.

76. If a supply is a mixture of:

- goods;
- real property;
- a telecommunication supply under Division 85; or
- things other than goods or real property, that is not a telecommunication supply,

and only part of the supply is connected with Australia, the supply will be treated as separate supplies under subsection 96-5(1).

77. If a part of a supply is reasonably regarded as incidental to another part of a supply, and its value is below the dollar threshold, the incidental supply is treated in the same way as that other part of the supply rather than treating the two parts of the supply as separate supplies.[25]

Vouchers

78. Subsection 100-10(1) states that the act of redeeming a voucher is not a supply.[26] The text note to this subsection states:

> A supply for which the voucher is redeemed is still a supply.

Supplies in satisfaction of debts

79. Subsection 105-5(3) provides that a supply by a creditor in satisfaction of a debt is not a taxable supply if:

- the debtor gives the creditor a written notice stating fully the reasons why the supply would not be taxable if the debtor were to make it; or
- if the creditor cannot obtain such a notice, the creditor believes, based on reasonable information, that it would not be a taxable supply if the debtor were to make it.

Income tax-related transactions

80. Division 110 provides that the supplies under various income tax related transactions that it identifies are not taxable supplies. It covers:

- supplies of tax losses and net capital losses;
- transfers of excess foreign credits;
- supplies under the operation of the consolidated group regime;
- certain supplies related to tax sharing arrangements; and
- certain supplies related to tax funding arrangements.

[25] For further discussion on Division 96 see paragraphs 95 to 102 of GSTR 2000/31 Goods and services tax: supplies connected with Australia.
[26] For further discussion on vouchers see GSTR 2003/5 Goods and services tax: vouchers.

PAYG voluntary agreements

81. A supply is not a taxable supply under Division 113 if:

- an amount must be withheld from payment for the supply because of section 12-55 in Schedule 1 to the *Taxation Administration Act 1953* (which is about voluntary agreements to withhold);
- the arrangement involves, in whole or in part, the performance of work or services;
- the acquisition of the thing supplied would be a creditable acquisition if the supply were a taxable supply;
- the supplying entity and the acquiring entity are parties to the voluntary agreement; and
- the supplying entity has an ABN that is in force and is quoted in the voluntary agreement.

Principals and agents as separate suppliers and/or acquirers under Subdivision 153-B

82. Section 153-50 provides that entities may enter into an arrangement under which an agent is treated as a separate supplier and/or acquirer. That is, the agent is treated as a principal in its own right.

83. The effect of entering into these arrangements is that the principal and the agent treat the taxable supply of goods or services that the principal makes to third parties through the agent as a supply made by the agent.[27] In addition, the principal is taken to have made a corresponding supply to the agent of the same thing that the agent is taken to supply.[28] The principal and agent are treated as acting between themselves as principal to principal for GST purposes.[29]

Part 2: Supply in the context of a transaction

84. In this part of the Ruling we move from the concept of 'supply' in the context of the GST Act into the concept of 'supply' in the context of the transaction in which it is made.

[27] See subsection 153-55(1).
[28] See subsection 153-55(2).
[29] For further discussion on the application of subdivision 153-B see paragraphs 74 to 96 of GSTR 2000/37 Goods and services tax: agency relationships and the application of the law (as amended).

85. We use a number of propositions in analysing a transaction in relation to a supply. The propositions are not universal as they may have exceptions or be qualified either by the operation of particular provisions of the GST Act, or by the facts and circumstances of a transaction. We list the propositions below and explain them, and some of the exceptions, in paragraphs 86 to 143:

(a) for every supply there is a supplier (see paragraphs 86 to 87);

(b) for every supply there is a recipient and an acquisition (paragraphs 88 to 98);

(c) creation of expectations alone does not establish a supply (paragraphs 99 to 110);

(d) 'supply' usually, but not necessarily, requires something to be passed from one entity to another (paragraphs 111 to 114);

(e) an entity cannot supply to itself (paragraphs 115 to 118);

(f) a supply can be made to one entity and provided to another entity (paragraphs 119 to 120);

(g) a supply may be mixed, composite or neither (paragraphs 121 to 124);

(h) a supply cannot be made by more than one entity (paragraphs 125 to 128);

(i) a transaction may amount to two or more supplies (paragraphs 129 to 132);

(j) the total fact situation including the legal position will determine the nature of a transaction (paragraphs 133 to 139); and

(k) it is necessary to analyse the transaction that occurs, not the transaction that might have occurred nor an earlier or subsequent transaction that occurs (paragraphs 140 to 143).

(a) For every supply there is a supplier

86. The term 'supplier' is not defined in the GST Act. However, whenever the term is used in the Act it refers to the entity that makes the supply or is capable of making a supply.

87. A supply cannot occur unless an entity (the supplier) makes the supply.[30]

[30] *Shaw v. Director of Housing and State of Tasmania (No 2)* 2001 ATC 4054; (2001) 46 ATR 213; [2001] TASSC 2.

(b) Generally, for every supply there is a recipient and an acquisition

88. The meaning of 'acquisition' in section 11-10 is the corollary of the meaning of supply in section 9-10. Subsection 11-10(1) provides that 'An ***acquisition*** is any form of acquisition whatsoever'. Subsection 11-10(2) refers to the thing acquired, such as goods, services or a right and the means by which the thing is acquired, such as its receipt or acceptance.

89. To make an acquisition you have to be the 'recipient' of the supply of the thing you are acquiring. Although the term 'recipient' does not appear in Division 11, it is defined in section 195-1 to mean the entity to which the supply was made. This definition suggests that something is passed from the supplier to the recipient.

90. The supplier and the recipient have to be different entities because, as we explain in paragraphs 115 to 118, an entity cannot supply to itself. Also, the recipient has to be identified, as you cannot make a supply to the world at large.[31]

Creditable acquisitions and input tax credits

91. If you make an acquisition and the other requirements of section 11-5 are met then the acquisition is a creditable acquisition. But, if you are not the recipient of that supply even though you may have made a payment for the supply you will not have made a creditable acquisition.

92. An entity that is the recipient of any creditable acquisitions that it makes is entitled to input tax credits.[32] An entity makes a creditable acquisition under section 11-5 if:

- the entity acquires anything solely or partly for a creditable purpose;
- the supply of the thing to the entity is a taxable supply;
- the entity provides, or is liable to provide, consideration for the supply; and
- the entity is registered or required to be registered.

93. Under subsection 11-15(1) an entity acquires a thing for a creditable purpose to the extent that the entity acquires it in carrying on its enterprise. However, under subsection 11-15(2) an entity does not acquire a thing for a creditable purpose to the extent that the acquisition relates to making input taxed supplies, or is of a private or domestic nature. Subsections 11-15(4) and 11-15(5) set out circumstances where an acquisition for the making of certain financial supplies is not treated as relating to making input tax supplies.

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[31] We explain this in paragraph 21 of GSTR 2000/11 Goods and services tax: grants of financial assistance. See also *Mohr v. Finanzamt Bad Segeberg* [1996] BVC 293: Opinion of Advocate General Jacobs at paragraph 27.

[32] See section 11-20.

Other references to 'recipient'

94. 'Recipient' appears in a number of provisions in the GST Act, including those stating that:

- it is not relevant from whom the consideration for a supply comes (subsection 9-15(2));
- the supply is connected with Australia (subsection 9-25(1), section 85-5);
- a supply is GST-free (for example, sections 38-10, 38-190, 38-385, 38-480);
- the GST may be 'reverse charged' (Division 83, section 84-10);
- an offshore intangible supply is a taxable supply (section 84-5);
- there is an adjustment in relation to the supply of a going concern (Division 135); and
- the supply satisfies the definition of 'medical service' in section 195-1 for the purposes of the application of section 38-7.

Qualifying the proposition 'For every supply there is a recipient and an acquisition'

95. Division 81 deems that the payment of a tax, fee or charge imposed under an Australian law is consideration for a supply. This means there is a deemed supply and a deemed acquisition in relation to the tax, fee or charge and its payment. Without Division 81 it may be that no supply is made or acquired as nothing passes from the entity receiving the payment (the deemed supplier) to the entity making the payment (the deemed recipient). However, if the particular tax, fee or charge is specified in a written determination of the Treasurer the payment of it is treated as not being the provision of consideration.

96. In some cases an entity can have something without having made an acquisition of the thing. For example, an author of an original literary work does not make an acquisition of a right where the *Copyright Act 1968* protects the copyright in that work. Contrast this with an inventor who needs to be granted a patent under the *Patents Act 1990* (Commonwealth) before being able to exclusively exploit their invention. The inventor acquires those rights to exclusively exploit the invention through the grant of the patent.

97. Paragraph 115 of GSTR 2002/2 Goods and services tax: GST treatment of financial services and related supplies and acquisitions explains that 'A financial supply consisting of the acquisition of a financial interest is treated by the legislation as being 'made to' a recipient, so that it does not matter that the recipient of the acquisition-supply may not actually receive something. The GST regulations treat the receipt of this interest by the acquirer as being a supply to the provider.' Paragraphs 110 to 116 of GSTR 2002/2 provide further information on the acquisition of a financial interest.

Recipient in tripartite arrangements

98. Determining the recipient of the supply is not difficult where there are only two parties to a transaction. In Part 3 of this Ruling, which begins at paragraph 144, we discuss how to identify the recipient of a supply in the more difficult tripartite arrangements.

(c) Creation of expectations alone does not establish a supply

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

100. This requirement was emphasised by the New Zealand Court of Appeal in *C of IR v. New Zealand Refining Co. Ltd* (1997) 18 NZTC 13,187 (*New Zealand Refining)*. The case concerned 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.

101. The New Zealand Court of Appeal 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.[33] The government's only recourse in the event that the refinery ceased to be operational was to stop making payments. Although the payments were intended as an inducement to keep the refinery open, they were not linked to any identifiable supply:

> In our view the payments related to the structure or framework within which supplies of services were expected to be made. They were to compensate NZRC for the removal of the protections given by the Support Letters and its exposure to the hot winds of competition. It was compensation directed to the same purpose as the grants which repaid the loans. The payments were received in course of the taxable activity of NZRC but they were not in consideration for any supply made by it. Accordingly, they are not subject to GST.[34]

[33] (1997) 18 NZTC 13,187 at 13,192.
[34] (1997) 18 NZTC 13,187 at 13,194.

102. This requirement that a transaction bind the parties in some way before it will involve a supply we consider to apply in Australia where the transaction is the supply of a right or obligation.[35]

Making a supply for consideration in the absence of binding obligations

103. Paragraph 9-5(a) states that 'you make the supply for consideration'. Making a supply for consideration constitutes a transaction and implies the existence of binding obligations between the supplier and recipient. It does not matter if the obligations are written or oral.

