GSTR 2006/9 - Goods and services tax: supplies

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Goods and Services Tax Ruling

Goods and services tax: supplies

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Preamble

*This document is a ruling for the purposes of section 105-60 of Schedule 1 to the **Taxation Administration Act 1953**. You can rely on the information presented in this document which provides advice on the operation of the GST system.*

*[**Note**: This is a consolidated version of this document. Refer to the Tax Office Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]*

What this Ruling is about

1. This Ruling examines the meaning of 'supply' in the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). The '**Background**' section of the Ruling discusses the general context of the GST Act and outlines how this informs the meaning of the term 'supply' in the GST Act including its relevance to input tax credit entitlements. It also discusses the use of the term supply in the context of United Kingdom Value Added Tax and New Zealand GST regimes and highlights some differences and similarities to the GST Act.

2. **Part 1** of the 'Ruling with Explanation' section discusses the concept of 'supply' in the GST Act and the meaning of 'supply' in section 9-10. This part lists the special rules that qualify or affect that meaning in the GST Act. The special rules are set out in paragraph 47 of this Ruling.

3. **Part 2** focuses on the characteristics of 'supply' in the context of a two party transaction. Part 2 discusses ten propositions that are considered relevant in analysing a transaction in relation to a supply.

4. **Part 3** builds on the ten propositions. It discusses six further propositions which also apply to analysing more complex multi-party arrangements, commonly known as tripartite arrangements.

5. The Ruling concludes with two case studies in **Part 4** which are used to illustrate several of the propositions.

6. This Ruling focuses on analysing the various arrangements in which supplies are made. An arrangement may be evidenced by various written agreements, oral agreements, legal instruments, or combinations of such things. Unless a particular type of agreement is mentioned by name, such as a contract, the Ruling uses 'the agreement' to refer to these things collectively. They include but are not limited to:

- written and oral contracts;

- various deeds, assignments and options;
- licence or permit conditions;
- memoranda of understanding; and
- legislative instruments, Ministerial directions and Departmental guidelines.

7. 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 Tax) Bill 1998 (the EM).

Date of effect

8. This Ruling explains the Commissioner's view of the law as it applied from 1 July 2000. You can rely upon this Ruling on and from its date of issue for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and the Commissioner's view of when you can rely on our interpretation of the law in GST public and private rulings.

9. If this Ruling conflicts with a previous private ruling that you have obtained or a previous public ruling, this public ruling prevails. However, if you have relied on a previous ruling, you are protected in respect of what you have done up to the date of issue of this 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 issue of this later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Background

The meaning of supply in the context of the GST Act

10. GST is a broad based indirect tax payable on consumption in Australia. Generally, GST is payable on the value added at each stage of the commercial chain of dealings with goods, services and other things. The GST Act describes these dealings as 'supplies'. In the absence of a supply (or importation) GST cannot arise.[1] The Full Federal Court noted the importance of supply in *Sterling Guardian Pty Ltd v. Commissioner of Taxation* (*Sterling Guardian*):[2]

[1] GST is payable on a taxable supply or a taxable importation. This Ruling does not deal with importation.
[2] At paragraph 15 in *Sterling Guardian Pty Ltd v. Commissioner of Taxation* (2006) 149 FCR 255; 2006 ATC 4227; (2006) 62 ATR 119.

> In economic terms it may be correct to call the GST a consumption tax, because the effective burden falls on the ultimate consumer. But as a matter of legal analysis what is taxed, that is to say what generates the tax liability (and the obligations of recording and reporting), is not consumption but a particular form of transaction, namely supply; see generally *HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553 at [10]-[15].

The meaning of 'supply' is given in section 9-10.

11. Chapter 2 of the GST Act has the basic rules dealing with liability for GST and the obligations for recording and reporting GST noted in *Sterling Guardian*. The basic rules provide for when and how GST arises, who is liable to pay GST and how input tax credits arise.

12. The basic rules require an entity, the supplier, to make the supply and generally another entity, the recipient, to acquire the supply. GST on a taxable supply is payable by the supplier who is registered or required to be registered for GST. The requirements for a taxable supply are stated in section 9-5.

13. A recipient who is registered for GST is generally able to claim input tax credits for acquisitions it makes in the course of its business. By providing for input tax credits the GST Act ensures that there ordinarily is no cascading of GST for taxable and GST-free supplies. It provides that tax will be payable by each supplier in a chain only upon the value added by that supplier. Subject to some exceptions, input tax credits are not available for acquisitions in relation to making input taxed supplies so that the inputs to these supplies will be taxed and not the value added by the supplier.[3]

14. Supply is important in relation to input tax credits because if a supply is not made an entity cannot acquire anything for a creditable purpose, as required by paragraph 11-5(a). Making an acquisition of something is the first element to be considered in determining whether you make a creditable acquisition under section 11-5. The meaning of acquisition is given in section 11-10. The second element is the requirement in paragraph 11-5(b) that the supply of the thing to you is a taxable supply.

15. 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 that is also provided with that supply. In contrast, some supplies are made to the recipient, but provided to another entity. Arguably, such provisions are also supplies. However, these are not relevant because there is no contractual or reciprocal relationship between the supplier and the entity being provided with the supply. 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. Also, an entity does not make an acquisition merely by paying for a supply.

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[3] See comments by Hill J at paragraphs 13 to 16 in *HP Mercantile Pty Ltd v. Commissioner of Taxation* (2005) 143 FCR 553; 2005 ATC 4571; (2005) 60 ATR 106.

16. Chapter 3 of the GST Act covers the exemptions from GST, being those supplies that are GST-free or input taxed. Chapter 4 has special rules that can apply in particular cases to modify the basic rules. Both Chapters 3 and 4 provide exceptions to the basic rules.

17. Because GST is intended to be broad based a supply may manifest itself in various ways. For example, a supply may be mixed, composite or neither and an analysis of a transaction may indicate one or more supplies. However, the scheme of the GST Act is not so broad as to embrace the notions of: an entity making a supply to itself; a supply being made by more than one entity; a supply arising out of the creation of expectations alone without more; or a supply without the supplier doing something.

Judicial approach to context

18. The High Court has considered the relevance of context both in a broad sense and in relation to the text of specific provisions within an Act. The judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance Ltd v. Bankstown Football Club Ltd*[4] indicates it is appropriate to consider the context '…in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute intended to remedy.' The Court went on to add that '…inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.'

19. However, consideration of the context of supply in its broadest sense in the GST Act does not obviate the need for close attention to the text of the provisions chosen by Parliament under consideration and the context of the provision in the GST Act. As the High Court noted in the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ in *Stevens v. Kabushiki Kaisha Sony Computer Entertainment*[5] 'No particular theory or "rule" of statutory interpretation, including that of "purposive" construction, can obviate the need for close attention to the text and structure of [the relevant part of the legislation].'[6] Ultimately, the task of the courts and the Commissioner is to construe the language of the statute.[7]

20. Further, as has been noted by Kirby J in *The Queen v. Lavender*[8] it is important to take a consistent approach to issues of statutory interpretation and not '…pluck out considerations of "context", "purpose" and "history" arbitrarily, so as to sustain the outcomes of interpretation … in some, but not other cases.'

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[4] (1997) 187 CLR 384 at 408.
[5] [2005] HCA 58.
[6] See *Stevens v. Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 at paragraph 30.
[7] In *Stingel v. Clark* [2006] HCA 37 see Kirby J at paragraph 117 agreeing with Gleeson CJ, Callinan, Heydon and Crennan JJ at paragraph 26.
[8] [2005] HCA 37 at paragraph 69.

Propositions for characterising and analysing supplies

21. The propositions for characterising supplies and analysing more complex transactions in Parts 2 and 3 of this Ruling flow from the concept of supply in the context of both a broad based GST and the text and structure of the GST Act. The propositions are not universal as they may have exceptions or be qualified by the operation of particular provisions of the GST Act. The length of discussion of a proposition is not intended to indicate a difference in importance of the proposition in relation to other propositions. Some propositions are obvious and so little has been said, whereas other propositions require a more in-depth explanation.

22. The propositions discussed in Part 2 are:

Proposition	***Description***
Proposition 1	*For every supply there is a supplier (paragraph 52)*
Proposition 2	*Generally, for every supply there is a recipient and an acquisition (paragraphs 53 to 62)*
Proposition 3	*A supply may be mixed, composite or neither (paragraphs 63 to 66)*
Proposition 4	*A transaction may involve two or more supplies (paragraphs 67 to 70)*
Proposition 5	*To 'make a supply' an entity must do something (paragraphs 71 to 91)*
Proposition 6	*'Supply' usually, but not necessarily, requires something to be passed from one entity to another (paragraphs 92 to 94)*
Proposition 7	*An entity cannot make a supply to itself (paragraphs 95 to 98)*
Proposition 8	*A supply cannot be made by more than one entity (paragraphs 99 to 101)*
Proposition 9	*Creation of expectations alone does not establish a supply (paragraphs 102 to 111)*
Proposition 10	*It is necessary to analyse the transaction that occurs, not a transaction that might have occurred (paragraphs 112 to 113)*

23. The propositions discussed in Part 3 are:

Proposition	***Description***
Proposition 11	*The agreement is the logical starting point when working out the entity making the supply and the recipient of that supply (see paragraphs 119 to 122)*
Proposition 12	*Transactions that are neither based in an agreement that binds the parties in some way nor involve a supply of goods, services, or some other thing, do not establish a supply (paragraphs 123 to 129)*
Proposition 13	*When A has an agreement 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 130 to 176)*
Proposition 14	*A third party may pay for a supply but not be the recipient of the supply (paragraphs 177 to 216)*
Proposition 15	*One set of activities may constitute the making of two (or more) supplies (paragraphs 217 to 221)*
Proposition 16	*The total fact situation will determine the nature of a transaction, the entity that makes a supply and the recipient of the supply (paragraphs 222 to 246)*

Comparison with the United Kingdom and New Zealand

24. The concept of supply is also fundamental to value added tax regimes in other countries and, as such, foreign law may shed light on the meaning of supply. However, it needs to be appreciated that differences exist between the Australian GST and value added tax regimes in other countries. Relevant places in this Ruling explain some of the differences contained in the United Kingdom *Value Added Tax Act 1994* (the UK VAT Act), the Sixth VAT Directive of the European Council (the Sixth Directive),[9] and the New Zealand *Goods and Services Tax Act 1985* (the NZ GST Act).

