



**EXPOSURE DRAFT - FOR COMMENT AND DISCUSSION ONLY | HUKIHUKI HURANGA  
- MŌ TE TĀKUPU ME TE MATAPAKI ANAKE**

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**INTERPRETATION STATEMENT | PUTANGA WHAKAMĀORI**

# **GST - Court-awarded costs and disbursements**

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IS XX/XX

This interpretation statement considers whether court-awarded costs and disbursements and out-of-court settlement payments for costs and disbursements are subject to GST.

This statement does not consider the GST treatment of court awards and out-of-court settlement payments more generally (eg, payments of damages). For more information on awards and payments made other than for costs and disbursements, see [IS 23/07: GST – Court awards and out-of-court settlements](#).

Legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

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## Summary | Whakarāpopoto

1. This interpretation statement explains how court-awarded costs and disbursements and out-of-court settlement payments for costs and disbursements are treated for GST purposes.
2. Court awards and settlement payments for costs and disbursements are not usually consideration for a supply for GST purposes (ie, unless a specific deeming provision, such as s 5(13) or 20A(4), applies). To be consideration for a supply, a payment must be made "in respect of, in response to, or for the inducement of" a supply of goods and services. Case law has concluded this requires there is reciprocity between a supply and the payment.

3. Where payments are made as court awards or out-of-court settlements for costs and disbursements, except where a specific deeming provision applies, there is no reciprocity between any supply by the recipient and the award or settlement payment. Instead, the payment is compensatory in nature. As a result, the recipient does not have to return GST or issue taxable supply information and there is no input tax for the payer to deduct.
4. In the New Zealand courts, awards for costs can be one of three types: scale costs, increased costs or indemnity costs. Scale costs are awarded from a predetermined scale, where the amount of the award depends on how complex the proceedings were and how much time it would have been reasonable to take to complete the relevant tasks. Increased costs are awarded at an uplift from the scale. Awards for indemnity costs cover all reasonable costs a taxpayer has incurred in the litigation.
5. The GST the recipient of the court award originally paid on its costs and disbursements can also affect the quantum of the court award:
  - Scale costs are regarded as a reasonable contribution to the costs that the successful party actually and reasonably incurred. The amount awarded does not represent the amount of the costs that the successful party actually and reasonably incurred. Therefore, the court will not award an added amount representing any GST that the successful party originally paid on the costs (ie, will award costs on a **GST-exclusive basis**).
  - Where the court awards increased costs, in most cases it will award them on a **GST-exclusive basis**. However, if the successful party has been unable to recover some or all the GST on the costs it has incurred, it should inform the court. The court can then take this into account, if, for example, it awards a lesser amount because the uplifted amount would result in an over-recovery of actual costs or an effective indemnity for costs.
  - Where the successful party seeks indemnity costs and has been unable to recover some or all the GST on the costs it has incurred, it should inform the court. If the court awards indemnity costs to a party who has been unable to recover GST, it will award them on a **GST-inclusive basis**, to ensure the successful party is not out of pocket for the GST.
  - If the successful party does not inform the court of its GST status, most courts will award increased or indemnity costs on the basis the successful party is GST-registered and has been able to recover the GST component (ie, award costs on a **GST-exclusive basis**).
  - Disbursements are treated in the same way as indemnity costs. The courts take into account the GST status of the successful party, with the aim of ensuring the party is not out of pocket for the GST.

**Table | Tūtohi 1 – Summary**

	Question	Answer
1.	Are court awards and out-of-court settlement payments for costs and disbursements subject to GST?	No, unless s 5(13) or s 20A(4) applies.
2.	Is the recipient of an award or settlement payment for costs and disbursements required to issue taxable supply information?	No.
3.	Can the unsuccessful party claim an input tax deduction?	No.
4.	Should the successful party make submissions to the court on its GST status?	Only if it is unregistered or partially exempt and is seeking increased costs, indemnity costs or GST on disbursements.

## Introduction | Whakataki

6. We have been asked to clarify the Commissioner’s position on the GST treatment of court awards and out-of-court settlement payments for costs and disbursements in non-tax litigation, including awards covered by insurance. We have also been asked to explain how the courts calculate awards for costs and disbursements, including how the GST status of the recipient affects the calculation of the award. These matters are explained in the analysis from [11].
7. We were further asked to clarify the Commissioner’s position on the GST treatment of court awards and out-of-court settlement payments for costs and disbursements in tax litigation. These awards and payments are covered by a special deeming provision, s 20A(4).
8. This statement does not discuss the application of s 20A(4) in detail. Briefly, s 20A(2) allows a taxpayer to claim an input tax deduction in relation to goods and services acquired for determining liability to tax. The section does this by deeming the goods and services to be acquired for making taxable supplies. If a taxpayer later receives an amount, whether through reimbursement, an award of the court, recovery or otherwise, for the goods and services, s 20A(4) deems the amount received is consideration for a supply the person made in the course of a taxable activity in the taxable period in which they received it. There is no requirement for the person to issue taxable supply information (within the meaning of s 19K). For more information

on s 20A, see [GST incurred in determining tax liability](#) *Tax Information Bulletin* Vol 7, No 13 (May 1996): 12.