104. However, the existence of binding obligations is not an absolute prerequisite to making a supply for consideration. 'Supply' is an all-encompassing concept and includes, for example, an entity making a non-monetary gift to another entity. Similarly, a payment, act or forbearance may be consideration for a supply even if it is made voluntarily.[36]

105. As we discussed in GSTR 2000/11,[37] you may still make a supply for consideration in the absence of binding obligations (that is, the obligations are not enforceable) where there is something other than an entry into an obligation, such as goods or some other thing, passing between the parties. For the supply to be a taxable supply, there must also be consideration and sufficient nexus between the consideration and the supply.[38]

106. The New Zealand Inland Revenue Department also takes the similar view that while the existence of a contract is not a prerequisite to making a supply for consideration, there must be a supply, consideration and an element of reciprocity between the supply and the consideration:

> Once the existence of a supply is established, the relationship between the parties needs to be evaluated. If the supply cannot be connected to the payment by enforceable reciprocal obligations it cannot be said that the payment is consideration for the supply. The payer and the supplier must have the ability to enforce the bargain for the transaction to have the reciprocity required to impose GST. *It is not necessary for there to be a contract between the parties, but reciprocity does require some type of enforceable reciprocal or two-sided relationship that links the payment to the supply*.[39]

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[35] This is discussed at paragraphs 33 to 35 of GSTR 2000/11 Goods and services tax: grants of financial assistance, and paragraphs 37 to 41 of GSTR 2001/4 Goods and services tax: GST consequences of court orders and out-of-court settlements.

[36] Subsection 9-15(2).

[37] GSTR 2000/11: Goods and services tax: grants of financial assistance, at paragraph 33.

[38] See *Commissioners for Her Majesty's Revenue and Customs v. Debenhams Retail plc* [2005] EWCA 892 at paragraph 8. The requirement for a sufficient nexus between the consideration and the supply is discussed in GSTR 2001/4 Goods and services tax: GST consequences of court orders and out-of-court settlements.

[39] 'GST Treatment of Court Awards and Out of Court Settlements' *Tax Information Bulletin* Vol. 14, No 10, October 2002.

107. We agree that you may still make a supply for consideration in the absence of binding obligations (that is, the obligations are not enforceable) where there is something other than an entry into an obligation, such as goods or some other thing, passing between the parties. This was the situation in the European Court of Justice (ECJ) case *Town & County Factors Ltd v. Customs & Excise Commissioners* [2002] BVC 645.

108. The ECJ held there was reciprocal performance between the organiser of a 'spot-the-ball' competition and the competitors. The entry fees received by the organiser being consideration for the services the organiser supplied to the competitors. The existence of this reciprocal relationship did not depend on the obligations of the supplier of the services being enforceable. It was agreed between the parties to the transaction that the obligations created for the organiser were not legally enforceable but binding in honour only.

Example 1 – Supply in the absence of binding obligations

109. *Tony is a busker who makes a living by playing guitar and singing the blues for passers-by in a busy city mall. Tony has a performance licence from the city council. The passers-by drop coins into Tony's guitar case.*

110. *Although there are no binding obligations between Tony and the passers by, Tony is making a supply of entertainment services to those passers-by. The money given to Tony is linked to Tony's performance and there is a sufficient nexus between the money and the supply.*[40]

(d) 'Supply' usually, but not necessarily, requires something to be passed from one entity to another

111. The fact that 'supply' requires something to be passed from one entity to another is largely self-evident in a transaction based tax. However, not all forms of a supply have this characteristic. For instance, paragraph 9-10(2)(e) includes a creation of a right as a supply. 'Creation' of a right does not intrinsically convey a passing of the right from one entity to another.

[40] In *Tolsma v. Inspecteur der Omzetbelasting Leeuwarden* [1994] BVC 117 the European Court of Justice considered similar facts and concluded the busker in that case did not make a taxable supply. The Court at paragraph 12 was mindful of former Article 2(a) of the Sixth Directive, replaced by Article 2(1), 'that taxable transactions, within the framework of the VAT system, presuppose the existence of a transaction between the parties in which a price or consideration is stipulated'. The supply made by Tony may be contrasted to a supply to the world at large where there may not be nexus between consideration and a supply.

112. Also, a comparison of subsection 9-10(2) with its corresponding provision, subsection 11-10(2), shows that the thing supplied is not necessarily the thing acquired. For example, a supply that is 'an entry into an obligation' is mirrored by an acquisition that is 'an acquisition of a right'. The obligation remains with the supplier, while the 'right' is created in the hands of the recipient, rather than there being a thing that passes from one entity to another.

113. The 'surrender' of a right under paragraph 9-10(2)(e) does not involve the passing of the right from one entity to another. At paragraph 50 of GSTR 2002/5,[41] we take the view that the surrender of the relevant licence, permit or quota should be taken to be the supply of that thing which is necessary for the continued operation of the enterprise in circumstances where it is highly probable that the licence, permit or quota will be automatically reissued by the relevant government or agency.

114. A 'financial supply' includes the acquisition of an interest, as defined in the regulations. An acquisition is not a supply in the ordinary sense as it focuses on the receipt of a thing rather than the passing from one to another of the thing.

(e) An entity cannot supply to itself

115. This proposition that an entity cannot supply to itself flows from the proposition 'Supply usually requires something to be passed from one entity to another'. It also seems self evident in a transaction based tax.

116. The proposition that an entity cannot supply to itself is accepted in the United Kingdom and New Zealand.[42]

117. An exception to this proposition is provided in Division 54 which allows an entity to register its branches separately for GST. Paragraph 54-40(2)(c) deems that all transfers of anything by the GST branch to the parent entity (including other GST branches of the parent), that would have been supplies made by the branch if it were an entity, to be supplies made by the branch as a separate entity. This has effect for working out the parent's additional net amount in relation to the branch. Without this specific provision a 'supply' from the branch to the parent entity would not be a supply for GST purposes as they are not separate legal entities.

118. Also, the GST Act recognises that an entity can act in more than one capacity. Subsection 184-1(3) states that:

> A legal person can have a number of different capacities in which the person does things. In each of those capacities, the person is taken to be a different entity.

For example, a company that is the trustee of a trading trust acts in a different capacity when it supplies administrative services to the trust.

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[41] GSTR 2002/5 Goods and services tax: when is a 'supply of a going concern' GST-free?

[42] In the UK see *Robinson* (1989) 4 BVC 740. In NZ see *Case M74* (1990) 12 NZTC 2441 at 2444 where Bathgate DJ stated: 'The supply normally envisages a supplier and a recipient'.

(f) A supply can be made to one entity and provided to another entity

119. A supply can be made to one entity and provided to another entity. The supply is 'made' to the recipient of the supply in a contractual sense. The supply is 'provided' to another entity where the actual flow of the supply is to that entity.

120. This point is considered in greater depth in Part 3 at paragraphs 160 to 206.

(g) A supply may be mixed, composite or neither

121. A supply may consist of separately identifiable taxable and non-taxable or input taxed parts. In GSTR 2001/8[43] we refer to this as a 'mixed supply'. Section 9-80 describes how you work out the value of the part of a mixed supply that is a taxable supply.

122. If all of the parts in a supply have the same GST treatment, then there is no requirement to separately identify each part. That is, if all of the parts are taxable, then apportionment of the consideration is not necessary as GST is payable on the total value of the supply.[44] Similarly, if all of the parts are non-taxable, then no GST is payable on the supply and apportionment is not necessary.

123. A supply that contains a dominant part, but also includes something that is integral, ancillary or incidental to that part is a 'composite supply', being the supply of a single thing.

124. On the other hand, a supply may simply involve one thing, for example, the supply of a cake. The cake is made from ingredients such as flour, butter, sugar and eggs, but it is readily apparent that it is a cake that is supplied. There are no separately identifiable parts.

(h) A supply cannot be made by more than one entity

125. This proposition has been stated by Millet LJ in *C & E Commrs v. Wellington Private Hospital Ltd* [1997] BVC 251 at 252:

> Where supplies are made by different suppliers, they cannot be fused together to make a single supply…

[43] This is explained in GSTR 2001/8 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts.
[44] Section 9-70.

126. As part of their judgment, the House of Lords in *The Trustees of the Nell Gwynn House Maintenance Fund v. Customs and Excise Commissioners* [1999] 1 All ER 385 (*Nell Gwynn*) endorsed Millett LJ's statement above.[45] In *Nell Gwynn* the House of Lords considered whether maintenance fees paid to an entity other than the lessor or their agent, was consideration for the grant of the lease. The trustees submitted that the grant of leases and provision for the supply of maintenance services all formed part of a simple economic transaction and should be treated as one exempt supply.

127. The House of Lords rejected this approach. The court held that it was not possible to view the supply of the services and the supply of the leases as a single supply because 'the supply of services is quite separate from any of the exclusions and is by a different taxpayer'.[46]

128. This proposition is applied in GSTR 2002/5[47] in interpreting the going concern provisions in section 38-325. The legislative requirements for the supply of a going concern in subsection 38-325(2) must be met by the same single supplier.

(i) A transaction may amount to two or more supplies

129. In a straight forward commercial transaction, a supply is made to a recipient, who provides consideration in the form of money to the supplier. As the payment of money in these circumstances is not a supply,[48] the recipient's payment of money is not treated as making a supply.

130. However, if the recipient provides consideration in a non-monetary form, the consideration itself is a separate supply.[49] In a transaction of this kind between two entities, there are two supplies, one going each way. As a result, each entity to the transaction needs to account for the supply it makes, and each entity needs to account for its input tax credit entitlement.

131. It is pointed out in GSTR 2001/6[50] that the recipient of a supply may provide or make a thing available for the supplier to use in making the supply. However, the provision of such a thing is not necessarily consideration.

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[45] See also *Telewest Communications plc v. Customs and Excise Commissioners* [2005] EWCA 102 at paragraph 79.
[46] At 397.
[47] This view is explained in paragraphs 42 to 44 of GSTR 2002/5 Goods and services tax: when is a 'supply of a going concern' GST-free?
[48] See subsection 9-10(4).
[49] We explain this in paragraph 16 of GSTR 2001/6 Goods and services tax: non-monetary consideration.
[50] See paragraphs 90 to 93 of GSTR 2001/6 Goods and services tax: non-monetary consideration.

132. The corollary of this proposition is that providing or making the thing available does not necessarily give rise to a supply. For example, a supplier may need to perform services on the recipient's premises. The recipient may agree to allow the supplier to use its computer facilities and stationery in performing the services. Allowing the use of these things is a condition of the contract that goes to defining the supply the supplier makes rather than being a supply of these things to the supplier by the recipient.

(j) The total fact situation including the legal position will determine the nature of a transaction

133. The GST consequences of a transaction are determined by the legal arrangements actually entered into and not by any economic consequences. We accept the comment by Blanchard J in *New Zealand Refining*:

> But it remains essential to remember that, unless it is being argued that the documentation masks the true nature of the transaction (and that is not contended in this instance), in taxation disputes the Court is concerned with the legal arrangements actually entered into and the rights and duties they create, not with economic or other consequences of the arrangements…[51]

134. Where parties to a transaction have reduced their understanding of the transaction to writing, that documentation is a significant factor in determining the supplies that have been made (on the proviso that there is no sham or hiding of the true transactions). An examination of the surrounding circumstances, which together with any relevant documentation form the total fact situation, is also important in determining whether the documentation captures the nature of a transaction for GST purposes.[52]

135. See *Customs and Excise Commissioners v. Reed Personnel Services Ltd* [1995] BVC 222 where Laws J said at 229:

> In many situations, of course, the contract will on the facts conclude any VAT issue, as where there is a simple agreement for the supply of goods or services with no third parties involved. In cases of that kind there is no space between the issue of supply for VAT purposes and the nature of the private law contractual obligation. But that is a circumstance, not a rule. There may be cases, generally (perhaps always) where three or more parties are concerned, in which the contract's definition (however exhaustive) of the parties' private law obligations nevertheless neither caters for nor concludes the statutory question, what supplies are made by whom to whom.