25. The Ruling recognises the context in which these differences appear and their relevance to our GST Act. 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, the Ruling discusses several of these cases. The Ruling also considers some relevant Australian decisions.

[9] SIXTH COUNCIL DIRECTIVE 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 (77/388/EEC) (OJ L 145 of 13 June 1977).

Supply of goods

26. 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 exception 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 future point (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, a supply of goods is 'the transfer of the right to dispose of tangible property as owner'. Both this and the UK VAT Act's definition of a supply of goods are in this sense more restricted than the definition in our GST Act.

28. '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 in that sense much wider than the definition in our GST Act.

Supply of services

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*[10] Willy DJ warned that there are limits to this definition. In that case a costs order was made against a solicitor who was struck off the roll by the New Zealand Law Practitioners Disciplinary Tribunal. The costs order required the solicitor to pay amounts to the New Zealand Law Society and the District Law Society for their costs and expenses relating to the disciplinary proceedings. Willy DJ held that these payments were not consideration for a supply of services by the Law Societies to the solicitor. He ruled that the ordinary meaning of the word *supply* limited the breadth of the phrase 'supply of services', which was only so wide as to include activities where the provider has done something *for*, not *against*, the recipient. To rule otherwise would lead to absurdity because it would allow the concept of a supply to encompass situations where a person sues for recovery of property, or steals something from someone else. The analysis in *Case S65* is consistent

[10] (1996) 17 NZTC 7408.

with the Commissioner's analysis of the effect of payments made under court orders or out-of-court settlements in GSTR 2001/4.[11]

31. The wide meaning of supply in section 9-10 and differences in the structure of our legislation mean that overseas cases should be considered with some caution.

Ruling with Explanation

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

Section 9-10

32. Section 9-10 states:

> 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.

[11] Goods and services tax: GST consequences of court orders and out-of-court settlements.

> (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.

Subsection 9-10(1)

33. The words 'A ***supply*** is any form of supply whatsoever' in subsection 9-10(1) cover 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.[12]

Subsection 9-10(2)

34. The intended scope of subsection 9-10(1) is more fully illustrated 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).[13]

35. Subsection 9-10(2) does not limit subsection 9-10(1). Something that is not listed in subsection 9-10(2) but falls within subsection 9-10(1) will be a supply.

References to paragraphs in subsection 9-10(2)

36. The subject matter of several of the paragraphs in subsection 9-10(2) is discussed in other GST public rulings:

- 9-10(2)(c) a provision of advice or information:

  See paragraphs 71 to 73 and 195 to 201 of GSTR 2000/31 (Goods and services tax: supplies connected with Australia).

  See also paragraph 90 of GSTR 2000/11 (Goods and services tax: grants of financial assistance).

- 9-10(2)(d) a grant, assignment or surrender of real property:

  See paragraphs 82 to 97 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*?).

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[12] Paragraph 3.6 of the EM.
[13] Paragraph 3.6 of the EM.

See also paragraph 18 of GSTR 2003/3 (Goods and services tax: when is a sale of real property a sale of new residential premises?).

- 9-10(2)(f) a financial supply:

  See generally GSTR 2002/2 (Goods and services tax: GST treatment of financial supplies and related supplies and acquisitions).

- 9-10(2)(g) an entry into, or release from, an obligation:

  See paragraphs 26 to 36 of GSTR 2000/11 (Goods and services tax: grants of financial assistance).

- 9-10(2)(h) any combination of any two or more of the matters referred to in paragraphs (a) to (g):

  See generally GSTR 2001/8 (Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts).

  See also paragraph 26 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*?).

Relationship between subsections 9-10(1) and (2)

37. The Full Federal Court noted in *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd* (*Westley*)[14] that for various reasons it thought the ordinary meaning of supply in subsection 9-10(1) 'is arguably extended by pars (f) and (g), if not by pars (a) – (e)' of subsection 9-10(2). Given the breadth of subsection 9-10(1) being stated to mean 'a supply is any form of supply whatsoever', the Commissioner is of the view that whilst paragraph 9-10(2)(f) expands subsection 9-10(1) in relation to financial supplies, subsection 9-10(2) does not limit the operation of subsection 9-10(1). This non-limitation is expressly stated in the opening words of subsection 9-10(2).

A 'thing'

38. As well as the supply examples 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.

[14] At paragraph 16 in *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd* [2006] FCAFC 115; 2006 ATC 4363; (2006) 62 ATR 682.

39. 'Thing' is used to refer to goods, services or other matters that are the subject of 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 use of the term 'thing' gives further emphasis to the breadth of the meaning of supply.

Subsection 9-10(3)

40. 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.

Under the GST Act something that is done illegally may constitute a supply. For example, in applying subsection 9-10(3), the Commissioner considers that a second hand car dealer who sells cars, which the dealer has either stolen or has received knowing they have been stolen, is making supplies.[15]

41. The European Court of Justice (ECJ), in interpreting the Sixth Directive, has held that the principle of fiscal neutrality precluded a generalised differentiation between lawful and unlawful transactions 'except where, because of the special characteristics of certain products, all competition between a lawful economic sector and an unlawful sector is precluded'.[16] 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).[17]

42. In contrast to the European position, under the GST Act something that is done illegally may still constitute a supply even where all competition between a lawful and an unlawful sector is precluded. For example, in applying subsection 9-10(3), the Commissioner considers that the illegal distribution of prohibited drugs, or the sale of 'fake' brand name handbags or clothing in breach of intellectual property rights, would constitute supplies for our GST purposes.

Subsection 9-10(3A)

43. 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.

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[15] See *Customs and Excise Commissioners v. Oliver* [1980] 1 All ER 353.
[16] See *Lange v. Finanzamt Furstenfeldbruck* [1993] ECR 1-4677, at paragraph 16 of the judgment.
[17] See *Mol v. Inspecteur der Invoerrechten en Accijnzen* (1988) 4 BVC 205 and *Vereniging Happy Family Rustenburgerstraat v. Inspecteur der Omzetbelasting* [1989] 4 BVC 216.

44. In identifying the thing supplied, and in emphasising that the supply does not take place on or after the subsequent relinquishment of title, subsection 9-10(3A) clarifies both the time and character of the supply.

Subsection 9-10(4)

45. 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.[18]

46. Money is defined by section 195-1 to include:

(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

47. Some provisions of the GST Act determine that:

- a supply is not a taxable supply;
- there is no supply; or
- a supply is made.

[18] For further discussion on the application of subsection 9-10(4) see paragraphs 37 to 42 and 99 to 102 of GSTR 2002/2.

This table sets out special rules relating to supplies:

Special rules

Subject	*Provision*
GST groups	subsection 48-40(2)
GST religious groups	subsection 49-30(1)
GST branches	paragraphs 54-40(2)(a) and (c)
Insurance settlements	subsections 78-25(1), 78-60(1), 78-65(2) and 78-70(2)
Compulsory third party schemes	subsection 79-85(1)
Australian tax, fee or charge	section 81-5
Company amalgamations	Division 90
Supplies partly connected with Australia	section 9-25, subsection 96-5(1) For further discussion on Division 96 see paragraphs 95 to 102 of GSTR 2000/31 Goods and services tax: supplies connected with Australia.
Vouchers	subsection 100-10(1) For further discussion on vouchers see GSTR 2003/5 Goods and services tax: Vouchers.
Supplies in satisfaction of debts	subsection 105-5(3)
Income tax related transactions	Division 110
PAYG voluntary agreements	Division 113
Principals and agents as separate suppliers or acquirers	Subdivision 153-B 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.

Part 2: Supply in the context of a transaction

48. Part 1 of this Ruling looked at the concept of 'supply' in the context of the GST Act. This Part of the Ruling looks at how to identify and characterise supplies in the context of the transactions in which they are made.

49. The Ruling uses ten propositions to assist in analysing a transaction to identify the supply or supplies made in that transaction. 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.

50. The propositions in this Part are:

Proposition	***Description***
Proposition 1	*For every supply there is a supplier (paragraph 52)*
Proposition 2	*Generally, for every supply there is a recipient and an acquisition (paragraphs 53 to 62)*
Proposition 3	*A supply may be mixed, composite or neither (paragraphs 63 to 66)*
Proposition 4	*A transaction may involve two or more supplies (paragraphs 67 to 70)*
Proposition 5	*To 'make a supply' an entity must do something (paragraphs 71 to 91)*
Proposition 6	*'Supply' usually, but not necessarily, requires something to be passed from one entity to another (paragraphs 92 to 94)*
Proposition 7	*An entity cannot make a supply to itself (paragraphs 95 to 98)*
Proposition 8	*A supply cannot be made by more than one entity (paragraphs 99 to 101)*
Proposition 9	*Creation of expectations alone does not establish a supply (paragraphs 102 to 111)*
Proposition 10	*It is necessary to analyse the transaction that occurs, not a transaction that might have occurred (paragraphs 112 to 113)*

51. Transactions may also require consideration of the total fact situation. The Ruling discusses the total fact situation as Proposition 16 in paragraphs 222 to 246. While this is discussed in Part 3 of the Ruling, the need to consider the total fact situation is also relevant in analysing two party transactions.

The propositions explained

Proposition 1: for every supply there is a supplier

52. The Commissioner considers that for every supply there is a supplier. 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 a supply or is capable of making a supply.

Proposition 2: generally, for every supply there is a recipient and an acquisition

53. 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.

54. 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 there is a supplier, a recipient and that something is passed from the supplier to the recipient.[19]

55. The supplier and the recipient have to be different entities because an entity cannot make a supply to itself.[20] Also, the recipient has to be identified, as you cannot make a supply to the world at large.[21] However, a supply can be made for no consideration.

Creditable acquisitions and input tax credits

56. If you make an acquisition and the other requirements of section 11-5 are met then the acquisition is a creditable acquisition. However, if you are not the recipient of the supply you will not have made a creditable acquisition, even if you provide consideration for the supply.

57. An entity that is the recipient of a supply may make a creditable acquisition of that supply and be entitled to an input tax credit.[22] 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.

[19] This is not always the case. See, for example, paragraphs 60 to 61 of this Ruling.
[20] See *Case M74* (1990) 12 NZTC 2441 at 2444 where Bathgate DJ stated: 'The supply normally envisages a supplier and a recipient'.
[21] This is explained in paragraph 21 of GSTR 2000/11.
[22] See section 11-20.