9. This item focusses on court awards and out-of-court settlements for costs and disbursements. For the GST treatment of court awards and out-of-court settlement payments generally, see [IS 23/07: GST – Court awards and out-of-court settlements](#).
10. All legislative references are to the Goods and Services Tax Act 1985, unless otherwise stated.

## Analysis | Tātari

11. Analysis of the following is set out below:
  - How the courts calculate awards for costs and disbursements under the rules that apply to them (see from [12]).
  - How the GST status of the recipient affects the amount of the award (see from [42]).
  - The GST treatment of court awards and out-of-court settlement payments for costs and disbursements in non-tax litigation, including awards covered by insurance (see from [54]).

## Awards of costs and disbursements

12. The following paragraphs outline how the New Zealand courts calculate awards for costs and disbursements. The focus is on the High Court, with some commentary on the rules applying to the Court of Appeal and Supreme Court. The rules governing awards of costs and disbursements in the District Court are very similar to those that apply in the High Court and are only mentioned where they differ from the High Court Rules.

## High Court

13. This section focuses on awards of costs and disbursements in the High Court.<sup>1</sup> All references to “the Rules” in this section are to the High Court Rules 2016, except where otherwise specified.<sup>2</sup> In this section:

- “costs” means the expense of hiring a lawyer for a legal proceeding; and
- “disbursements” refers to the expenses a person incurs in taking a legal proceeding (other than lawyers’ fees) such as court fees, expenses of serving documents, photocopying costs for required documents, costs of conducting conferences via telephone or video link, and expert witness fees.

### Costs

14. Under the Rules, the Court has an overriding discretion as to costs (r 14.1). Subject to that discretion, the Court may award costs on a scale basis, an increased basis or an indemnity basis.

#### *Scale costs*

15. In most of its cases, the High Court awards costs on a scale basis. The scale has two components: a category (represented by a number) and a band (represented by a letter). For example, “costs on a 1A basis” means costs awarded on a Category 1, Band A basis.
16. There are three categories, 1–3. The Court allocates proceedings to a category based on their degree of complexity or significance (r 14.3). The categories are:
- Category 1: straightforward proceedings, which counsel who are considered junior in the High Court can conduct.
  - Category 2: proceedings which counsel with skill and experience considered average in the High Court can conduct.
  - Category 3: complex or significant proceedings, which require counsel to have special skill and experience in the High Court.

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<sup>1</sup> Awards of costs and disbursements in the District Court work in a very similar way. For awards of costs and disbursements in the District Court, see the District Court Rules 2014 (LI 2014/179), Part 14 (Costs), sch 4 (Time allocations) and sch 5 (Appropriate daily recovery rates).

<sup>2</sup> The High Court Rules 2016 are deemed by s 147 of the Senior Courts Act 2016 to form a part of that Act. However, they are published as the High Court Rules 2016 (LI 2016/225), as if they were a legislative instrument within the meaning of the Legislation Act 2012, under s 154 of the Senior Courts Act 2016. See [www.legislation.govt.nz](http://www.legislation.govt.nz).

17. The category of the proceedings determines the amount of money that a litigant can claim each day in legal fees. The appropriate daily recovery rates for each category are found in sch 2 of the Rules.<sup>3</sup>
18. The scale similarly has three bands, A–C. A litigant falls within a band for a step in a proceeding depending on how much time would have been reasonable to complete that step (r 14.5(1)). Under r 14.5(2), if it is considered that it is reasonable for the step to take:
  - a comparatively small amount of time, the litigant falls within Band A for the step;
  - a normal amount of time, the litigant falls within Band B for the step; or
  - a comparatively large amount of time, the litigant falls within Band C for the step.
19. Schedule 3 of the Rules lists various steps that may be taken in a proceeding, and the times considered reasonable to complete them, for each of Bands A–C. Note the times (expressed in decimals) are part days (not part hours).<sup>4</sup>
20. Subject to its overriding discretion, as a matter of principle the Court will not award scale costs where the costs reasonably incurred by the party claiming them are less than an award of scale costs would be (r 14.2(1)(f)).<sup>5</sup>