And later at 229:

> …the nature of a VAT supply is to be ascertained from the whole facts of the case.

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[51] *C of IR v. New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 at 13,192.

[52] See also the discussion at paragraphs 253** to 274**where we discuss the total factual situation in relation to arrangements that involve more than two parties.

136. The total fact situation will determine the nature of a transaction, including, who is making a supply to whom and who is making a payment to whom. Further analysis in terms of the GST Act is needed to determine:

- the 'character' of the supply, that is, whether it is goods, services or something else; and
- the 'status' of the supply, that is, whether the supply is taxable, GST-free, input taxed, or non-taxable.

137. An arrangement between the parties will be characterised not merely by the description the parties give to the arrangement, but by looking at the transactions entered into and the circumstances in which the transactions are made.[53] This was made clear by McTiernan J in *Radaich v. Smith* (1959) 101 CLR 209 at 214:[54]

> …the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label they choose to put on it.

and by Gray J in *Re Porter*; *Re Transport Workers Union of Australia*:[55]

> Although the parties are free, as a matter of law, to choose the nature of the contract which they will make between themselves, their own characterisation of that contract will not be conclusive. A court will always look at all of the terms of the contract, to determine its true essence, and will not be bound by the express choice of the parties as to the label to be attached to it. As Mr Black put it in the present case, the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck.

138. The circumstances in which the contract or other legal arrangements will not represent the total fact situation include where they:

- are vague (in which case further information will be needed);
- do not represent the transactions that are taking place between the parties as the contract could be a sham, the arrangement may have progressed beyond the original agreement or the parties may simply not be abiding by the documents (the transactions actually taking place will need to be taken into account);
- may be varied by the action of the parties (the actions of the parties will form part of the total factual matrix to be taken into account);

[53] *Marac Finance v. Virtue* (1981) 1 NZLR 586.
[54] Adopting Lord Denning's comments in *Facchini v. Bryson* (1952) 1 TLR 1386.
[55] (1989) 34 IR 179, at 184.

- may be prepared within, or in accordance with, a particular statutory framework (the statutory framework will assist in determining the factual background);
- may be outcome focused rather than looking to the supplies that are being made between the parties (an objective analysis of what is occurring to achieve those outcomes is necessary);
- may not make reference to principles, concepts or accepted practices within the industry (they will need to be interpreted according to normal industry practices); or
- may form part of a series of interrelated documents (a transaction should not be considered in isolation).

139. Even where the contract or other arrangements state that they contain all of the terms and conditions of the agreement, such as in an 'entire agreement clause',[56] this would not preclude an analysis of the total fact situation if one or more of the circumstances in paragraph 138 are indicated.

(k) It is necessary to analyse the transaction that occurs, not the transaction that might have occurred nor an earlier or subsequent transaction that occurs

140. A supplier may have a number of alternative methods available to achieve an end result. When determining what the supply is, we should not take into account the various alternative approaches to making the supply but what has been done.

141. For example, A could provide B with money so that B can pay to receive a particular service. In this case A has not made a supply as the provision of money in this example is not a supply (subsection 9-10(4)).

142. If A itself provides the service to B, A has made a supply of the service. It is not open to A to argue what it could have done. That is, if it had provided cash it would not have made a supply for GST purposes and, therefore, it should not be considered to be making a supply when it provides those services directly.

143. Further, in determining the nature of the supply that A makes to B, that analysis should not be coloured by earlier or later transactions in the supply chain. Each transaction must be analysed on its own merits. In arrangements involving more than two parties it may be necessary to consider other transactions in working out the total fact situation.

[56] For an example of an entire agreement clause (also known as 'whole of agreement') see *Hope v. RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348.

Part 3: Supply in the context of a tripartite arrangement

Analysing a tripartite arrangement

144. In a two party transaction, a thing supplied to an entity is typically also provided to that entity.

145. In more complex arrangements involving more than two entities, which we refer to as tripartite arrangements, analysis may reveal:

- a supply made to one entity but provided to another entity;
- two or more supplies made; or
- a supply made and provided to one entity and third party consideration.

146. As with two party transactions, the GST consequences of tripartite arrangements turn on identifying:

- one or more supplies;
- consideration (a payment, act or forbearance);
- a nexus between the supply and the consideration; and
- to whom the supply is made.

147. The propositions we use to characterise two party transactions hold true for characterising tripartite arrangements. But, as Lord Millett points out in *Customs and Excise Commissioners v. Plantiflor Ltd* [2002] UKHL 33 (*Plantiflor*)[57], the involvement of a third entity in a tripartite arrangement calls for closer analysis. In this part of the Ruling we use some further propositions to analyse the transaction:

(i) the contract is the logical starting point when working out the entity making the supply and the recipient of that supply (see paragraphs 149 to 152);

(ii) transactions that are neither based in an agreement that binds the parties in some way nor involve a supply of goods, or some other thing do not establish a supply (paragraphs 153 to 159);

(iii) when A contracts with B for B to provide a supply to C, there is a supply made by B to A (contractual flow) that B provides to C (actual flow) (paragraphs 160 to 206);

(iv) an entity that pays for a supply may not be the recipient of a supply (paragraphs 207 to 246);

(v) one set of activities may be the basis for the making of two (or more) supplies (paragraphs 247 to 252); and

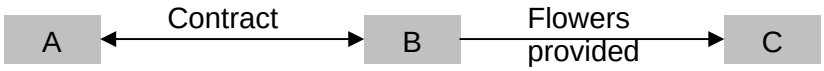
[57] At paragraph 49.

(vi) the total fact situation will determine the entity that makes a supply and the recipient of the supply (paragraphs 253 to 274).

148. We use the scenario of *Grandma's flowers* to illustrate our tripartite propositions.

Grandma's flowers

A enters into a contract with B for B to provide goods to C. A is an individual, B is a florist, the goods are flowers, and C is A's grandmother:

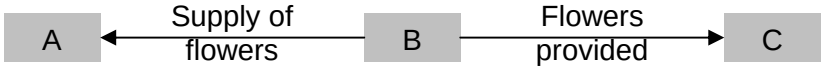


(i) The contract is the logical starting point when working out the entity making the supply and the recipient of that supply

149. Examining the underlying contractual relationships is the starting point in analysing an arrangement to determine who is making a supply to whom.

150. In *Grandma's flowers* there is no contractual relationship between A and C. Also there is no contractual relationship between B and C. B simply provides flowers to C on A's behalf.

151. If you take a contractual approach in analysing the arrangement in *Grandma's flowers,* then the only contractual relationship is between A and B. Under this contract B makes a supply of flowers to A and consideration is paid by A to B. That supply is provided by B to C:



152. The analysis of *Grandma's flowers* raises the following proposition for identifying supplies in tripartite arrangements:

- transactions that are neither based in an agreement that binds the parties in some way nor involve a supply of goods, or some other thing do not establish a supply; and
- when A contracts with B for B to provide a supply to C, there is a supply *made* by B to A (contractual flow) that B *provides* to C (actual flow).

(ii) Transactions that are neither based in an agreement that binds the parties in some way nor involve a supply of goods, or some other thing do not establish a supply

153. We explained in Part 2 at paragraphs 99 to 102, how an agreement that does not bind the parties in some way is not 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.

154. The following example examines a transaction (in a tripartite arrangement) that is not based in an agreement that binds the parties nor involves a supply of goods, or some other thing.

Example 2 – Loyalty payment with no supply of goods, or some other thing

155. *M is a manufacturer of goods. M supplies those goods to authorised dealers who on-supply those goods to end users. M makes a standing offer to end users that if an end user's purchases from an authorised dealer reach a certain level, M will pay the end user a 'loyalty payment'.*

156. *D is a dealer and E is an end user. The supply chain is that M supplies goods to D and D supplies goods to E. E receives a loyalty payment from M.*

157. *There is no supply from E to M in relation to the loyalty payment. There is a contract between M and E as a result of E's acceptance of M's standing offer to make the loyalty payment. However, E is not under any binding obligation to M to purchase goods through D.*

158. *It is E's entry into the contract with D for supply of the goods to E that constitutes E's acceptance of M's standing offer and the contract between M and E is formed and executed at this time. Although M is obliged to make the loyalty payment to E, at no point can M compel E to complete the contract of sale with D.*

159. *In the absence of any entry into an obligation by E to complete a contract of sale with D, E also does not provide or furnish anything else to M that may be considered to be a supply. There is no supply of goods or something else by E to M. The loyalty payment made by M to E is not consideration for a supply from E to M (E does not make a supply to M). Further, the payment does not give rise to an adjustment event for either M or E.*[58]

[58] This Example mirrors the Example at paragraph 42 in the Addendum to GSTR 2000/19 Goods and services tax: making adjustments under Division 19 for adjustment events. We include it in this Ruling to illustrate the relationships between the entities from a tripartite perspective.

(iii) When A contracts with B for a supply to be provided to C, there is a supply made by B to A (contractual flow) that B provides to C (actual flow)

160. In *Grandma's flowers* there is no supply from B to C. We consider the correct view follows the contract between A and B. That is, B makes the supply to A but provides the flowers to C.

161. 'Made' in this context takes its meaning from the definition of 'recipient' in section 195-1:

> ***recipient***, in relation to a supply, means the entity to which the supply was made.

162. 'Provide' is used to contrast with 'made' – it distinguishes between the contractual flow of the supply to the recipient (the entity to whom the supply is made) and the actual flow of the supply to another entity (the entity to whom the supply is provided).

163. We use 'made' and 'provide' in analysing tripartite arrangements in the sense given to those words by the subsection 38-190(3) context.

Certain supplies of health services

164. Under the GST health provisions in subdivision 38-B (except for sections 38-45 and 38-47 dealing with particular supplies of goods and section 38-55 dealing with private health insurance and ambulance insurance), the supply is only GST-free where an individual receiving that service or specific health treatment is the recipient of that supply. This outcome results from the specific wording in some health provisions, whilst in others it is due to the nature of the services themselves. This means that a GST-free health service cannot be made to a business entity or a non-profit body

165. In some fiduciary relationships it may be necessary for one party to give consent to the supply of a health service for another party. For example, a custodial parent gives consent for the medical treatment of a child. We accept in these circumstances that the other party, the child, is the recipient of the supply. There is support for this in *Secretary, Department of Health and Community Services v. J.W.B. and S.M.B* (1992) 175 CLR 218 at 316-317, McHugh J at 316:

> Consequently, when a custodial parent gives consent to the medical treatment of his or her child, the parent does so as agent for the child.