58. 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 taxed supplies.

59. 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 in relation to the tax, fee or charge and its payment. Without Division 81 it may be that no supply is made if nothing passes from the entity receiving the payment (the deemed supplier) to the entity making the payment. 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.

60. 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.

61. 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 it does not matter that the recipient of the acquisition-supply may not actually receive something. The GST regulations[23] 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

62. Determining the recipient of the supply is not difficult where there are only two parties to a transaction. Part 3 of this Ruling, which begins at paragraph 114, discusses how to identify the recipient of a supply in the more difficult tripartite arrangements.

[23] A New Tax System (Goods and Services Tax) Regulations 1999.

Proposition 3: a supply may be mixed, composite or neither

63. A supply may consist of separately identifiable taxable and non-taxable parts. In GSTR 2001/8 the Commissioner refers 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.

64. 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. Similarly, if all of the parts are non-taxable, then no GST is payable on the supply and apportionment is not necessary. Apportionment may still be necessary in relation to the acquisition of the supply, such as where not all the parts of the supply are acquired for a creditable purpose.

65. 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.

66. On the other hand, a supply may simply involve something that is different to, and has a separate identity from, its parts, 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.

Proposition 4: a transaction may involve two or more supplies

67. 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,[24] the recipient's payment of money is not a supply.

68. However, if the recipient provides consideration in a non-monetary form, the consideration itself is a separate supply.[25] In a transaction of this kind between two entities, there are two supplies, one going each way. As a result, each party to the transaction needs to account for any GST on the supply it makes, and each party needs to account for any input tax credit entitlement for the acquisition it makes.

[24] See subsection 9-10(4).
[25] The Commissioner explains this in paragraph 16 of GSTR 2001/6 Goods and services tax: non-monetary consideration.

69. In GSTR 2001/6[26] the Commissioner points out 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. The corollary of this proposition is that providing or making the thing available does not necessarily give rise to a supply. It will depend on the facts and circumstances of the transaction between the parties whether the supplier's use of, for instance, facilities provided by the recipient in order to make the supply is simply part of the circumstances in which the supply is to be made, or does in fact involve a supply by the recipient to the supplier.

70. 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. Depending on the particular circumstances, allowing the use of these things could be 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.

Proposition 5: to 'make a supply' an entity must do something

71. In overseas jurisdictions the term 'supply' has been held to take its ordinary and natural meaning, being 'to furnish or to serve' or 'to furnish or provide'.[27] The Commissioner picks up this meaning in considering the meaning of supply in the GST Act at paragraph 41 of GSTR 2004/9,[28] a ruling which is about the assumption of liabilities:

> In adopting the ordinary and natural meaning of the term, 'to furnish or provide', it follows that an entity must take some action to 'make a supply'. This approach is consistent with the use of active phrases throughout the examples of supplies in subsection 9-10(2), such as the normalised verbs: 'a provision'; 'a grant'; 'a creation'; 'a transfer'; 'an entry into'; and 'an assignment'.

72. The use of the word 'make' in the context of section 9-5 was considered by Underwood J in *Shaw v. Director of Housing and State of Tasmania (No. 2)* ('Shaw')[29] in relation to the payment of a judgment debt. His Honour was of the view that GST only applies where the 'supplier' makes a voluntary supply and not where a supply occurs without any action by the entity that would be the 'supplier' had there been a supply. He considered the actions of the judgment creditor with respect to the extinguishment of the debt when the judgment debtor made the payment of the judgment sum to meet the judgment debtor's obligations.

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[26] See paragraphs 90 to 92 of GSTR 2001/6.

[27] In the UK see *Carlton Lodge Club v. Customs and Excise Commissioners* [1974] 3 All ER 798 at 801 and *Customs and Excise Commissioners v. Oliver* [1980] 1 All ER 353 at 354-5. In NZ see *Databank Systems Ltd v. C of IR* (1987) 9 NZTC 6213 at 6223.

[28] Goods and services tax: GST consequences of the assumption of vendor liabilities by the purchaser of an enterprise.

[29] *Shaw v. Director of Housing and State of Tasmania (No. 2)* [2001] TASSC 2; 2001 ATC 4054; (2001) 46 ATR 242. This decision was also discussed in paragraphs 42 to 44 of GSTR 2004/9. This Ruling discusses the decision in more detail.

73. The Commissioner agrees with Underwood J's decision that there was no supply by the judgment creditor, as the judgment creditor did not do any act or thing to extinguish the obligation when the judgment debtor paid the judgment debt.[30]

74. However, Underwood J was of the view, with which the Commissioner also agrees, that an entity can still make a supply even if the supply is made under the compulsion of statute if the entity takes some action to cause a supply to occur. His Honour went on to compare a supply resulting from a positive act against a situation where there is no supply because nothing is done:[31]

> It seems to me that different considerations arise when considering the meaning of 'supply' in the Act. Notwithstanding the statutory compulsion, the liquidator's disposition in *St Hubert's Island Pty Ltd (in liq)* was something that was 'made' by him and for that reason would be likely to be considered a supply within the meaning of the Act. This is quite a different situation from the matter at hand, for the release of the obligation to pay a judgment sum by the payment of that sum will occur regardless of whether the judgment creditor makes or does any act at all. It was held in *Databank Systems Ltd v. Commissioner of Inland Revenue (NZ)* (1987) 9 NZTC 6213 that 'supply' means 'to furnish or provide'. Application of that proposition to the word 'supply' as enacted in the Act, s9-10 reinforces the concept that there is a legislative intention not to include in the word 'supply' the release of an obligation that occurs independently of the act of the releasor.

75. Underwood J considered the disposition by the liquidator would have been a supply under the GST Act because it was something 'made' by the liquidator. His Honour did not find a supply in relation to the release of the obligation to pay a judgment sum because the release occurred upon payment and not as a result of the judgment creditor doing something. However, an entity may do something and make a supply by agreeing to refrain from an act or to tolerate an act or situation.

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[30] This view is endorsed by Hunter J in *Walter Construction Group Ltd v. Walker Corporation Ltd* [2001] NSWSC 283; (2001) 47 ATR 48.

[31] At paragraph 19 in *Shaw v. Director of Housing and State of Tasmania (No. 2)* [2001] TASSC 2; 2001 ATC 4054; (2001) 46 ATR 242.

76. In *Westley* the Full Federal Court considered two questions: whether the acquisition of a property subject to an existing lease constituted a 'supply' for the purposes of section 9-10; and whether, for purposes of section 13 of the *A New Tax System (Goods and Services Tax Transition) Act 1999,* a review opportunity arose when the lease provided for a rent review. The Court noted that the ordinary meaning of 'supply' required a positive act and continued on to suggest paragraphs 9-10(2)(f) and (g), 'arguably', extend the ordinary meaning of supply. At paragraph 16 the Court said:[32]

> The concept of 'supply' in its ordinary meaning in subs 9-10(1) of the GST Act does seem to require some act of provision, furnishment, conferral or giving of some thing. The inclusions in subs 9-10(2) specifically identify some of these things, without limitation to subs (1), as goods, services, advice or information, real property and any right, (pars (a) – (e) inclusive). On the other hand, the concept of 'financial supply' in par (f) is defined in the GST Regulations 1999 (40-5.09) to include, amongst other things, the **acquisition** of an interest in or under specified financial instruments and par (g) extends the concept of 'supply' to include the entry into an obligation to do something, to refrain from doing something or to tolerate an act or situation. For these reasons, the ordinary meaning of 'supply' is arguably extended by pars (f) and (g), if not by pars (a) – (e) inclusive.[33]

77. The Court concluded, at paragraphs 22 and 23:

> While the matter is not free from doubt, we have concluded that when the appellants purchased the reversion they assumed the obligation of Lake Eerie to honour the lease according to its terms and in that sense entered into an obligation to tolerate an act or situation and in consequence, made a 'supply' by virtue of s 9-10(2)(g). The fact that the obligation arises by operation of law does not, in our view, impede this conclusion; after all, the reference to 'obligation' in s 9-10(2)(g) must be a legal obligation, although not necessarily one sourced in contract.[34]
>
> In the circumstances, it is unnecessary for us to determine whether there is a '… "supply" by way of lease of the exclusive possession of the demised property in accordance with the lease' as her Honour below concluded in reliance of the ordinary meaning of the word 'supply' in s 9-10(1). However, the indications discussed at [16] above tend to point away from that construction.

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[32] *Westley Nominees Pty Ltd v. Coles Supermarkets Australia Pty Ltd* [2006] FCAFC 115; 2006 ATC 4363; (2006) 62 ATR 682.
[33] See our comments at paragraph 37 of this Ruling.
[34] See also the discussion in paragraphs 33 to 35 and 37 of this Ruling in relation to the breadth of subsection 9-10(1).

78. The Court's wider comments about 'supply' and 'obligation' in paragraphs 16, 22 and 23 of its decision were expressed with some caution. With respect, the Commissioner does not consider the Court has stated a general principle, contrary to our proposition, that a supply can be brought about by operation of law in the absence of an entity taking any positive action. The Commissioner distinguishes something brought about solely by operation of law where there is no supply, from something done by an entity as a consequence of a legal requirement where there may be a supply, as was the situation noted by Underwood J in *Shaw* citing the example of the liquidator's actions in St Hubert's Island.[35] The Commissioner also distinguishes an action that results in obligations arising by operation of law, as the Full Court found in *Westley*, where there may be a supply by the entity taking the action.

79. Also, the Court did not discuss whether *Westley* made an ongoing supply in relation to honouring the existing lease, as this question was not central to its conclusion that *Westley* assumed the obligation to honour the lease. Our view is that an owner who has acquired a reversion interest in a lease is making a positive act by continuing to tolerate the lessee's occupation subject to the terms of the existing lease and is also making a supply of real property. The owner is making a supply under paragraph 9-5(a) and if all of the other requirements of section 9-5 are satisfied, the action of tolerating the occupation in return for the consideration of the lease payments is a supply for a period for the purposes of Division 156.

Extinguishment of real property rights

80. Various government authorities are empowered by legislation to acquire an interest in real property. Two common mechanisms employed by legislation are:

- the vesting of the interest in the relevant government authority and extinguishing any previous interests in the real property; and
- the particular statute may allow the government authority to acquire the real property by agreement.

[35] *Federal Commissioner of Taxation v. St Hubert's Island Pty Ltd (in liq)* (1978) 138 CLR 210; 78 ATC 4104; (1978) 8 ATR 452.