### ***Increased costs***

21. The Court may order a party to pay increased costs if (r 14.6(3)):
  - the nature of the proceeding or a step in it means the time required substantially exceeds the time allocated under Band C (r 14.6(3)(a));
  - the party opposing costs has contributed unnecessarily to the time or expense of the proceeding by: failing to comply with the Rules or with a direction of the Court; taking or pursuing an unnecessary step or an argument that lacks merit;

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<sup>3</sup> As at the date of this Statement, the High Court daily recovery rates where a party has a solicitor on record are Category 1 – \$1,590, Category 2 – \$2,390 and Category 3 – \$3,530. The District Court daily recovery rates for parties with a solicitor on record are lower than the High Court rates. As at the date of this Statement, they are Category 1 – \$1,270, Category 2 – \$1,910 and Category 3 – \$2,820. The rate for parties acting in person is currently the same in the High Court and District Court (\$500 for all three categories of proceeding). These rates are subject to change.

<sup>4</sup> Schedule 3 is not reproduced here, as it is amended from time to time. For example, recent changes will take effect from 1 January 2026 (see r 38 High Court (Improved Access to Civil Justice) Amendment Rules 2025 (SL 2025/149)).

<sup>5</sup> This principle does not apply where a party is acting in person, ie, without a solicitor on record and representing their own personal interests, including a lawyer representing their own personal interests. In such cases, the daily rate of \$500 applies (r 14.2(1)(f)). Further, the “employed solicitor rule” allows employers of in-house lawyers to be eligible for costs on the same basis as if they had used external lawyers: see [https://www.courtsofnz.govt.nz/assets/4-About-the-judiciary/rules\\_committee/Rules-Committee-Media-Statement-August-2024.pdf](https://www.courtsofnz.govt.nz/assets/4-About-the-judiciary/rules_committee/Rules-Committee-Media-Statement-August-2024.pdf).

failing to admit facts, evidence or documents or to accept a legal argument; failing to comply with an order for discovery, a notice for further particulars, a notice for interrogatories or a similar requirement; or failing to accept an offer of settlement (r 14.6(3)(b));<sup>6</sup>

- the proceeding is of general importance to other persons, and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected (r 14.6(3)(c)); or
- some other reason exists that justifies the Court in making an order for increased costs (r 14.6(3)(d)).

22. The onus is on the party seeking increased costs to show those costs are justified.<sup>7</sup>

### ***Indemnity costs***

23. The Court may order a party to pay indemnity costs if (r 14.6(4)):

- the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding or a step in a proceeding (r 14.6(4)(a));
- the party has ignored or disobeyed an order or direction of the Court or breached an undertaking given to the Court or another party (r 14.6(4)(b));
- costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding (r 14.6(4)(c));
- the person in whose favour the Court makes the costs order was not a party to the proceeding and has acted reasonably in relation to it (r 14.6(4)(d));
- the party is entitled to indemnity costs under a contract or deed (r 14.6(4)(e)); or
- some other reason exists that justifies the Court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious (r 14.6(4)(f)).

24. The Court exercises the discretion to award indemnity costs under r 14.6(4)(a), (b) or (f) only on an exceptional basis. It may award indemnity costs, for example, when a party has made false or irrelevant allegations of fraud, has engaged in misconduct that has wasted the Court's and the other party's time, has started proceedings with an ulterior

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<sup>6</sup> The term "order for discovery" will be replaced with "disclosure obligations" with effect from 1 January 2026 by r 38 of the High Court (Improved Access to Civil Justice) Amendment Rules 2025 (SL 2025/149).

<sup>7</sup> See *Easton Agriculture Ltd v Manawatu-Wanganui Regional Council* HC Palmerston North CIV-2008-454-31, 22 December 2011.



motive or in disregard of the facts or law, or has made wrongful allegations or groundless contentions.<sup>8</sup>

25. Rule 14.6(4)(e) recognises that one party may contractually bind itself to pay the other's full solicitor-client costs.<sup>9</sup> In assessing whether costs are "reasonably incurred" under r 14(6)(4)(e), the Court does not have a general discretion.<sup>10</sup> Instead, the Court makes an objective assessment of:
- what tasks attract a costs indemnity on a proper construction of the contract;
  - whether the tasks undertaken were contemplated in the contract;
  - whether the steps undertaken were reasonably necessary in pursuing those tasks;
  - whether the rate at which the steps were charged was reasonable under the principles that normally apply to solicitor-client costs; and
  - whether any other principles of contract law should apply to deny the claim for costs.<sup>11</sup>

### ***Discretion to refuse or reduce costs***

26. Despite rr 14.2–14.5, the Court may refuse to make an order for costs or may reduce the costs otherwise payable in certain circumstances (see r 14.7 for details).