Redrow and related cases

166. The UK House of Lords' case *Customs and Excise Commissioners v. Redrow Group plc* [1999] BVC 96 (*Redrow*) has been cited in support of the view that when A contracts with B for a supply to be provided to C, B makes two distinct supplies:

- B supplies to A a *right* to have a supply made to C; and
- B makes a supply of the thing to C.

167. We do not accept that *Redrow* can be used to support this view.[59] As pointed out in GSTR 2003/8:[60]

> Rights are created under executory contracts and although the creation of such rights is supported by valuable consideration, the supply may not be characterised as a supply that is made in relation to rights if, for example, those rights contribute to the supply as a whole but cannot be identified as the dominant part of the supply.

168. We consider the proposition to be derived from *Redrow* is no broader than: the entity that contracts for a supply from a supplier is the recipient of that supply (even if that supply is provided to a third party). This proposition is consistent with our proposition here, that when A contracts with B for B to provide a supply to C, there is a supply made by B to A that B provides to C. The proposition finds support in UK cases before and after *Redrow* and is also endorsed in NZ cases.

Redrow

169. In *Redrow*, a builder, Redrow, constructed new houses for sale. Most prospective Redrow purchasers could not purchase a Redrow home unless they had a buyer for their existing home. To expedite sales of its homes Redrow instructed an estate agent to value the prospective purchaser's existing home and to handle the sale.

170. Redrow monitored progress in the marketing of the property, maintaining pressure on the agent to achieve a sale. Redrow entered into an agreement with both the agent and the prospective purchaser that it pay the estate agent's fee plus VAT if the prospective purchaser bought a Redrow home. Redrow was not liable to pay the agent's fee if the prospective purchaser did not purchase a Redrow home.

171. Redrow advised the agent to enter into a separate agreement in the normal terms with the prospective purchaser, to provide cover in the event that Redrow was not liable to pay the fee if the prospective purchaser bought elsewhere. The agent instructions could not be changed without Redrow's agreement.

172. The agents made a supply of services on which they were obliged by subsection 2(1) of the *Value Added Tax Act 1994* (UK) to charge VAT. The issue was whether Redrow's expenditure was consideration for services supplied by the agents to Redrow. Redrow was only entitled to deduct the tax which it paid as input tax if the estate agent supplied services to Redrow. The UK Commissioners contended that the estate agent was only supplying services to the prospective purchaser.

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[59] We explain this in paragraphs 870 and following GSTR 2005/6 Goods and services tax: the scope of subsection 38-190(3) and its application to supplies of things (other than goods or real property) made to non-residents that are GST-free under item 2 of the table in subsection 38-190(1) of the *A New tax System (Goods and Services Tax) Act 1999*.

[60] See paragraph 47 of GSTR 2003/8 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

173. The House of Lords held that estate agent services were supplied to Redrow. Lord Hope of Craighead said, at 100:

> The service is that which is done in return for the consideration…Questions such as who benefits from the service or who is the consumer of it are not helpful. The answers are more likely to differ according to the interest which various people have in the transaction…The fact that someone else – in this case, the prospective purchaser – also received a service as part of the same transaction does not deprive the person who instructed the service and who has had to pay for it of the benefit of the deduction.

174. Lord Millett said, at 105:

> Everything which the agents did was done at the taxpayer's request and in accordance with its instructions and, in the events which happened, at its expense. The doing of those acts constituted a supply of services to the taxpayer.

175. *Redrow* is unusual because both Redrow and the prospective purchaser contracted for a supply of services from the agent. Usually when an entity arranges for a supply to be provided to another entity, it is only the first entity that contracts for the supply.

British Airways

176. *Redrow* was applied in *British Airways plc* [2000] BVC 2207 (*British Airways*). British Airways had an arrangement where airside food outlets provided food to passengers of delayed flights. When there was a flight delay, an announcement was made to passengers that vouchers of a specified amount were available for passengers' use at airside outlets. Passengers could use their boarding pass when a voucher was not available.

177. For British Airways to succeed in claiming a deduction for the VAT included in the charge to it for the refreshments provided to delayed passengers there must have been a supply of something by the outlets to British Airways. The issue was did British Airways obtain 'anything – anything at all?' The VAT tribunal followed *Redrow* and found the answer to be, at paragraph 9:

> Yes – it obtained the right to have its delayed passengers fed at its expense - and that was clearly for the purpose of its business. That is enough to enable it to succeed.

178. The tribunal held that there was a supply of services made to British Airways. Under subsection 5(2) of the UK VAT Act 'anything which is not a supply of goods but is done for consideration (including, if so done, the granting, assignment or surrender of any right) is a 'supply of services''.

179. We agree there is a supply made to British Airways. But, respectfully, we consider the character of the supply made by the food outlets to British Airways is the supply of food, not a service. The food is provided to the passengers. In this case there is a contract between two entities, British Airways and the food outlet, under which a third entity is to be provided with the thing that is the subject of the supply between the first two entities. That is, British Airways and the airside food outlet have contracted for the food outlet to provide food to the passengers. For GST purposes we consider *British Airways* is an example of *Grandma's flowers*.

180. British Airways had actually argued their case a first time in the VAT tribunal and on appeal to the High Court.[61] This was before *Redrow*. Those earlier decisions focused on whether there was a supply of goods rather than services to British Airways. The definition of supply of goods under both the Sixth Directive and the UK VAT Act required a transfer of dispositive power. As British Airways never had dispositive power over the supply of food, the tribunal and the court could not hold that a supply of goods had been made to British Airways.

181. As we said in paragraphs 26 to 27, our definition of supply in section 9-10 in relation to a supply of goods is not restricted in this way. In paragraph 31 we explained subsection 9-10(2) places supplies of goods and services alongside things like rights and obligations. This reduces the need to resort to creative language in analysing a transaction as a supply of services. The differences in the structure of our legislation mean that the VAT tripartite cases characterising a transaction as a supply of goods or a supply of services should be treated with caution when being examined in an Australian context.

Other UK cases

182. *Redrow* has been unsuccessfully argued in three subsequent cases:

- *Poladon Ltd* [2001] BVC 4046;
- *London Borough of Camden* [2001] BVC 4139; and
- *Ashfield District Council v. Customs and Excise Commissioners* [2002] BVC 212.

In each of these cases, the relevant entity failed in its *Redrow* argument because it did not contract for the supply from the supplier.

[61] See the earlier tribunal case *British Airways plc* [1996] BVC 2383 that went on appeal to the High Court in *British Airways plc v. Customs & Excise Commissioners* [1996] BVC 359.

183. This is a proposition at work in the UK VAT that predates *Redrow*: see *P&O European Ferries Ltd* [1992] BVC 955. It was established by the evidence in this case that the company was the contractual recipient of the relevant solicitors' services 'notwithstanding that the individual employee received the benefit of these services'.

NZ cases

184. The courts in New Zealand have also adopted the proposition that the entity contracting for a supply from a supplier is the recipient of that supply (even if that supply is provided to a third party).

185. McKay J highlighted the proposition in *Wilson & Horton Ltd v. C of IR* (1995) 17 NZTC 12,325 (at 12,333):

> Where two people enter into a contract whereby one is to supply a service, the service can properly be described as supplied 'to' the other, even if it is a service for the benefit of a third party. An example is where a husband contracts with a mechanic to repair his wife's motorcar. The service is provided[62] to the husband for the benefit of his wife.

186. Durie J in *C of IR v. Capital Enterprises Ltd* (2001) 20 NZTC 17,511 (at paragraph 50), after stating that the core provisions of the NZ GST Act 'are directed to contractual arrangements between the suppliers and the recipients of the supply', said that GST 'attaches to the supply to the person who at contract can require its performance'.

Examples applying the proposition: When A contracts with B for B to provide a supply to C, there is a supply made by B to A (contractual flow) that B provides to C (actual flow)

Example 3 – Ambulance services supplied to hospital

187. *A, an ambulance service, enters into an agreement with B, a hospital, which creates a binding obligation for the services by A as and when requested by B and for the payment of those services by B.*

188. *Pursuant to the agreement, A transfers C, a patient, from hospital B to another hospital. The transfer of C is in the course of C's treatment and B pays A to provide its services to C.*

189. *The recipient of A's supply of ambulance services is hospital B. A's supply is made to B and provided to C.*

190. *One of the requirements under subsection 38-10(5) for a supply of an ambulance service to be GST-free is that the service is provided in the course of treating the recipient of the supply. As hospital B is the recipient of the supply, not the patient, the supply of the ambulance service is not GST-free.*

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[62] 'Provided' is used here as a synonym for 'supplied'.

Example 4 – Occupational therapist

191. *A, an occupational therapist, is engaged by B, a company, to assess the needs of C, its employee. C suffers from multiple sclerosis and needs to use a wheelchair to get around. A and B enter into an agreement which requires A to undertake an assessment of C's condition, to give recommendations in a report to B and to send an invoice for its services to B for payment.*

192. *A's supply of services is made to B. Although C may benefit from these services, it is B who contracts for the supply of these services and is the recipient of the supply.*

193. *This supply is not GST-free as B is the recipient of the supply and it is not for the appropriate treatment of B as required under paragraph 38-10(1)(c).*

194. *If C engages the occupational therapist to supply its services and B merely pays the therapist on behalf of C, the recipient of the occupational therapist's services is C. This supply will be GST-free if all of the requirements of subsection 38-10(1) are satisfied.*

Example 5 – Teaching services

195. *A, a supplier of teaching services, enters into a contract with B, a course provider, to provide teaching services to B's students.*

196. *B conducts professional or trade courses that are GST-free under section 38-85. Students enrol with, and pay fees directly to B. When a student completes the course, B is authorised by the relevant State or Territory authority to conduct a test. If a student passes the test, B facilitates the issuing of the qualification/licence by the relevant State or Territory authority.*

197. *A has no contractual relationship with the students.*

198. *A makes a supply of the teaching services to B and A provides this supply to the students. This is not a GST-free supply of a professional or trade course.*

199. *However, B does make a GST-free supply of a professional or trade course to the students. The students enter into contractual arrangements with B for the supply of the professional or trade course. B makes a supply of the course to the students. It does not matter whether B's employees do the actual teaching or B subcontracts that to another entity (in this case A).*

200. *Based upon these contractual arrangements, the students are the recipients of the supply of the professional or trade course made by B, and B is the recipient of the supply of teaching services made by A.*

Example 6 – Community care

201. *A, a community care provider, receives Health and Community Care funding to provide home and maintenance services to people living at home, who are frail and have a moderate or severe disability. A sets the fees for its services according to the care recipient's ability to pay.*

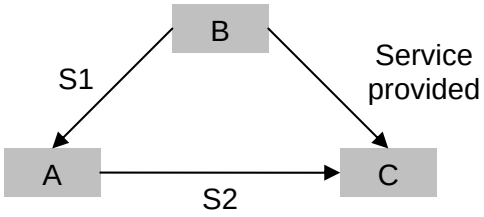
202. *C, a client of A, is the care recipient. C is assessed by A as being entitled to receive a lawn-mowing service every fortnight at the subsidised rate of $10. There is a contractual relationship between A and C for the supply of the lawn-mowing service at the subsidised rate of $10.*

203. *A engages B, an independent contractor, to provide the lawn mowing service to C. A agrees to pay B $44 for its service.*

204. *C is required to pay A $10 for the service, but A directs C to pay the amount to B on A's behalf. A then pays B the balance of $34.*

205. *There is no contractual relationship between B and C.*

206. *B is making a supply of the lawn-mowing service (S1) for $44 to A that B provides to C. A is also making a supply of a lawn mowing service (S2). A's supply is to C at the subsidised rate of $10.*[63]



(iv) An entity that pays for a supply may not be the recipient of a supply

Payment for a supply

207. Subsection 9-15(2) provides that the consideration for a supply does not have to come from the recipient of the supply. Similarly, section 2 of the NZ GST Act states that consideration in relation to a supply to anyone includes any payment made 'by any other person'.