Vesting in the government authority

81. An example of vesting is provided by section 20 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), where the required acquisition notices are gazetted, the relevant land is:

- 'vested in the authority of the State acquiring the land'; and
- 'freed and discharged from all estates, interests, trust, restrictions, dedications, reservations, easements, rights, charges, rates and contracts in, over or in connection with the land'.

The entity whose interest in the land is extinguished is compensated for the loss of that interest. That entity may agree to the compensation determined by the Valuer-General and execute a form of release. If the entity disputes the compensation amount, there is provision for payment of 90% of the initial valuation until the matter is resolved.

82. The effect of the gazettal notice is that the legal ownership of the land, described in the notice, is vested in the authority acquiring the land, and that the land becomes freed from any other interests. The entity's interest in the land, whether legal or equitable, is extinguished. In this case the entity does not make a supply because it takes no action to cause its legal interest to be transferred or surrendered to the authority.

83. Some statutes provide that land remaining, where only part of the land (the 'target land') is to be compulsorily acquired, will also be compulsorily acquired if the owner and the acquiring authority agree that the remaining land will be of no practical use or value to the owner. Although the owner requests the remaining land be also acquired, it is by operation of the statute that the remaining land is compulsorily acquired with the 'target' land. The actual transfer of the interest is made by statute rather than by the owner.

84. Mere acceptance by an owner of an amount of compensation payable on the compulsory acquisition does not provide a sufficient nexus between the land which passes and the means by which it passes. The fact that the owner does not dispute the acquisition is not an activity that effects the supply of the land. Even if the owner agrees to the terms of the acquisition and the amount of compensation, the land is acquired by operation of the statute, upon publication of the acquisition notice, not by an action taken by the landowner.

Example 1: compulsory acquisition

85. *A government authority is compulsorily acquiring land and interests relating to that land, including the native title rights under a particular statute. The effect of compulsory acquisition is that every registered and unregistered interest in the land is extinguished, and each person who formerly held such an interest has that holding converted into a claim for compensation.*

86. *As required by the statute, the authority has made a public announcement that it is acquiring the land, and as a result, a number of groups of claimants have registered their respective native title over the land.*

87. *The authority has negotiated with each of the claimant groups as required by the statute, as to just compensation for the extinguishment of their rights over the land, and has entered into a deed with them. The deed sets out, among other things, that:*

- *the claimants accept the compulsory acquisition and extinguishment of any and all native title rights and interests in the land and agree to withdraw a related objection made under the statute to compulsory acquisition; and*
- *the authority undertakes to provide compensation to the native title claimants in the form of funding, land and certain services.*

88. *Although the claimants have agreed to accept the compulsory acquisition and the amount of the compensation, the agreement does not cause claimants' rights to be extinguished. These rights over the land are extinguished when all the limitations, reservations and restrictions over the land are revoked by the operation of the statute. The claimants are not making a supply of surrendering their rights.*

89. *It may be argued that the native title claimants are making a supply of entering into an obligation to withdraw any objections made under the relevant native title statute. However, no part of the compensation is consideration for a supply of withdrawing objections to the compulsory acquisition. The compensation relates to the loss suffered by the claimants on the extinguishment of their interest in the land.*

90. In contrast, the extinguishment of an owner's interest by statute needs to be distinguished from the doing of a thing that is compelled by statute.[36]

[36] See comments by Moses J in *Parker Hale Ltd v. Customs and Excise Commissioners* [2000] BVC 167 at paragraph 49.

Acquisition by agreement

91. It may transpire that, before a compulsory acquisition under a statute is initiated, an owner and an authority enter into negotiations that result in the owner selling land under a standard land contract. The land in this case is not vested in the authority through the compulsory acquisition process. Instead, the interest in the land transfers as a result of settlement of the contract and execution of a transfer instrument. As such, the owner makes a supply of land to the authority.

Proposition 6: 'supply' usually, but not necessarily, requires something to be passed from one entity to another

92. 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 supply have this characteristic. For instance, paragraph 9-10(2)(e) includes a creation of a right as a supply. The 'creation' of a right does not involve a passing of the right from one entity to another. In this case, the action of the supplier causes the recipient to make an acquisition but without anything passing between them.

93. 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.

94. A 'financial supply' includes the acquisition of an interest, as defined in the GST regulations. An acquisition is not a supply in the ordinary sense as it focuses on the receipt of a thing rather than the passing of a thing from one to another. Nonetheless, because the acquisition is deemed to be a supply, the entity from which it is made is deemed to have made an acquisition of the acquisition-supply, even though nothing passes from one entity to the other.

Proposition 7: an entity cannot make a supply to itself

95. The proposition that an entity cannot make a supply to itself flows from the proposition 'supply usually, but not necessarily, requires something to be passed from one entity to another'. It also seems self evident in a transaction based tax.

96. 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 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 entities.

97. 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.

98. 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. Because the entity is a different entity in relation to each capacity in which it acts, the provision of trustee services by the company to itself as trustee of the trust is a supply between two entities, the company and the trustee/trust.

Proposition 8: a supply cannot be made by more than one entity

99. 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…

100. As part of its 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.[37] In *Nell Gwynn* the House of Lords considered whether maintenance fees paid to an entity other than the lessor or the lessor's agent were consideration for the grant of the lease. The trustees submitted that the grant of the lease and provision for the supply of maintenance services all formed part of a single economic transaction and should be treated as one exempt supply.

101. 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 lease as a single supply because the supply of services was separate from the supply of the lease and they could not be a single supply because the services and the lease were supplied by different taxpayers.[38]

Proposition 9: creation of expectations alone does not establish a supply

102. The Commissioner considers that an agreement that does not bind the parties in some way is not sufficient to establish a supply by one party to the other. 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, which were only to be made on condition that the refinery remained operational.

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[37] [1999] 1 All ER 385 at 397. See also *Telewest Communications plc v. Customs and Excise Commissioners* [2005] EWCA 102 at paragraph 79.
[38] [1999] 1 All ER 385 at 397.

103. 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 obligation to that effect.[39] 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.[40]

Supply and consideration

104. In Europe for a supply to occur there is a requirement for a pre-existing framework of a reciprocal legal relationship between the supplier and the recipient. This is illustrated in former Article 2(a) of the Sixth Directive, replaced by Article 2(1), under which 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.[41] That is, the linkage between the supply and consideration is worked out between the parties in advance.

105. In the European Court of Justice (ECJ) case *Town & County Factors Ltd v. Customs & Excise Commissioners* [2002] BVC 645 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 were 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.

106. The relationship between a supply and consideration in Australia is less strict than in Europe. Paragraph 9-5(a) states that 'you make the supply for consideration'. If read alone, 'making a supply for consideration' arguably suggests the existence of enforceable obligations, be they written or oral, between the supplier and recipient. However, this is not an absolute prerequisite to making a supply for consideration.

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[39] (1997) 18 NZTC 13,187 at 13,192.
[40] (1997) 18 NZTC 13,187 at 13,194.
[41] See the European Court of Justice decision of *Tolsma v. Inspecteur der Omzetbelasting Leeuwarden* [1994] BVC 117 at paragraph 12 of the judgment.

107. The definition of consideration in section 195-1 states:

> ***consideration***, for a supply or acquisition, means any consideration within the meaning given by section 9-15, in connection with the supply or acquisition.

Hence, consideration for a supply is defined as being any consideration in connection with a supply. Consideration in section 9-15 relevantly means:

> (1) ***Consideration*** includes:
>
> (a) any payment, or any act or forbearance, in connection with a supply of anything; and
>
> (b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.
>
> (2) It does not matter whether the payment, act or forbearance was voluntary ...

The Commissioner takes the view that the words 'in connection with the supply or acquisition' in section 195-1, and the phrases 'in connection with a supply of anything' and 'it does not matter whether the payment, act or forbearance was voluntary' in section 9-15 mean that there does not have to be an enforceable relationship for there to be a sufficient nexus between the supply and a payment. Nor does the consideration have to be agreed in advance.

108. For GST purposes you may still make a supply in the absence of enforceable obligations, provided there is something else, such as goods, services or some other thing, passing from the supplier to the recipient.[42] For the supply to be a taxable supply there must also be consideration and a sufficient nexus between the supply and the consideration.[43] The Ruling considers 'sufficient nexus' further in paragraph 180.

Example 2: voluntary payments for restaurant supplies

109. *A restaurant run by a sole trader accepts tips from its customers, including tips on bills paid by credit card. These tips are unsolicited and are in addition to the price stipulated by the restaurant in the bills presented to the customers. The sole trader does not pass these tips on to the restaurant's employees.*

[42] See GSTR 2000/11 at paragraph 33.

[43] See *Commissioners for Her Majesty's Revenue and Customs v. Debenhams Retail plc* [2005] EWCA 892; [2005] BVC 425 at paragraph 8. The requirement for a sufficient nexus between the consideration and the supply is discussed in GSTR 2001/4 and in GSTR 2001/6.

110. *The tips are voluntary payments made in connection with the restaurant supplies made by the sole trader to its customers. Although there is no obligation on the customers to make these payments, the tips form part of the consideration for the restaurant supplies by the sole trader to its customers.*

111. *On the other hand, if the sole trader passes the tips on to the restaurant's employees, the payments are not for the restaurant supplies by the sole trader. The tips constitute income of the restaurant employees[44] and such payments are not subject to GST as the employees are not carrying on an enterprise for GST purposes.[45] If the bill is paid by credit card and the amount of a tip is marked on the payment slip the restaurateur would need to demonstrate that the tip is passed on to the employee.*

Proposition 10: it is necessary to analyse the transaction that occurs, not a transaction that might have occurred

112. There may be a number of different ways by which an entity could achieve a desired end result. In determining whether the entity has made a supply, and the true character of any supply it has made, what is relevant is what the entity actually did, rather than what it might have done.

113. For example, A could provide B with money so that B can pay to receive a particular service from another entity. A has not made a supply as the provision of money in this example is not a supply (subsection 9-10(4)). 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, it is not open to A to argue that 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. Similarly, if A did provide money to B so B can pay to receive a particular service from another entity, it would not be open to B to argue that A could have provided the service and B should be considered to have made an acquisition from A.

Part 3: Supply in the context of a tripartite arrangement

Analysing a tripartite arrangement

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

[44] See paragraphs 19 and 41 to 44 of Taxation Ruling TR 95/11 Income tax: hospitality industry employees – allowances, reimbursements and work-related deductions.
[45] See paragraph 9-20(2)(a).

115. In more complex arrangements involving more than two entities, which the Commissioner refers 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 consideration paid by a third party.

116. 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.

117. The propositions used 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*)[46], the involvement of a third entity in a tripartite arrangement calls for close analysis. This part of the Ruling uses some further propositions to analyse the transaction. They are:

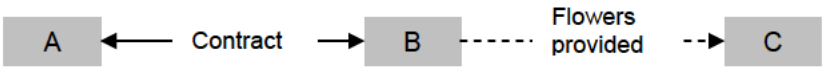
Proposition	***Description***
Proposition 11	*The agreement is the logical starting point when working out the entity making the supply and the recipient of that supply (see paragraphs 119 to 122)*
Proposition 12	*Transactions that are neither based in an agreement that binds the parties in some way nor involve a supply of goods, services, or some other thing, do not establish a supply (paragraphs 123 to 129)*
Proposition 13	*When A has an agreement 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 130 to 176)*
Proposition 14	*A third party may pay for a supply but not be the recipient of the supply (paragraphs 177 to 216)*
Proposition 15	*One set of activities may constitute the making of two (or more) supplies (paragraphs 217 to 221)*
Proposition 16	*The total fact situation will determine the nature of a transaction, the entity that makes a supply and the recipient of the supply (paragraphs 222 to 246)*

[46] At paragraph 49 of the decision.

Grandma's flowers

118. The scenario of *Grandma's flowers* illustrates some of the tripartite propositions.

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:

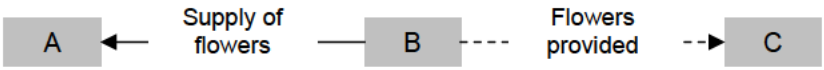


Proposition 11: the agreement is the logical starting point when working out the entity making the supply and the recipient of that supply

119. Examining the agreement or other reciprocal legal relationships is the starting point in analysing an arrangement to determine who is making a supply to whom.

120. 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.

121. 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:



122. The analysis of *Grandma's flowers* raises the following propositions 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, services, or some other thing, do not establish a supply; and
- when A has an agreement 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).

These two propositions are discussed next.

Proposition 12: transactions that are neither based in an agreement that binds the parties in some way nor involve a supply of goods, services, or some other thing, do not establish a supply

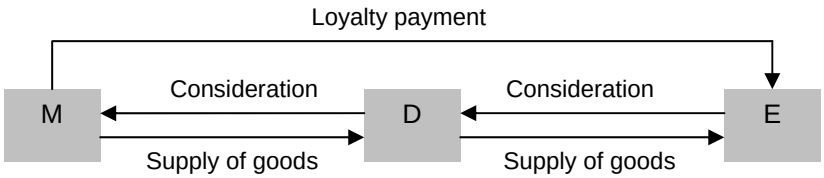
123. The Commissioner explained in Part 2 of this Ruling at paragraphs 102 to 103 how an agreement that does not bind the parties in some way is not sufficient to establish a supply by one party to the other unless there is something else, such as goods, services, or some other thing, passing between the parties.

124. The following example examines a transaction (in a tripartite arrangement) that is not based in an agreement that binds the parties and does not involve a supply of goods, services, or some other thing.

Example 3: loyalty payment with no supply of goods, services, or some other thing

125. *M is a manufacturer of goods. M supplies 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'.*

126. *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.*



127. *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 and does not make a supply to M simply by making acquisitions from D.*

128. *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 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.*

129. *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, services or some other thing by E to M. The loyalty payment made by M to E cannot be consideration for a supply from E to M because E does not make a supply to M. Further, the payment does not give rise to an adjustment event for either M or E.*[47]

Proposition 13: when A has an agreement 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)

130. In *Grandma's flowers* pursuant to the contract between A and B, B makes the supply to A but provides the flowers to C.

131. 'Made' in the context of 'a supply made' 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.

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

133. The Commissioner uses 'made' and 'provide' in analysing tripartite arrangements in the sense given to those words by the subsection 38-190(3) context, similar to the sense in which those words were used by Neuberger LJ in *WHA Ltd & Anor v. Customs & Excise* [2004] EWCA Civ 559 (*WHA*). At paragraph 38, Neuberger LJ said 'the services in question are "supplied" to WHA…[T]he fact that they are also provided to the vehicle owner does not, to my mind, prevent them from being treated as "supplied" to WHA'. *WHA* is discussed in more detail at paragraphs 50 to 54 of GSTR 2006/10 Goods and services tax: insurance settlements and entitlement to input tax credits.

134. In contrast, 'provided' is used elsewhere in the GST Act in a number of other senses, 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));
- the day 'provided for' (subsection 151-20(3));
- fringe benefits 'provided' (in the headings in Division 71); and
- information to be 'provided' (subsection 31-20(2)).

[47] This example mirrors the example at paragraph 42 of GSTR 2000/19 Goods and services tax: making adjustments under Division 19 for adjustment events, as amended by the Addendum to the Ruling. It was included in this Ruling to illustrate the relationships between the entities from a tripartite perspective.

Redrow and related cases

135. The UK House of Lords' case *Customs and Excise Commissioners v. Redrow Group plc* [1999] BVC 96 (*Redrow*) has been cited by others 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.

136. The Commissioner does not accept that *Redrow* supports this view.[48] As pointed out in GSTR 2003/8:[49]

> 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.

137. The grant of a right or entry into an obligation may be a term or condition of a larger transaction. Where the grant of the right or entry into the binding obligation is the substance of the transaction it will be the subject matter of a supply.[50]

138. The Commissioner considers the proposition to be derived from *Redrow* is no broader than: the entity that has an agreement with a supplier for a supply 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 has an agreement 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

139. 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.

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[48] The Commissioner explains this in paragraphs 870 and following of 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*.

[49] 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).

[50] This is explained in paragraphs 30 to 36 of GSTR 2000/11 and in paragraphs 84 to 85 of GSTR 2001/6.

140. 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 would 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.

141. 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 instructions to the agent could not be changed without Redrow's agreement.

142. The agent made a supply of services on which it was obliged by subsection 2(1) of the UK VAT Act to charge VAT. The issue was whether Redrow's expenditure was consideration for services supplied by the agent 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.

143. 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.

144. 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.

145. *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

146. *Redrow* was applied in *British Airways plc* [2000] BVC 2207 (*British Airways*). British Airways had an arrangement where 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 food outlets. Passengers could use their boarding pass when a voucher was not available.

147. 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.

148. 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"'.

149. The Commissioner agrees there is a supply made to British Airways, but, respectfully, it is considered that the character of the supply made by the food outlets to British Airways is a supply of a meal. The meal 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 food outlet have contracted for the food outlet to provide a meal to the passengers. For GST purposes the Commissioner considers *British Airways* is analogous to the scenario in *Grandma's flowers*.

150. The British Airways case above was not the first time British Airways disputed the VAT treatment of this arrangement. Before *Redrow*, British Airways had argued a case in the VAT tribunal and on appeal to the High Court.[51] 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.

151. As stated in paragraph 27 of this Ruling, the definition of supply in section 9-10 in relation to a supply of goods is not restricted in this way. Section 9-10 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 characterisation of a supply as being a supply of goods or a supply of services in the VAT tripartite cases should be treated with caution when being examined in an Australian context.

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[51] 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.

Other UK cases

152. The arguments accepted in *Redrow* have been unsuccessfully argued in two subsequent cases:

- *Poladon Ltd* [2001] BVC 4046; and
- *London Borough of Camden* [2001] BVC 4139.

In each of these cases the relevant entity failed in its *Redrow* type argument because it did not contract for the supply from the supplier. This proposition, Proposition 13, was at work in the UK VAT before *Redrow*. For example, the proposition was successfully argued in *P&O European Ferries (Dover) Ltd* [1992] BVC 955 where it was found on the evidence that the company instructed the relevant solicitors and was the contractual recipient of the solicitors' services 'notwithstanding that the individual employee also received the benefit of those services'.

New Zealand cases

153. The courts in New Zealand have also adopted the proposition that the entity that has an agreement with a supplier for a supply is the recipient of that supply (even if that supply is provided to a third party).

154. 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'.

Certain supplies of health services

155. 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 other provisions it is due to the nature of the services themselves. This means that a GST-free supply of a health service cannot be made to a business entity or a non-profit body.

156. 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. The Commissioner accepts in these circumstances that the other party, the child, is the recipient of the supply.

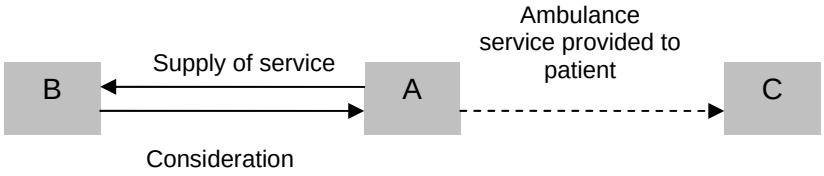
Examples applying the proposition: when A has an agreement with B for B to provide a supply to C, there is a supply made by B to A (contractual flow) that B provides to C (actual flow)

Example 4: ambulance services supplied to hospital

157. *A, a supplier of ambulance services, enters into an agreement with B, a hospital, under which A agrees to provide ambulance services as and when B requests them and B agrees to pay for the services. The obligations under the agreement between A and B are binding.*

158. *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 A's services to C.*

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

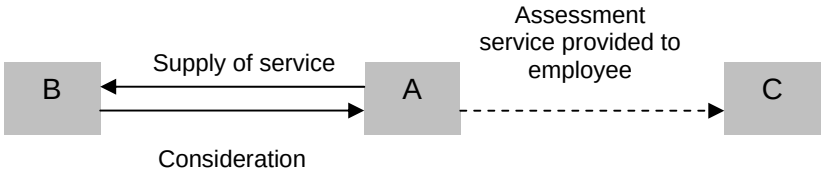


160. *One of the requirements under subsection 38-10(5) for a supply of an ambulance service to be GST-free is that the service is supplied in the course of treating the recipient of the supply. As hospital B is the recipient of the supply, not the patient, and there is no treatment of the hospital, the supply of the ambulance service is not GST-free.*