208. This point was confirmed in the New Zealand case *Turakina Maori Girls College Board of Trustees & Ors v. C of IR* (1992) 15 NZTC 10,032 which considered the relationship of attendance dues paid by parents and guardians to supplies made by the proprietors of the school property. In its decision the NZ Court of Appeal stated (at 10,036) that the NZ GST Act 'does not require that the supply be to the person who pays the consideration' and went on to say (at 10,036) that 'the identity of the recipient is not significant, as

[63] The $10 payment made by C is for a GST-free supply under subsection 38-30(2).

long as there is a supply and the provision by some person of consideration in respect of it'.

209. It makes no difference to the GST liability of the supplier which entity provides the consideration, though there are clear ramifications for the recipient of the supply in determining whether they have made a creditable acquisition.

Creditable acquisition

210. You make a creditable acquisition if you satisfy the requirements of section 11-5. Two of the requirements of section 11-5 are that you are the recipient of a taxable supply (paragraph 11-5(b)) and that you must provide or be liable to provide consideration for the supply (paragraph 11-5(c)).

Third party payer proposition

211. If you provide or are liable to provide consideration for a supply, but you are not the recipient of the supply, we refer to you as a 'third party payer'. As a third party payer you do not make a creditable acquisition in relation to your payment because the supply is not to you as required by section 11-5. Payment for a supply that is made to another entity is not sufficient to make you the recipient of that supply.

212. The third party payer proposition is demonstrated in the decision of *London Borough of Camden* [2001] BVC 4139 where the UK VAT tribunal considered whether the Borough was entitled to claim input tax on legal fees it funded for a prospective adopter. Under the UK *Adoption Act 1976* the Council was obliged to run an adoption service. If a prospective adopter was not eligible for legal aid, the Council would normally pay the prospective adopter's legal costs.

213. The Council would provide the prospective adopter with a list of solicitors; the adopter would instruct the solicitor and the Council would pay the legal costs:



214. The Council was willing to consider other solicitors who were on the Law Society's children panel. The Council was to receive progress reports and give authorisation for expenditure on counsel and any unusual expenditure. The Council could terminate the agreement to pay for future work if the solicitors were not performing to their satisfaction or if a conflict of interest with the adopters arose.

215. The proposition in *Redrow*[64] could not apply because only the prospective adopters contracted for the solicitors' services, not the Council who only agreed to pay for those services under certain circumstances. The Council's payment was not consideration for a supply to the Council. The liability to pay for the services still resided with the prospective adopters. At paragraph 9 of the judgment the VAT tribunal distinguished *Redrow* and found:

> In our view, this case is far away from Redrow. The Appellant did not contract with the solicitors for the service to be supplied by the solicitors. The adopters contracted with the solicitors of their choosing, subject to the solicitors being acceptable to the Appellant, and the adopters gave them instructions…The Appellant merely contracted with the solicitors (assuming that they did so, about which there is also no evidence) to pay their bill on certain terms…The adopters were the sole clients of the solicitors. The Appellants were merely payer, just as in the case of the grant in the Ashfield District Council case, although technically the payment of solicitors may not have been a grant.

Examples of the third party payer proposition

216. The following examples are practical applications of the third party payer proposition.

Example 7 – Electricity rebate scheme

217. *A State Government Department administers an electricity rebate scheme which provides financial assistance to certain people in need (such as pensioners and senior card holders) to meet their electricity costs. The Department administers the scheme but the rebate is delivered by the relevant electricity suppliers.*

218. *The electricity suppliers accept applications from customers, determine and verify eligibility, and credit the rebate to the customers' electricity accounts. The electricity suppliers subsequently submit claims to the Department seeking recovery of the rebate credited.*

219. *The electricity suppliers deliver the rebates as part of their non-commercial activities performed on behalf of the State Government, collectively referred to as Community Service Obligations. This undertaking is only evidenced by a verbal agreement with the Department for reimbursement of rebates credited and does not rely on any formal written agreements.*

220. *Each time the electricity suppliers lodge a claim they charge the Department an administration fee.*

[64] The proposition in *Redrow* is contained in paragraph 168 of this Ruling.

221. *The electricity suppliers make a supply of electricity to the eligible applicants and receive consideration for the supply from two sources: partly from the eligible applicant and partly from the Department. The rebate is not a discount on the price of the supply of electricity by the electricity suppliers. The reimbursement of the rebate by the Department is not consideration for a supply made by the electricity suppliers to the Department. It is consideration for the supply of electricity to the eligible applicant. The Department is not entitled to input tax credits in respect of the reimbursements of the rebates it pays as those payments are not consideration for supplies to it from the electricity suppliers.*

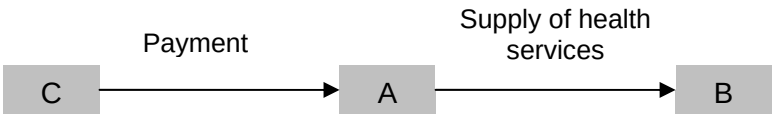
222. *However, the administration fee is consideration for the supply of services made by the electricity suppliers to the Department in respect of the rebate scheme. These services include accepting applications, determining and verifying eligibility and crediting the rebate to the electricity accounts of successful applicants. The Department has made acquisitions of these services from the electricity suppliers and, assuming these acquisitions are creditable acquisitions under section 11-5, the Department is entitled to input tax credits in respect of the administration fees.*

Example 8 – Requisite health service

223. *C, a Government Department, advises the health profession that it will pay for certain health services*[65] *performed for a class of persons requiring those services.*

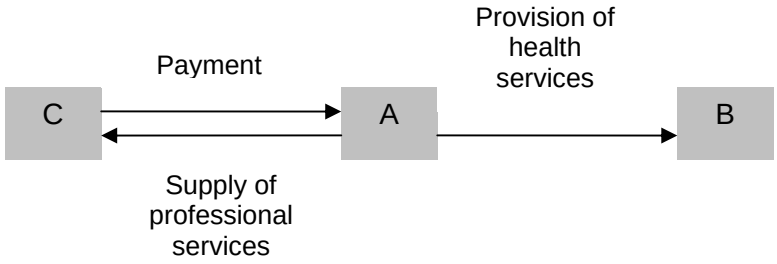
224. *A, a supplier of those health services, supplies a requisite health service to B, who falls within the required class of persons. C pays A for this service. There is no binding obligation between A and C regarding the performance of this service.*

225. *C is paying for the supply of health services made by A to B. The supply (for the appropriate treatment of B) will be GST-free if the requirements of section 38-10 are met. C is not the recipient of this supply:*



[65] For the purposes of this example, the health services are those to which section 38-10 applies.

226. *If C contracted A to provide the health services to the class of persons that includes B, there would be different GST consequences. There would be a supply of professional services by A to C and a provision of health services by A to B:*



227. *The supply of professional services is not GST-free under section 38-10 as C is the recipient of the supply and it is not necessary for the appropriate treatment of C as required under paragraph 38-10(1)(c).*

Example 9 – Hospital services and preferred provider

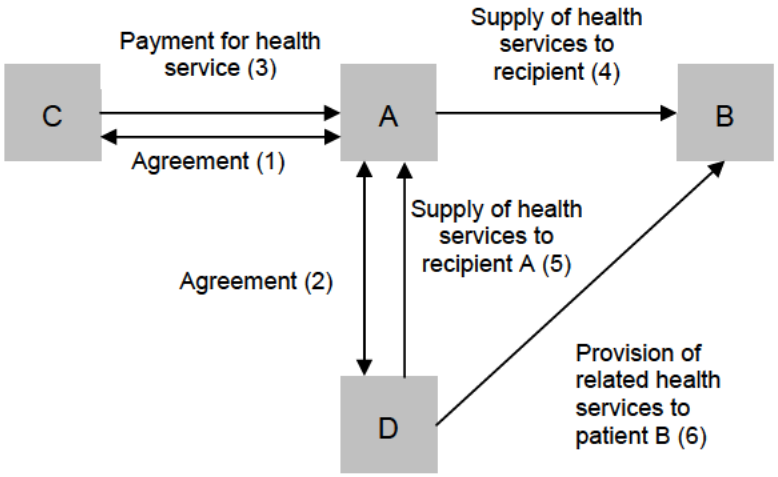
228. *A is a provider of hospital services and admits B, a patient, to its hospital for treatment.*

229. *A is a preferred provider of hospital services under an agreement (1) with health fund C. The purpose of the agreement is to establish the level of fees payable by the health fund when a fund member receives treatment from the preferred provider. The agreement does not require A to perform health services for C's health fund members. B is one of C's fund members.*

230. *A and C agree that a 'bed fee' will cover a range of things including use of a room, meals, certain medication and certain related health services.*

231. *To enable A to provide the hospital services covered by the bed fee, A enters into an agreement with D (2) which creates a binding obligation for D to perform the related health services as and when requested by A and for payment of those services by A.*

232. *C is paying (3) for the supply of hospital services made by A to B (4).*[66] *C is not the recipient of this supply:*



233. *The existence of the agreement between A and C does not change the fact that the recipient of A's supply of services is the patient B (4), not the health fund C.*

234. *However, in relation to the supply by D (5), the recipient of this supply is A. D's supply is made to A and provided to B (6).*[67]

Example 10 – Legal services and third party payer arrangement contrasted with a recipient arrangement

235. *A Government Department administers a funding arrangement under which it agrees to pay for legal services supplied to a successful grantee by a solicitor. The grantee chooses the solicitor from a list provided by the Department and instructs the solicitor.*

236. *The funding application does not bind the grantee to expend the funds in a particular way and as the Department makes any payments direct to the solicitor the grantee does not receive the funds directly. The solicitor issues a written itemised account to the Department who makes the payment if the services delivered to the grantee are within the scope of the funding arrangement.*

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[66] The supply of those services by A to B will be GST-free if the requirements of section 38-7, section 38-10 or section 38-20 are met.

[67] This supply cannot be GST-free under section 38-7 as A is not the recipient of the appropriate treatment as required under the definition of medical service and a medicare benefit is not payable for the supply from D to A. This supply cannot be GST-free under section 38-10 as A is the recipient of the supply and it is not for the appropriate treatment of A as required under paragraph 38-10(1)(c). The supply cannot be GST-free under section 38-20 as the definition of hospital treatment only relates to the supply made to the patient. However, the supply of those services by A to B will be GST-free if the requirements of section 38-7, section 38-10 or section 38-20 are met.