Example 5: occupational therapist

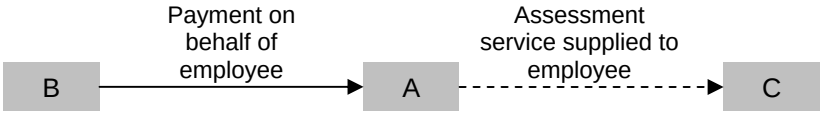
161. *A, an occupational therapist, is engaged by B, a company, to assess the needs of C, its employee. C suffers from multiple sclerosis and needs to use a wheelchair. A and B enter into an agreement which requires A to undertake an assessment of C's condition, to give recommendations in a report to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

162. *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.*



163. *This supply is not GST-free under subsection 38-10(1). This is because paragraph 38-10(1)(c) requires the supply to be generally accepted in the relevant profession as being necessary for the appropriate treatment of the recipient of the supply. B is the recipient of the supply. The supply is not for the treatment of B. Paragraph 38-10(1)(c) is not satisfied.*

164. *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.*



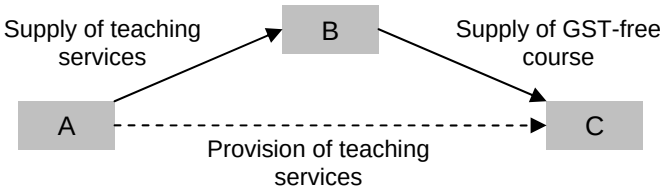
Example 6: teaching services

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

166. *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.*

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

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



169. *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 the teaching to another entity (in this case A).*

170. *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 7: community care

171. *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.*

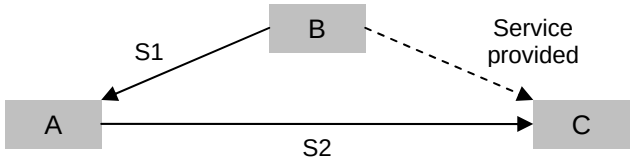
172. *C, a client of A, is the care recipient. C is assessed by A as being entitled to receive a lawn-mowing service every fortnight at the subsidised rate of $10. There is a contractual relationship between A and C for the supply of the lawn-mowing service at the subsidised rate of $10.*

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

174. *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.*

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

176. *B is making a supply of the lawn-mowing service (S1) for $44 to A but providing that service 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.*[52]



Proposition 14: a third party may pay for a supply but not be the recipient of the supply

Payment for a supply

177. Subsection 9-15(1) provides that the consideration for a supply includes any payment 'in connection with', 'in response to' or 'for the inducement of' a supply of anything. Subsection 9-15(2) provides that the payment 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'.

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

178. This point was confirmed in the New Zealand case *Turakina Maori Girls College Board of Trustees & Ors v. C of IR* (1993) 15 NZTC 10,032. That case considered whether attendance dues paid by parents and guardians were consideration for 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 long as there is a supply and the provision by some person of consideration in respect of it'.

179. 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.

Sufficient nexus

180. In other GST rulings the Commissioner discusses the close coupling between supply and consideration in the GST Act.[53] In determining whether a payment is consideration under section 9-15 and whether there is a 'supply for consideration' those rulings take the view that:

- the test is whether there is a sufficient nexus between the supply and the payment made;[54] this test is objective;
- regard needs to be had to the true character of the transaction; and
- an arrangement between parties will be characterised not merely by the description that the parties give to the arrangement, but by looking at all of the transactions entered into and the circumstances in which the transactions are made.

Creditable acquisition

181. 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 provide or are liable to provide consideration for the supply (paragraph 11-5(c)).

[53] See GSTR 2001/4 at paragraphs 89 to 96 and GSTR 2001/6 at paragraphs 64 to 72.
[54] In *Berry v. FC of T* (1953) 89 CLR 653 at 659 Kitto J noted that consideration will be in connection with property where 'the receipt of the payment has a substantial relation, in a practical business sense, to that property'. His Honour was considering the meaning of consideration 'for or in connection with' goodwill in a lease premium for purposes of former section 84 of the *Income Tax Assessment Act 1936*.

Third party payer

182. The objective test discussed in paragraph 180 of this Ruling may determine that a payment an entity makes is:

- consideration for a supply made to the payer and the payer is the recipient of that supply;[55]
- not consideration for a supply;[56] or
- consideration for a supply but the paying entity is not the recipient of that supply.

183. If you provide or are liable to provide consideration for a supply, but you are not the recipient of the supply, you are referred to in this Ruling 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 made to you as required by section 11-5. Making a payment for a supply that is made to another entity is not sufficient to make you the recipient of that supply.

184. 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 deduct 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.

185. 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:

186. 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.

[55] This is a typical outcome in a two party arrangement as noted in paragraph 15 of this Ruling.
[56] See, for example, the payment made in *C of IR v. New Zealand Refining Co. Ltd* (1997) 18 NZTC 13,187.

187. The proposition in *Redrow*[57] 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 rested 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 payers, 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.

188. *Ashfield District Council v. Customs and Excise Commissioners* [2002] BVC 212 is another UK case which considered a payment made by a third party.

189. The Council was a local housing authority charged with the administration in its area of a scheme for the renewal of private sector housing. Under the scheme an applicant would apply to the Council for a grant. The applicant could elect for the Council to pay the grant directly to the builders doing the work. The applicant could also choose an agency of the local council (CNHIA) to supervise this work.

190. As the Court phrased it, the question at issue was 'to whom did the builders supply their services: the person whose application for the grant has been approved by Ashfield or Ashfield as the person who paid the builders?' In holding that the applicant was the recipient of the builders' services, the Court held that it was the applicant that contracted for the services and thereby came under an immediate liability to pay for those services. At paragraph 23 of the decision the High Court stated:

> It is also necessary to consider who, immediately before payment, was liable for the builders' account. It is clear from the speeches of Lord Millett and Lord Hope of Craighead in *Redrow* that the person making the relevant payment must be the person who is liable in respect of the underlying obligation…In this case, on the facts found by the Tribunal, CNHIA acted throughout as agent for the owner. Accordingly neither CNHIA nor the Council were liable to the builders.

[57] The proposition in *Redrow* is stated in paragraph 138 of this Ruling.

191. The Court held that the grant did not give rise to any right the Council could exercise against the builders. The builders' obligations were due to the applicant under the contract between them and it was the applicant that was liable to pay the builder. This led to the conclusion that the Council was paying the builder as agent of the owner.[58] The Council was not entitled to an input tax deduction for the VAT included in the payment to a builder. Further, even if the payment was not made as agent of the owner, it was held that there was no supply from the builder to the Council for which the payment was consideration.[59]

Examples of the third party payer proposition

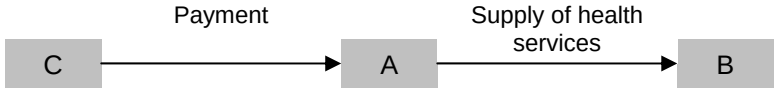
192. These examples are practical applications of the third party payer proposition.

Example 8: requisite health service

193. *C, a Government Department, advises the health profession that it will pay for certain health services[60] performed for a class of persons requiring those services.*

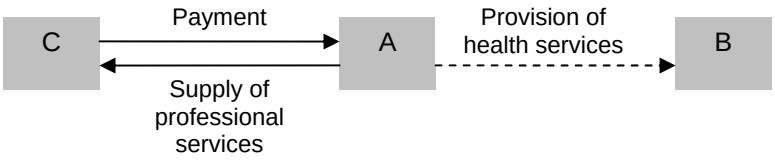
194. *A, a supplier of those health services, supplies a health service to B, who falls within the required class of persons. C pays A for this service. There is no binding obligation between A and C regarding the performance of this service.*

195. *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:*



[58] Paragraphs 24 to 35 of *Ashfield District Council v. Customs and Excise Commissioners* [2002] BVC 212.
[59] Paragraph 29 of *Ashfield District Council v. Customs and Excise Commissioners* [2002] BVC 212.
[60] For the purposes of this example, the health services are those to which section 38-10 applies.

196. *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:*



197. *The supply of professional services to C 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). As the recipient of the supply and the payer of the consideration, C will make a creditable acquisition if all the other requirements of section 11-5 are met.*

Example 9: hospital services and preferred provider

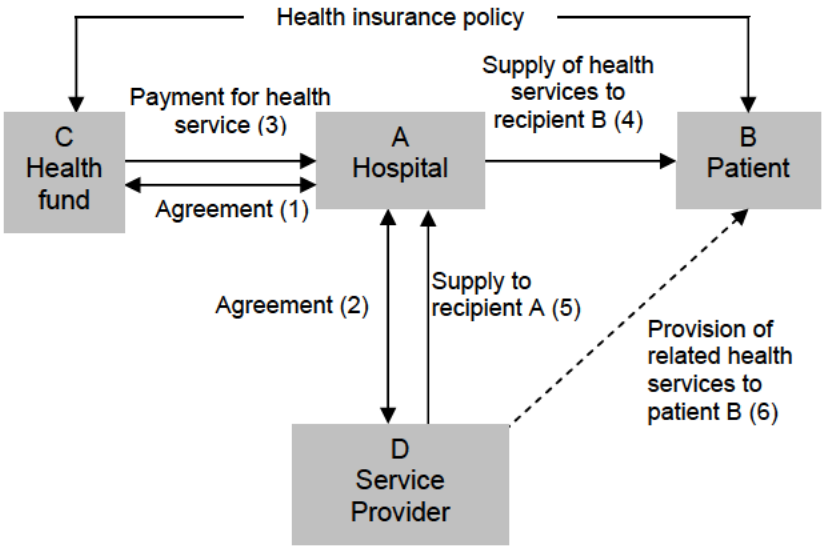
198. *A is a provider of hospital services and admits B, a patient, to its hospital for treatment.*

199. *A is a preferred provider of hospital services under an agreement with health fund C (1). 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.*

200. *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.*

201. *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.*

202. *C is paying (3) for the supply of hospital services made by A to B (4).*[61] *B is the recipient of this supply, not C:*



203. *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.*

204. *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).*[62] *As the recipient of the supply and payer of the consideration, A will make a creditable acquisition if all the other requirements of section 11-5 are met.*

Example 10: legal services and third party payer arrangement contrasted with a recipient arrangement

205. *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.*

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[61] 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.

[62] 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.

206. *The funding arrangement 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 which makes the payment if the services delivered to the grantee are within the scope of the funding arrangement.*[63]

207. *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 the analysis of whether the Department or the grantee has made a creditable acquisition.*

208. *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 an input tax credit.*

209. *The grantee has not made any supply to the Department because it does not have a contractual arrangement in relation to the grant, and nothing has passed from the grantee to the Department in return for the funds, nor has the grantee created any right in the Department. There is not a reciprocal legal relationship between the two parties. The grantee has done nothing more than complete an application for funding.*

210. *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.*

211. *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 if all the other requirements of section 11-5 are met.*

212. 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.

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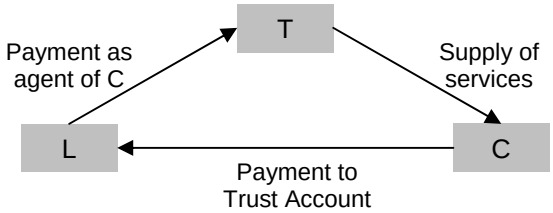
[63] As in the *Ashfield District Council* case as discussed at paragraphs 188 to 191 of this Ruling, the payment by the Department discharges both the Department's liability to the grantee and the grantee's liability to the solicitor.

Example 11: legal services and third party disbursements

213. *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 payment for future services.*

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

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



216. *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. As the recipient of the supply and the payer of the consideration, C will make a creditable acquisition if all the other requirements of section 11-5 are met.*

Proposition 15: one set of activities may constitute the making of two (or more) supplies

217. 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.

218. *Redrow* has been referred to as authority for the proposition that 'one set of acts can constitute two different supplies'[64] or 'a single course of conduct by one party may constitute two or more supplies to different persons'.[65] 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[66] and the prospective purchaser.

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

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

[66] It may be argued that the supply made by the estate agent to Redrow was provided to the purchaser. However, this question was not the issue in dispute in *Redrow*. See paragraphs 882 to 883 of GSTR 2005/6.

219. The New Zealand Court of Appeal in *Suzuki New Zealand Ltd v. C of IR* (2001) 20 NZTC 17,096 (*Suzuki*) also highlighted this proposition (at paragraph 23 of the judgment):

> 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.

220. An example of Proposition 15 is an Australian horse race caller's services. The caller has agreements with a racing club and a radio station to supply broadcast services of the same race program to each. The caller supplies the racing club with an 'on-course' service and the radio station with an 'off-course' service of the same race calls. The caller's one set of activities results in two supplies being made to two different entities.

221. Where there are two supplies made based on one set of acts, it is possible that one of those supplies may be made to one entity and provided to another. For example, for a claim under an insurance policy, the insured may be required to pay an insurance excess to a repairer, who is not acting as agent of the insurer. The one set of acts, the repairs by the repairer, can, depending on the particular facts, result in a supply made by the repairer to the insurer and provided to the insured, and a supply made and provided by the repairer to the insured. This is consistent with the UK Court of Appeal decision in *Brown & Davis Ltd v. Galbraith*[67] where it was held that, although the primary contract was between the insurance company and the repairer for a supply of repair services, there was a second contract between the insured and the repairer requiring the insured to pay for the repairs only to the extent of the excess under the policy.[68]

[67] [1972] 3 All ER 31.

[68] In *Brown & Davis Ltd v. Galbraith*, the issue was whether there was an implied contract between the insured and the repairer to pay for the main cost of the repairs in the event that the insurance company did not pay those costs. When the insurance company went into liquidation, the repairer sought to recover the main costs of the repairs from the insured. It was held that there was no implied contract between the insured and the repairer in respect of these costs. Rather, there were two contracts, one between the insurance company and the repairer whereby the insurance company undertook to pay the main repair costs and the second between the insured and the repairer whereby the insured would pay the excess to the repairer. For further discussion on insurance settlements see GSTR 2006/10 Goods and services tax: insurance settlements and entitlement to input tax credits.

Proposition 16: the total fact situation will determine the nature of a transaction, the entity that makes a supply and the recipient of the supply

222. Where the parties to a transaction have reduced their understanding of the transaction to writing, that documentation is the logical starting point in determining the supplies that have been made. An examination of any relevant documentation and the surrounding circumstances, which together form the total fact situation, is also important in determining whether the documentation captures the nature of a transaction for GST purposes.

223. Australian courts have held that 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. This was made clear by McTiernan J in *Radaich v. Smith* (1959) 101 CLR 209 at 214:[69]

> …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* (1989) 34 IR 179 at 184:

> 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. …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.

However, that is not to say that the parties' characterisation of the arrangement will always be entirely irrelevant. As Wilcox, Conti and Stone JJ held in *ACT Visiting Medical Officers Association v. Australian Industrial Relations Commission* [2006] FCAFC 109, at paragraph 32:

> Each of the VMO contracts contained an express stipulation that the contract did not create an employer and employee relationship. The Full Bench [of the Australian Industrial Relations Commission] correctly accepted that such a stipulation is not conclusive of the position it postulates; the parties cannot by their agreement change the nature of their relationship. Where, however, the nature of the relationship is otherwise ambiguous such a provision may remove the ambiguity.

[69] Adopting Lord Denning's comments in *Facchini v. Bryson* (1952) 1 TLR 1386. In New Zealand see *Marac Finance v. Virtue* (1981) 1 NZLR 586.

Overseas approach

224. In *Customs and Excise Commissioners v. Reed Personnel Services Ltd* [1995] BVC 222 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. …the nature of a VAT supply is to be ascertained from the whole facts of the case.

225. In New Zealand the GST consequences of a transaction are determined by the arrangements actually entered into and not by any economic consequences. The Commissioner agrees with the comment by Blanchard J in *New Zealand Refining*:

> …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…[70]

Circumstances where you need to consider the total fact situation

226. The circumstances in which the agreement will not represent the total fact situation include where it:

- is vague (in which case further information will be needed);
- 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);
- 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);

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

- may form part of a series of interrelated documents (a transaction should not be considered in isolation); or
- does not represent the transactions that are taking place between the parties as the arrangement may have progressed beyond the original agreement or the parties may simply not be abiding by the documents, or the agreement could be a sham (the transactions actually taking place will need to be taken into account).

227. In discussing the total fact situation in relation to tripartite arrangements this Ruling considers three UK VAT decisions:

- the High Court decision in *Customs and Excise Commissioners v. Reed Personnel Services Ltd* [1995] BVC 222 (*Reed)* that established this proposition, with which the Commissioner agrees, 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

228. 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.[71]

229. 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 that 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.

[71] Under the VAT legislation exempt supplies are the equivalent of our input taxed supplies. Nursing services to hospitals are not input taxed under the GST Act. One of the requirements for nursing supplies to be GST-free (the equivalent of zero-rated supplies under the VAT legislation) under paragraph 38-10(1)(c) is that they are 'generally accepted, in the profession…as being necessary for the appropriate treatment of the *recipient of the supply.' A supply of nursing services made to a hospital is not GST-free because the hospital is the recipient of the supply and such a supply would not satisfy this requirement in paragraph 38-10(1)(c).

230. 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 to Reed for the nurses' salaries, 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.

231. 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.

232. 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

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

234. 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.

235. 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.

236. 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.

237. 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.

238. 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

239. The House of Lords' endorsement of *Reed* was noted by the Court of Appeal in *Debenhams*.[72] This case concerned trading terms where, if a customer paid the retailer Debenhams by credit or debit card, 2.5% of the payment was said to be consideration for an exempt supply of card handling services by a separate card issuing company (DCHS).

240. It was held that there was no separate contract between Debenhams' customers and DCHS for which 2.5% of the sale price was being paid:[73]

> 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.

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[72] *Commissioners for Her Majesty's Revenue and Customs v. Debenhams Retail plc* [2005] EWCA 892; [2005] BVC 425 at paragraph 8.

[73] *Commissioners for Her Majesty's Revenue and Customs v. Debenhams Retail plc* [2005] EWCA 892; [2005] BVC 425 at paragraph 42.

241. 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% of the payment by credit or debit card.

Example 12: funeral service

242. *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.*

243. *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.*

244. *Although there is a written contract signed by the surviving spouse as a starting point for the analysis, it is necessary to look at all the surrounding circumstances to determine who the recipient of the supply is.*

245. *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.*

246. *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.*

Part 4: Case studies

Case Study 1: Plantiflor

247. 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. *Plantiflor* is examined to illustrate the analysis of multiparty transactions.

Facts

248. Plantiflor sold plant bulbs by mail order. Customers could collect the bulbs, 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.

249. Plantiflor entered into a five year contract with Parcelforce for the delivery (at a reduced rate) of bulbs to its customers. Plantiflor's goods delivered through Parcelforce were treated as 'postal packets' the conveyance of which qualified for exemption from VAT.[74] 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 meant that Plantiflor 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.

250. Plantiflor's argument that it acted as an agent for the customers in its dealings with Parcelforce found favour in the Court of Appeal decision.[75] 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).

251. 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 withdraw this concession and to argue that there was only one supply by Plantiflor of delivered goods.

[74] The service of conveyance of postal packets by the Post Office is an exempt supply, UK VAT Act section 31 Schedule 9 Group 3 item 1.
[75] [2000] BVC 103.

The House of Lords decision considered

252. This argument that Plantiflor acted as an agent was rejected by the majority in the House of Lords as it did not fit the total fact situation. This illustrates Proposition 16 that is discussed at paragraphs 222 to 246 of this Ruling. Lord Millet said, at paragraph 61:

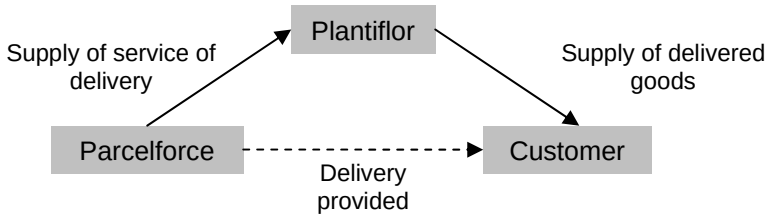
> The difficulty with this analysis, however, is that it does not fit the facts. As Law J correctly held, Parcelforce does not deliver the goods pursuant to the contract with the customer or his agent. It makes delivery pursuant to its contract with Plantiflor, which both parties entered into as principals. This is plain from the terms of the contract, *[the agreement is the logical starting point, Proposition 11, paragraphs 119 to 122]* 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.

253. 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.