237. *In this case the solicitor makes a supply of legal services to the grantee not to the Department as the contract for the legal services is between the solicitor and the grantee. The Department is not the recipient of the supply of legal services but is making a third party payment for that supply. It makes no difference to the GST treatment of the supply whether the grantee or the Department makes the payment for the supply, but it can affect either the Department's or the grantee's ability to make a creditable acquisition.*

238. *As a third party payer, the Department has not made a creditable acquisition because the solicitor made the supply to the grantee not to the Department. The Department is not entitled to any input tax credits.*

239. *The grantee has not made any supply to the Department because it does not have a contractual arrangement for the grant, nor is there a reciprocal relationship between the two parties. The grantee has done nothing more than complete an application for funding.*

240. *In another arrangement the Department fulfils a legislative function that requires it to ensure the provision of legal services to an eligible group of individuals. In this arrangement the Department chooses a solicitor from its list and sends a letter of offer to the solicitor. This letter explains the requirement that the solicitor provide legal services to an eligible individual, the extent of those services and the rates at which payment will be made if the offer is accepted. The legal liability for the payment of these services is with the Department.*

241. *When the offer is accepted the Department has entered into a contractual relationship with the solicitor under which the solicitor is required to perform the legal services. The Department is the recipient of the supply made by the solicitor. The supply is provided to the eligible individual. As the recipient of the supply and the payer of the consideration, the Department will make a creditable acquisition where all the other requirements of section 11-5 are met.*

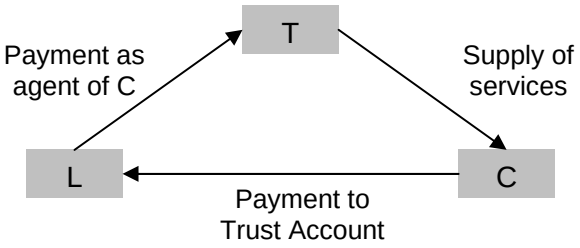
242. The third party payer situation is different from the situation of a paying agent. A third party payer provides or is liable to provide consideration for a supply made to another entity. A paying agent makes a payment on behalf of the entity to which the supply is made.

Example 11 – Legal services and third party disbursements

243. *L, a legal firm, is engaged by C, a client, to provide legal services. As part of the service agreement, prior to the provision of the legal services, C deposits money into L's trust account. This money is treated as an advance for later disbursements made by L on behalf of C and as security for future services made by L.*

244. *L then advises C to seek the service of a third party, T. C contracts with this third party directly.*

245. *L, acting as agent for C, pays for T's services using funds from the trust account:*



246. *The recipient of the supply of the service by T is C, not L. L is merely paying for a supply on behalf of C.*

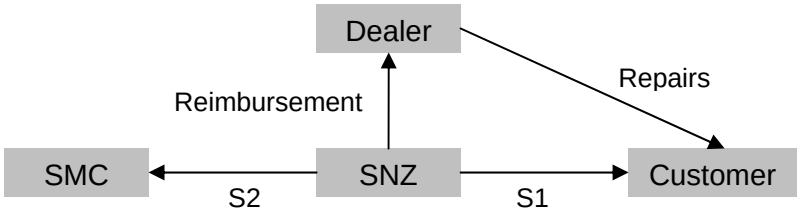
(v) One set of activities may be the basis for the making of two (or more) supplies

247. This proposition is illustrated by the facts in the New Zealand case *Suzuki New Zealand Ltd v. C of IR* (2001) 20 NZTC 17,096 (*Suzuki*).

248. *Suzuki* was about warranties offered by an offshore motor vehicle manufacturer (SMC) selling vehicles into New Zealand. SMC sold vehicles with a warranty to a New Zealand distributor (SNZ). SNZ supplied vehicles to dealers who on–supplied the vehicles to customers in New Zealand. SNZ also supplied its own warranty to the customers. If a vehicle required repairs covered by SNZ's warranty, the customer took the vehicle to the dealer who performed the repairs. SNZ paid the dealer for the repairs and SNZ then sought reimbursement from SMC.

249. There was only one repair of a vehicle but this activity was the subject of two supplies:

- one supply (S1) by SNZ to the customer (fulfilling SNZ's warranty obligation to the customer); and
- the other supply (S2) by SNZ to SMC (fulfilling a separate contractual obligation for repair services from SNZ to SMC, which also fulfilled SMC's warranty obligation to SNZ).



250. As the New Zealand Court of Appeal noted (at paragraph 23 of the judgment):

> Through its agents, the dealers, SNZ was simultaneously, in cases falling within both warranties, discharging its obligations to purchasers of faulty vehicles. This is simply an instance of the common enough situation in which performance obligations under two separate contracts with different counter-parties overlap, so that performance of an obligation under one contract also happens to perform an obligation under another. In such case a supply can simultaneously occur for GST purposes under both contracts. There is a nexus in both cases between the performance and the consideration given by the other party. In the present case there is a more than sufficient financial and legal connection, as demonstrated by the evidence, between SMC's payments and the carrying out of the repairs on behalf of SNZ by its dealers. The repairs may have been done for the customers, in practical terms, under SNZ's standard warranty, but they were also done for SMC under its warranty.

251. *Redrow* is another case that has been referred to as authority for the proposition that 'one set of acts can constitute two different supplies'[68] or 'a single course of conduct by one party may constitute two or more supplies to different persons'.[69] In *Redrow* both Redrow and the prospective purchaser contracted for the estate agent's services. The agent's activities resulted in the agent making a supply of services to both Redrow and the prospective purchaser.

252. *Suzuki* and *Redrow* show that examining the levels of contractual or reciprocal relationships between the entities in a tripartite arrangement may reveal two or more supplies being made based upon the one set of activities.

(vi) The total fact situation will determine the entity that makes a supply and the recipient of the supply

253. In Part 2 of this Ruling at paragraphs 133 to 139 we explained that you needed to consider the total fact situation to characterise a transaction so that you can determine who is making a supply to whom, who is making a payment to whom and what the status of the supply is.

254. If there is a written contract, the contractual documentation is the starting point for this analysis, but with tripartite arrangements the conduct of the parties and the surrounding circumstances may be significant in determining how the legal arrangements are treated for GST purposes.

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[68] Lord Slynn of Hadley in *Commissioners of Customs and Excise v. Plantiflor Ltd* [2002] UKHL 33 at paragraph 32.

[69] Lord Millet in *Commissioners of Customs and Excise v. Plantiflor Ltd* [2002] UKHL 33 at paragraph 50.

255. In discussing our proposition about the total fact situation we consider three UK VAT decisions:

- the High Court decision in *Customs and Excise Commissioners v. Reed Personnel Services Ltd* [1995] BVC 222 (*Reed)* which established the proposition as a principle in the UK;
- the House of Lords decision in *Eastbourne Town Radio Cars Association v. Commissioners of Customs and Excise* [2001] BVC 271 *(Eastbourne)* which confirmed the principle at the highest level; and
- the more recent Court of Appeal decision in *Commissioners for Her Majesty's Revenue and Customs v. Debenhams Retail plc* [2005] EWCA 892 *(Debenhams)* which followed the principle.

Reed

256. In *Reed* the issue was whether a nursing agency, Reed, made supplies of nurses to hospitals or exempt supplies of nursing services to the hospitals.

257. Reed entered into contracts with the nurses which provided for a degree of control over their activities by Reed. Although it stated that the nurses were self-employed, Reed was obliged under relevant income tax legislation to withhold tax from the nurses' remuneration. The contracts also stated the nurse 'shall be deemed to have accepted the normal common law duties of an employee as far as they are reasonably applicable', but did not specify who the employer was.

258. Reed also entered into a contract with the relevant health authority (controlling the hospitals). The authority was to make payments of commission to Reed and to make payments directly to Reed for the nurses salary which Reed passed on to the nurses. The authority did not pay the nurses. The rates of pay to the nurses were calculated by reference to national agreements and were not negotiable between Reed and the authority.

259. Laws J, at 229, concluded that the contractual documentation alone did not determine the VAT question:

> Where the facts only involve two parties there is necessarily little or no room for argument over who supplies what to whom. Where there are three (or more), the position may be very different. It should in my judgment be recognised that in that situation the parties' contractual arrangements, even though exhaustive for the purposes of their private law obligations, may not – as indeed they need not – define and conclude issues arising under the [VAT legislation]; and where they do not, the resolution of such issues remains a question of fact for the tribunal.

260. Laws J found that the tribunal's determination of the total fact situation that Reed supplied nurses, who in turn supplied their services to the hospitals, could not be regarded as unreasonable. Reed acting as a recruitment agency had supplied intermediary services to the hospitals.

Eastbourne

261. The House of Lords in *Eastbourne* cited *Reed* with approval in characterising the transactions in that case.

262. Eastbourne was an unincorporated non-profit making association that provided a communications network for its members. The members carried on business individually as private car hire drivers.

263. Eastbourne contended that under its new constitution it was no longer making supplies of services to its members but that the sums paid by its members should be regarded as the collective funding for the members' own employment of the staff and facilities. For example, the new constitution referred to various supplies being made to 'members as joint principals'. The employment agreements stated the employer to be 'each of the members for the time being of Eastbourne Town Radio Cars Association'. Payment of members' subscriptions was on the basis of simply dividing the expenses of the association among the members pro rata in accordance with the time for which they had been members.

264. Lord Slynn of Hadley, after citing *Reed*, looked beyond the contractual arrangements and said, at paragraph 17:

> If the terms of the [constitution] and the [employment agreement] are looked at only as a matter of contract between the various drivers and the employees it may well be that since the Association is not a legal entity the employers would be the various drivers from time to time and the rights and obligations of the drivers would depend only on the contract between them. In such a case the Association would be acting as agent for the drivers; it would hold property in trust for the drivers and the drivers would be individually or jointly liable to third parties for what they did or what was done on their behalf.

265. Lord Slynn then noted the effect of the relevant provision in the VAT Act, at paragraph 18:

> When an Association provides, for subscription or other consideration, facilities or advantages available to its members, such provision is 'deemed to be the carrying on of a business'. That does not of itself mean that the Association is automatically making a taxable supply but it does mean that the Association is carrying on a business and can be within the scope of VAT. The intention of the Act is plainly that the activities of an Association should not be excluded from VAT merely because it was unincorporated and not a legal person.

266. In the VAT context, as would be the case in Australia, an unincorporated association was capable of making supplies to its members. Their Lordships went on to find that Eastbourne was supplying services to its members.

Debenhams

267. The House of Lords' endorsement of *Reed* was noted by the Court of Appeal in *Debenhams*.[70] This case concerned the legitimacy of trading terms where, if a customer paid the retailer Debenhams by credit or debit card, 2.5 per cent of the payment was said to be consideration for an exempt supply of card handling services by a separate card issuing company (DCHS).

268. It was held that there was no separate contract between Debenhams' customers and DCHS for which 2.5 per cent of the sale price was being paid:

> Even if the documentation seen by the customer could or would otherwise be read as indicating that the customer was required to contract with DCHS, contracts are not made by mere assertion. The natural interpretation of the course of events and documentation would accordingly be that any card handling (other than that covered by the agreement between the cardholder and his card issuer) was and remained the responsibility of the seller accepting the card in discharge of the price.[71]

269. Taking into account the total fact situation, the Court of Appeal held there was no supply by DCHS to a customer. Debenhams made a supply to the customer for 100 per cent of the payment by credit or debit card.

Example 12 – Funeral service

270. *Rex, a respected member of a charitable institution, passed away. Tom, a representative of the charitable institution, contacted the surviving spouse and made it known that the charitable institution wanted to organise and pay for Rex's funeral service. This was in recognition of Rex's extensive voluntary work for the charitable institution.*

[70] *Commissioners for Her Majesty's Revenue and Customs v. Debenhams Retail plc* [2005] EWCA 892, at paragraph 8.
[71] *Commissioners for Her Majesty's Revenue and Customs v. Debenhams Retail plc* [2005] EWCA 892, at paragraph 42.

271. *Tom contacted the funeral service company and organised a meeting between himself, the surviving spouse and the funeral director. With the surviving spouse's consent, Tom made the arrangements with the funeral director. At the direction of Tom, the surviving spouse signed the relevant documents for the service. It was the accepted practice that the surviving spouse was the appropriate person to sign the relevant documents. Tom made it known to the funeral director that the charitable institution would be responsible for all the costs of the service. The funeral director accepted that the surviving spouse was signing the documents on behalf of the charitable institution and that the surviving spouse was not responsible for the costs of the service.*

272. *Although we would start with the written contract signed by the surviving spouse, we need to look at all the surrounding circumstances to determine who the recipient of the supply is.*

273. *The fact the charitable institution has bound itself to pay for the supply is not sufficient in itself to make it the recipient of the supply. It is possible that the charitable institution is binding itself to pay for a supply made to another entity.*

274. *In this case the facts and surrounding circumstances demonstrate that it was the charitable institution that commissioned the supply and was also the recipient of the supply because:*

- *the charitable institution made it known to the supplier that it was commissioning the supply and that it would be liable to pay for that supply;*
- *the charitable institution exercised complete control over how that supply was to be delivered (albeit with the surviving spouse's agreement); and*
- *the surviving spouse signed the contract under the direction of Tom a representative of the charitable institution.*

Plantiflor – a Case Study

275. The House of Lords' decision in *Customs and Excise Commissioners v. Plantiflor Ltd* [2002] UKHL 33 (*Plantiflor*) is a significant UK VAT case on multiparty arrangements. *Plantiflor* involves the application of several of the propositions discussed in this Ruling. We examine the case to illustrate the analysis of multiparty transactions.

Facts

276. Plantiflor sold plants by mail order. Customers could collect the plants, in which case there was no delivery charge. Alternatively, pursuant to the contract between Plantiflor and its customer, Plantiflor arranged delivery via Parcelforce and a charge was made for post and packaging.

277. Plantiflor entered into a five year contract with Parcelforce for the delivery (at a reduced rate) of plants to its customers. Plantiflor's goods delivered through Parcelforce were 'postal packets' that qualified for exemption from VAT. Customs and Excise said that VAT was chargeable on the total of Plantiflor's invoice price (including the postage component) for the delivered goods to its customers. This created a problem for Plantiflor – it could not deduct the input tax on the amounts it paid to Parcelforce as this was for exempt supplies, but it was accountable for VAT on the postage included in the price of the delivered goods to its customers.

278. Plantiflor's argument that it acted as agents for the customers in its dealings with Parcelforce found favour in the Court of Appeal decision [2000] BVC 103. According to this argument, when Plantiflor commissioned the supply from Parcelforce it did so for undisclosed principals – their customers. As a consequence, rather than there being a supply by Parcelforce to Plantiflor, there was a supply by Parcelforce to the customers (an exempt supply).

279. When *Plantiflor* was heard by the VAT tribunal the Commissioners conceded that there were two supplies by Plantiflor: a sale of goods and a service of arranging delivery of those goods. The Court of Appeal refused to allow the Commissioners to renege on this concession and to argue that there was only one supply by Plantiflor of the sale of delivered goods.

The House of Lords decision considered

280. This argument that Plantiflor acted as agents was rejected by the majority in the House of Lords as it did not fit the total fact situation. This is the proposition that we discuss at paragraph 253 and following. Lord Millet said, at paragraph 61:

> The difficulty with this analysis, however, is that it does not fit the facts. As Law J correctly held, Parcelforce does not deliver the goods pursuant to the contract with the customer or his agent. It makes delivery pursuant to its contract with Plantiflor, which both parties entered into as principals. This is plain from the terms of the contract, *[The contract is the logical starting point, proposition (i), paragraph 149].*which was to last for a term of five years, contained an obligation on the part of Plantiflor to deliver a minimum number of parcels in each year, and provided for the annual indexation of postal charges. The minimum volume obligation, for example, which indirectly affects the price per parcel payable by Plantiflor, does not attach to any individual customer or to all the customers collectively. The conclusion is inescapable that neither party entered into the contract as agent for Plantiflor's future customers as undisclosed principals; and the contrary has not been suggested.

281. Lord Millett went on to identify three supplies, at paragraph 67:

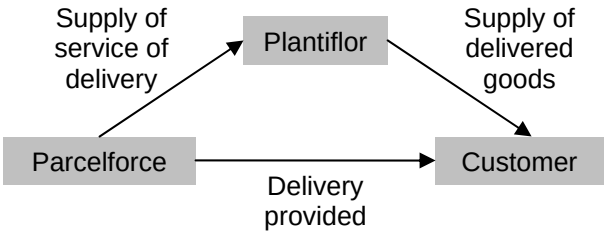
> To sum up: there were three distinct supplies in the present case, and it is necessary to identify the particular supply for which the payment made by the customer was the consideration:
>
> (i) The supply by Parcelforce to Plantiflor of the service of delivering its customer's goods. This was supplied pursuant to a contract for delivery made between Parcelforce and Plantiflor and was for a consideration payable by Plantiflor. It is (or would if Parcelforce were a private carrier be) a taxable supply.
>
> (ii) The supply by Parcelforce to the customer of the service of delivering his goods to him or his order. This supply was also made pursuant to the contract for delivery between Parcelforce and Plantiflor. It was made in circumstances in which the customer incurred no liability to Parcelforce to pay a consideration and was not (and would not even if Parcelforce were a private carrier be) a taxable supply.
>
> (iii) The supply by Plantiflor to the customer of an arrangement service for which Plantiflor charged £1.63 per parcel. Whatever else was included in this supply, it was not the service of actual delivery. That was supplied by Parcelforce. What the customer received for his money was the benefit of the arrangements which Plantiflor had made with Parcelforce to deliver its customer's goods to his order without charging him in the normal way. Since Plantiflor made this supply for consideration, it was a taxable supply.

Two supplies

282. With respect, consistent with the approach taken in this Ruling we identify two supplies:

- a supply by Parcelforce to Plantiflor of the service of delivering its customer's goods – this supply is made to Plantiflor but provided to its customer; and
- a supply by Plantiflor to the customer of delivered goods,[72] as shown in the diagram below.

[72] Lord Slynn, at paragraph 24, considered the proper construction of the transaction between Plantiflor and the customer was that there was an agreement for the supply of delivered goods. We consider this characterisation to be the better view. This view is also stated in GSTD 2002/3 Goods and services tax: how do I account for GST when I supply taxable goods, non-taxable goods and delivery services together?



283. Lord Millett characterises the delivery to the customer as a supply. We respectfully consider it is no more than a provision arising out of the supply Parcelforce makes to Plantiflor. This accords with proposition (iii) discussed at paragraph 160 and following that when A contracts with B for B to provide a supply to C, there is a supply made by B to A (contractual flow) that B provides to C (actual flow).

284. As Lord Millett recognised, there was no contractual relationship between Plantiflor's customers and Parcelforce; and there is no nexus between the consideration paid by the customers to Plantiflor for the postage charge and delivery service made to Plantiflor (but provided to the customer). This accords with proposition (ii) discussed at paragraph 153 and following that transactions that are neither contractually based in an agreement that binds the parties in some way nor involve a supply of goods, or some other thing, do not establish a supply.

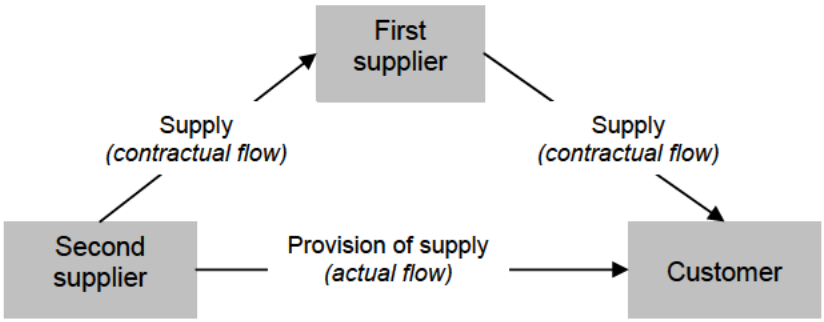
Distinction between arranging and subcontracting

285. Both Lord Millet and Lord Slynn of Hadley made the distinction between a contracting service and an arranging service. Lord Slynn (at paragraph 33) cited *Nell Gwynn* as authority for this proposition and Lord Millett said, at paragraph 57:

> If Plantiflor had undertaken to deliver the goods itself, using Parcelforce as its subcontractor to make the actual delivery, the tax position would be straightforward. There would be two supplies: (i) a supply by Parcelforce to Plantiflor of the service (as its subcontractor) of delivering the customer's goods to the addressee and (ii) a supply by Plantiflor to the customer of the service of delivering his goods to the addressee (performed through its subcontractor). Consideration would pass from the customer to Plantiflor and from Plantiflor to Parcelforce.

This accords with proposition (k) discussed at paragraph 140 and following that it is necessary to analyse the transaction that occurs, not the transaction that might have occurred, nor an earlier or subsequent transaction that occurs.

286. We agree there is a distinction between an arranging service and a subcontract arrangement. We also agree with the analysis of a subcontract arrangement in *Plantiflor*. In a subcontract arrangement, a supplier contracts with a customer for the supply of something. The first supplier then contracts with a second supplier for the provision of the thing to the customer. This diagram illustrates a subcontract arrangement:



287. However, we consider a supply is only the supply of arranging for a supply to be made to the customer (or another entity) if that is what the first supplier has been contracted to supply. If the first supplier arranges for a second supplier to contract with the customer to supply the required thing, the first supplier is only responsible for arranging that service. This was not the case in *Plantiflor*.

288. Further, if the first supplier arranges for a second supplier to supply a particular thing to a customer, the customer typically has no legal recourse against the first supplier for the second supplier's failure to supply the thing. If the second supplier fails to supply that thing, the customer usually only has legal recourse against the second supplier. If the first supplier promises to arrange for the supply of a thing and that promise is not carried out, the customer then usually has legal recourse against the first supplier for breach of its promise to arrange for the supply by the other supplier.