254. Lord Slynn, at paragraphs 23 and 24, stated the appropriate question was 'whether one act (here arranging delivery) is "ancillary or incidental to another" (here the supply of bulbs) or is a "distinct supply"'. His Lordship's preferred construction of the contractual documents between Plantiflor and the customer was that there was an agreement for the supply of delivered goods. Lord Slynn was barred from taking this approach because of the earlier concession by the Commissioners that there were two supplies by Plantiflor: a sale of goods; and a service of arranging delivery of those goods.

255. The Commissioner considers the construction of the transaction between Plantiflor and the customer that there was an agreement for the supply of delivered goods to be the better view. If customers did not come to collect the goods, the delivery was necessary for the customers to enjoy the goods and did not represent an end in itself. Hence, the delivery was integral to the supply of the goods and the supply was one of delivered goods. This is consistent with the view in paragraph 4 of GSTD 2002/3[76] that 'You supply delivered goods where the delivery is integral, ancillary or incidental to the supply of the goods.' The Commissioner also considers that the supply by Parcelforce to Plantiflor of the service of delivering its customer's goods is made to Plantiflor and provided to Plantiflor's customer as there was no contractual or reciprocal relationship between Parcelforce and Plantiflor's customer.



Agency, subcontracting or arranging

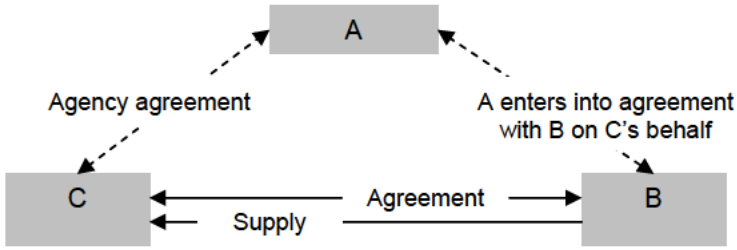
256. In *Plantiflor* the House of Lords examined three competing characterisations of the relationship in tripartite arrangements between parties such as Plantiflor and its customers:

- agency – A agrees with C that A, as agent of C, will enter into an agreement with B for B to perform certain acts for C;
- subcontracting – A pays B (subcontractor) to perform acts for C (A's customer) which fulfils the agreement between A and C; or
- arranging – A agrees to supply a service to C of arranging for B to make a supply to C.

[76] 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?

Agency

257. This diagram illustrates an agency arrangement:



258. As explained in paragraph 252 of this Ruling, the majority in the House of Lords rejected the argument (which had found favour in the Court of Appeal) that Plantiflor acted as agent for undisclosed principals (its customers) in contracting with Parcelforce for the delivery of the goods. Plantiflor contracted with Parcelforce as a principal, not as an agent for its future customers.

Subcontracting and arranging

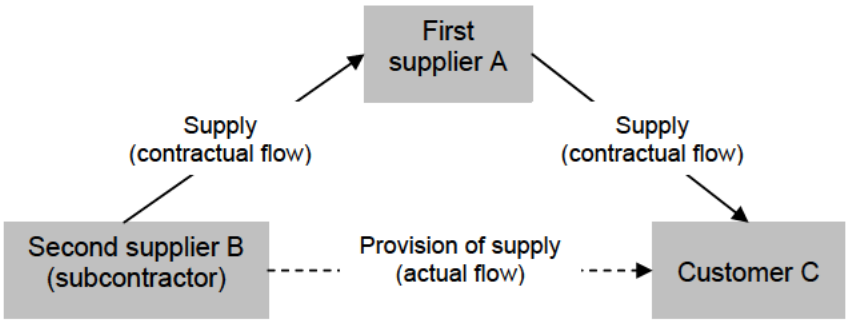
259. Further, Lord Millet and Lord Slynn of Hadley made the distinction between a subcontracting service and an arranging service. Lord Slynn (at paragraph 33) cited *Nell Gwynn* as authority for this proposition and Lord Millett said, at paragraph 57:

> 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.

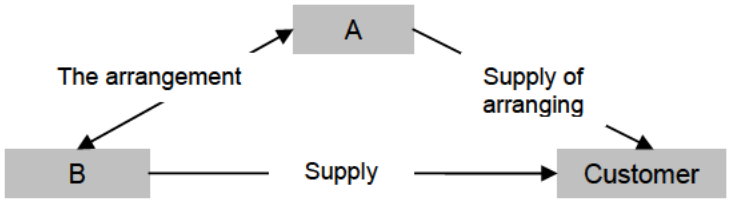
This accords with Proposition 10, discussed at paragraphs 112 to 113 of this Ruling, that it is necessary to analyse the transaction that occurs, not the transaction that might have occurred.[77]

[77] The question of whether there is a supply of delivered goods or a supply of delivery service and a supply of goods is discussed in GSTD 2002/3.

260. The Commissioner agrees there is a distinction between a subcontracting arrangement and an arranging service. The Commissioner also agrees with the analysis of a subcontracting arrangement in *Plantiflor*. In a subcontracting arrangement, a supplier contracts with a customer for the supply of something. The first supplier then contracts with a second supplier (the subcontractor) for the provision of the thing to the customer. This diagram illustrates a subcontracting arrangement:



261. However, the Commissioner considers a supply can only be a 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 responsible for arranging for the second supplier to supply that thing. This was not the case in *Plantiflor*. This diagram illustrates an arrangement with the supply of arranging and the supply of the thing arranged:



262. 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 in respect of that failure 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.

Case study 2 – The Bus Company[78]

Supply for consideration

263. A State Government Transport Authority wishes to improve transport services to residents in a particular rural locality. The authority enters into an agreement to pay the Bus Company a grant of $5 million to enable it to purchase the buses it needs to establish a bus service in the locality. In return for the grant, the Bus Company agrees to use the buses to operate commercial bus services in the locality. Passengers will pay reasonable commercial fares to the Bus Company for trips they take.

264. The grant from the authority is consideration for the supply to it from the Bus Company of the entry into the obligation to operate the agreed bus service. The Transport Authority makes an acquisition of a corresponding right and will make a creditable acquisition if the other requirements of section 11-5 are met *[Proposition 6: 'supply' usually, but not necessarily, requires something to be passed from one entity to another, paragraphs 92 to 94 of this Ruling].*

Payment of money – no supply

265. After the bus service has been operating for some years the Department for Rural Industry rationalises the main rural industry in the locality. This leads to a downturn in the activities of businesses in the locality, including the Bus Company which has a reduction in passenger numbers. The Department offers compensation to the Bus Company and other affected businesses in the locality. The Department and the Bus Company agree that if the company is still operating a business in the locality it will receive a payment from the Department of $50,000 at the end of each of the following three financial years.[79]

266. The Bus Company does not make a supply to the Department in return for the payments from the Department *[Proposition 9: creation of expectations alone does not establish a supply, paragraphs 102 to 111of this Ruling]*. The Bus Company does not enter into an obligation to operate a business in the rural locality *[Proposition 12: transactions that are neither based in an agreement that binds the parties in some way nor involve a supply of goods, services, or some other thing, do not establish a supply, paragraphs 123 to 129 of this Ruling].* If the Bus Company is operating a business in the locality at the end of the relevant financial year it qualifies for the $50,000 payment. None of the annual payments have a connection with any supplies made by the Bus Company in operating its business. The Department does not make a creditable acquisition as it is not the recipient of a supply.

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[78] Some of the propositions that are relevant in this case study have been the subject of discussion in an earlier GST public ruling, GSTR 2000/11.

[79] The facts here are analogous to those in *New Zealand Refining*. Paragraphs 102 to 103 of this Ruling discuss this case.

Supply made and provided

267. The Department's support has enabled the Bus Company to ride out the downturn in business and the payments have now ended. However, the Bus Company has never been able to provide services for the locality's three schools. Under its initiatives to support rural education the State Education Department enters into an agreement to pay the Bus Company $1 million per year to run school buses. In return for the payments the Bus Company agrees to service the locality's three schools.

268. The Bus Company makes the supply of the bus service to the Education Department and this supply is provided to the particular schools *[Proposition 13: when A has an agreement 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 130 to 176 of this Ruling].* As the recipient of the supply, the Education Department will make a creditable acquisition if the other requirements of section 11-5 are met.

Third party payment in connection with a supply – no input tax credit

269. The Bus Company decides to offer school trips at a student fare. Later, to provide temporary assistance to families in the locality during a period of prolonged drought, the Department decides to pay for such school trips supplied by the Bus Company to students for a period of 12 months. Rather than reimburse the families for the fares, the Department issues swipe cards to students and card readers to the Bus Company. The Bus Company submits a monthly claim to the Department based on the number of passengers recorded by the swipe card reader. The formula agreed for payment is (the student fare for school transport supplied by the Bus Company $\times$ the number of school trips swiped in the previous month).

270. The payments from the Department are consideration for the supplies of transport made to the students. The Department is not the recipient of the supplies of transport and does not make creditable acquisitions in connection with the payments *[Proposition 14: a third party may pay for a supply but not be the recipient of the supply, paragraphs 177 to 216 of this Ruling]*.

Reimbursement not consideration for a supply

271. In the next year the Environmental Protection Agency introduces a scheme to reimburse costs incurred by bus operators who convert their buses to be powered by natural gas. Under the scheme, operators will be required to submit evidence of any conversion expenses to the agency for payment. The Bus Company decides to have its buses converted by a specialist contractor and submits copies of tax invoices held by it to the agency.

272. The consequent reimbursement payments to the Bus Company from the agency are not made in connection with the supply to the Bus Company of converting the buses and as such are not consideration for the supply. The consideration for that supply has been paid by the Bus Company. The Bus Company acquired, and provided the consideration for, the supply of converting the buses and will be entitled to an input tax credit for that acquisition. The Bus Company does not make any undertaking or other supply to the agency in return for the reimbursements, it merely accepts the agency's unilateral standing offer for reimbursement. Also, as the Bus Company has not made any supplies to the agency, the agency has not made creditable acquisitions in connection with the reimbursement payments *[Proposition 6: supply usually, but not necessarily, requires something to be passed from one entity to another, paragraphs 92 to 94 of this Ruling; Proposition 12: transactions that are neither based in an agreement that binds the parties in some way nor involve a supply of goods, services, or some other thing, do not establish a supply, paragraphs 123 to 129 of this Ruling].*

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Commissioner of Taxation
25 October 2006

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GSTR 2005/D8

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- recipient
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- supply
- third party payer
- tripartite arrangements

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