Your comments

289. We invite you to comment on this draft Goods and Services Tax Ruling. Please forward your comments to the contact officer(s) by the due date. (Note: The Tax office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

Due date: **17 February 2006**
Contact officers: **Kent Sawyer or Terry Wheeler**
E-mail address: **kent.sawyer@ato.gov.au or terry.wheeler@ato.gov.au**
Telephone: **(07) 3213 5629 or (07) 3213 5117**
Facsimile: **(07) 3213 5055**
Address: **PO Box 9990 Brisbane QLD 4001**

Note: the contact officer from 3 January 2006 to 20 January 2006 is Ian Underwood. His telephone number is (07) 3213 5698.

Detailed contents list

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Commissioner of Taxation
21 December 2005

Previous drafts:

Not previously issued as a draft

Related Rulings/Determinations:

GSTD 2002/3; GSTR 1999/1; GSTR 2000/7; GSTR 2000/11; GSTR 2000/19; GSTR 2000/31; GSTR 2000/36; GSTR 2000/37; GSTR 2001/4; GSTR 2001/6; GSTR 2001/8; GSTR 2002/2; GSTR 2002/3; GSTR 2002/5; GSTR 2003/3; GSTR 2003/5; GSTR 2003/7; GSTR 2003/8; GSTR 2005/6; TR 1998/3

Subject references:

- acquisition
- creditable acquisition
- input tax credits
- multi-party arrangements
- recipient
- supplier
- supply
- third party payer
- tripartite arrangements

Legislative references:

- Adoption Act 1976 (UK)
- ANTS(GST)A 1999 2-1
- ANTS(GST)A 1999 2-5
- ANTS(GST)A 1999 2-10
- ANTS(GST)A 1999 2-15
- ANTS(GST)A 1999 2-20
- ANTS(GST)A 1999 2-25
- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-5(a)
- ANTS(GST)A 1999 9-10
- ANTS(GST)A 1999 9-10(1)
- ANTS(GST)A 1999 9-10(2)
- ANTS(GST)A 1999 9-10(2)(a)
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- ANTS(GST)A 1999 9-10(3A)
- ANTS(GST)A 1999 9-10(4)
- ANTS(GST)A 1999 9-15(2)
- ANTS(GST)A 1999 9-25
- ANTS(GST)A 1999 9-25(1)
- ANTS(GST)A 1999 9-70
- ANTS(GST)A 1999 9-80
- ANTS(GST)A 1999 Div 11
- ANTS(GST)A 1999 11-5
- ANTS(GST)A 1999 11-5(a)
- ANTS(GST)A 1999 11-5(b)
- ANTS(GST)A 1999 11-5(c)
- ANTS(GST)A 1999 11-10
- ANTS(GST)A 1999 11-10(1)
- ANTS(GST)A 1999 11-10(2)
- ANTS(GST)A 1999 11-15(1)
- ANTS(GST)A 1999 11-15(2)
- ANTS(GST)A 1999 11-15(4)
- ANTS(GST)A 1999 11-15(5)
- ANTS(GST)A 1999 11-20
- ANTS(GST)A 1999 11-30(3)
- ANTS(GST)A 1999 Div 17
- ANTS(GST)A 1999 Div 19
- ANTS(GST)A 1999 31-10(2)
- ANTS(GST)A 1999 Subdiv 38-B
- ANTS(GST)A 1999 38-7
- ANTS(GST)A 1999 38-10
- ANTS(GST)A 1999 38-10(1)
- ANTS(GST)A 1999 38-10(1)(c)
- ANTS(GST)A 1999 38-10(5)
- ANTS(GST)A 1999 38-20
- ANTS(GST)A 1999 38-30(2)
- ANTS(GST)A 1999 38-45
- ANTS(GST)A 1999 38-47
- ANTS(GST)A 1999 38-55
- ANTS(GST)A 1999 38-85
- ANTS(GST)A 1999 38-190
- ANTS(GST)A 1999 38-190(1)
- ANTS(GST)A 1999 38-190(2)
- ANTS(GST)A 1999 38-190(3)
- ANTS(GST)A 1999 38-190(4)
- ANTS(GST)A 1999 38-325
- ANTS(GST)A 1999 38-325(2)
- ANTS(GST)A 1999 38-385
- ANTS(GST)A 1999 38-480
- ANTS(GST)A 1999 Subdiv 40-A
- ANTS(GST)A 1999 40-5(2)
- ANTS(GST)A 1999 40-65
- ANTS(GST)A 1999 48-40(2)
- ANTS(GST)A 1999 49-30(1)
- ANTS(GST)A 1999 51-5
- ANTS(GST)A 1999 Div 54
- ANTS(GST)A 1999 54-40(2)(a)
- ANTS(GST)A 1999 54-40(2)(c)
- ANTS(GST)A 1999 Div 71
- ANTS(GST)A 1999 75-5(1)
- ANTS(GST)A 1999 Div 78
- ANTS(GST)A 1999 78-25(1)
- ANTS(GST)A 1999 78-60(1)
- ANTS(GST)A 1999 78-65(2)
- ANTS(GST)A 1999 78-70(2)
- ANTS(GST)A 1999 78-95(1)
- ANTS(GST)A 1999 79-85(1)
- ANTS(GST)A 1999 Div 81
- ANTS(GST)A 1999 81-5(1)

- ANTS(GST)A 1999 81-5(2)
- ANTS(GST)A 1999 Div 83
- ANTS(GST)A 1999 Div 84
- ANTS(GST)A 1999 84-5
- ANTS(GST)A 1999 84-10
- ANTS(GST)A 1999 Div 85
- ANTS(GST)A 1999 85-5
- ANTS(GST)A 1999 Div 90
- ANTS(GST)A 1999 Div 96
- ANTS(GST)A 1999 96-5(1)
- ANTS(GST)A 1999 Div 100
- ANTS(GST)A 1999 100-10(1)
- ANTS(GST)A 1999 105-5(3)
- ANTS(GST)A 1999 Div 110
- ANTS(GST)A 1999 Div 113
- ANTS(GST)A 1999 Div 135
- ANTS(GST)A 1999 151-20(3)
- ANTS(GST)A 1999 Div 153
- ANTS(GST)A 1999 Subdiv 153-B
- ANTS(GST)A 1999 153-50
- ANTS(GST)A 1999 153-55(1)
- ANTS(GST)A 1999 153-55(2)
- ANTS(GST)A 1999 184-1(3)
- ANTS(GST)A 1999 195-1
- ANTS(GST)R 1999 40-5.01
- ANTS(GST)R 1999 40-5.08
- ANTS(GST)R 1999 40-5.09
- ANTS(GST)R 1999 40-5.10
- Copyright Act 1968
- Goods and Services Tax Act 1985 (NZ) 2
- Goods and Services Tax Act 1985 (NZ) 2(1)
- Patents Act 1990
- TAA 1953 37
- TAA 1953 Sch 1 12-55
- Value Added Tax Act 1994 (UK) 2(1)
- Value Added Tax Act 1994 (UK) 5(2)
- Value Added Tax Act 1994 (UK) 1(1) Schedule 4
- Value Added Tax Act 1994 (UK) 1(2) Schedule 4

Case references:

- Ashfield District Council v. Customs and Excise Commissioners [2002] BVC 212
- British Airways plc [1996] BVC 2383
- British Airways plc [2000] BVC 2207
- British Airways plc v. Customs & Excise Commissioners [1996] BVC 359
- C & E Commrs v. Oliver [1980] 1 All ER 353
- C & E Commrs v. Wellington Private Hospital Ltd [1997] BVC 251
- Case M74 (1990) 12 NZTC 2441
- Case S65 (1996) 17 NZTC 7408
- C of IR v. Capital Enterprises Ltd (2001) 20 NZTC 17,511
- C of IR v. New Zealand Refining Co. Ltd (1997) 18 NZTC 13187
- Coles Supermarkets Australia Pty Ltd v. Westley Nominees Pty Ltd & Anor 2005 ATC 4484; [2005] FCA 839; 60 ATR 52
- Commissioners for Her Majesty's Revenue and Customs v. Debenhams Retail plc [2005] EWCA 892; 2005 BVC 425
- Customs and Excise Commissioners v. Oliver (1979) 1 BVC 314
- Customs and Excise Commissioners v. Plantiflor [2002] UKHL 33; [2002] BVC 572
- Customs and Excise Commissioners v. Reed Personnel Services Ltd [1995] BVC 222
- Customs and Excise Commissioners v. Redrow Group plc [1999] BVC 96
- Eastbourne Town Radio Cars Association v. Commissioners of Customs and Excise [2001] BVC 271
- Facchini v. Bryson (1952) 1 TLR 1386
- Federal Commissioner of Taxation v. St Hubert's Island Pty Ltd (in liq) (1978) 138 CLR 210; 78 ATC 4101; (1978) 8 ATR 452
- Hope v. RCA Photophone of Australia Pty Ltd (1937) 59 CLR 348
- Landboden – Agrardienste GmbH & Co. KG v. Finanzamt Calau [1998] BVC 70
- Lange v. Finanzamt Furstenfeldbruck [1993] ECR 1-4677
- London Borough of Camden [2001] BVC 4139

- Marac Finance v. Virtue (1981) 1 NZLR 586
- Mohr v. Finanzamt Bad Segeberg [1996] BVC 293
- Mol v. Inspecteur der Invoerrechten en Accijnzen (1988) 4 BVC 205
- P & O European Ferries Ltd [1992] BVC 955
- Parker Hale Ltd v. C & E Commrs [2002] BVC 176
- Poladon Ltd [2001] BVC 4046
- Radaich v. Smith (1959) 101 CLR 209
- Re Porter; Re Transport Workers Union of Australia (1989) 34 IR 179
- Robinson (1989) 4 BVC 740
- Secretary, Department of Health and Community Services v. J.W.B. and S.M.B. (1992) 175 CLR 218; [1992] FLC 92-293
- Shaw v. Director of Housing and State of Tasmania (No 2) 2001 ATC 4054; (2001) 46 ATR 213; [2001] TASSC 2
- Suzuki New Zealand Ltd v. C of IR (2001) 20 NZTC 17,096
- Telewest Communications plc v. Customs and Excise Commissioners [2005] EWCA 102; [2005] BVC 156
- The Trustees of the Nell Gwynn House Maintenance Fund v. Customs and Excise Commissioners [1995] BVC 8
- Tolsma v. Inspecteur der Omzetbelasting Leeuwarden [1994] BVC 117
- Town & County Factors Ltd v. Customs & Excise Commissioners [2002] BVC 645
- Turakina Maori Girls College Board of Trustees v. C of IR (1992) 15 NZTC 10,032
- Vereniging Happy Family Rustenburgerstraat v. Inspecteur der Omzetbelasting (1988) 4 BVC 216
- Wilson & Horton Ltd v. C of IR (1995) 17 NZTC 12,325

Other references:

- Council Directive 77/388 of 17 May 1977 – Common system of value added tax: uniform basis of assessment
- Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998
- GST Treatment of Court Awards and Out of Court Settlements, Tax Information Bulletin, Vol. 14, No 10, October 2002

ATO references
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