### **Disbursements**

27. Under r 14.12 of the Rules, "disbursements" means an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs (r 14.12(1)(a)).
28. Disbursements include court fees, expenses of serving documents, photocopying costs for documents required by the Rules or by court direction, and costs of conducting conferences via telephone or video link (r 14.12(1)(b)). Other disbursements (eg, expert witness fees) will be allowed if they are of a class that the Court approves for the purposes of that proceeding (r 14.12(2)(a)).

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<sup>8</sup> *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA) at [28].

<sup>9</sup> That is, the actual costs charged by the solicitor to their client, provided they are reasonable. *ANZ Banking Group (NZ) Ltd v Gibson* [1986] 1 NZLR 556 (CA) and *Beecher v Mills* [1993] MCLR 19 (CA).

<sup>10</sup> *Frater Williams & Co Ltd v Australian Guarantee Corporation (NZ) Ltd* (1994) 2 NZ ConvC 191,873 (CA) at 191,887 and *Beecher v Mills*.

<sup>11</sup> *Black v ASB Bank Ltd* [2012] NZCA 384 at [80]. See also *Dunedin Catering Supplies v Mr Chips Ltd* and *Norfolk Nominees Ltd v King* [2014] NZHC 278.

29. All disbursements must be specific to the conduct of the proceeding, reasonably necessary for the conduct of the proceeding and reasonable in amount (r 14.12(2)(b)–(d)).
30. The Court Registrar usually fixes the amount of disbursements (r 14.12(4)).

## **Court of Appeal**

31. All references to “the Rules” in this section are to the Court of Appeal (Civil) Rules 2005 (SR 2005/69), unless otherwise specified.

## **Costs**

32. The costs principles applying in the Court of Appeal are prescribed in Part 4A of the Rules, subject to a general overriding discretion in r 53.
33. The general principles for determining costs and disbursements are set out in r 53A. The Court classifies each appeal as either standard or complex (r 53B). The amounts of costs it awards to complex appeals, which may require senior counsel, are greater than those it awards to standard appeals.
34. Court of Appeal costs are calculated on the basis of the High Court daily recovery rate for Category 2 proceedings (if classified as standard) or for Category 3 proceedings (if classified as complex). For complex appeals, there may be an uplift of up to 50% (r 53C).
35. The amount of time considered reasonable for a step in an appeal is set out in Schedule 2. If a normal amount of time for the particular step is considered reasonable, the amount of time is decided on by reference to Band A. If a comparatively large amount of time for the particular step is considered reasonable, the amount of time is decided on by reference to Band B (r 53D).
36. Despite the above, the Court may make an order for increased costs or indemnity costs (r 53E). The principles for making an award of increased costs or indemnity costs are set out in r 53E and are similar to those set out at [21] and [23] for awards in the High Court. The Court may also refuse to order costs or may order reduced costs in specified circumstances (r 53F).
37. The Rules deal separately with principles applying to costs on an application for leave to appeal (see r 53G) or on an interlocutory application (see r 53GA).

## **Disbursements**

38. Rule 53H deals with disbursements. The Court may direct the Registrar to exercise the Court’s powers to order one party to pay another party’s disbursements. If an order is

made, the order encompasses “disbursements” as defined in r 14.12(1) of the High Court Rules 2016 (see from [27]), as well as counsel’s reasonable travelling and accommodation expenses. The Registrar may fix the types and amounts of disbursements if the parties are unable to agree on them.

## Supreme Court

39. All references to “the Rules” in this section are to the Supreme Court Rules 2004 (SR 2004/199), unless otherwise specified.

### Costs

40. Under r 44 of the Rules, the Supreme Court has a broad discretion to make any orders that seem just concerning the whole or any part of the costs and disbursements of a civil appeal, an application for leave to appeal, or any application relating to an appeal or application for leave to appeal (r 44(1)).

### Disbursements

41. The Court may direct the Registrar to fix the types and amounts of disbursements payable to any party under an order (r 44(4)). If the Court orders “usual disbursements” are payable, this means disbursements as defined in r 14.12(1) of the High Court Rules 2016 (see from [27]), as well as the reasonable travel and accommodation expenses of counsel or of an unrepresented party (r 44(5)–(6)).

## GST status of the recipient

42. The recipient’s GST status can influence the amount a court awards for costs and disbursements. This is because GST status determines whether the recipient bears the GST charged by suppliers. For example, an unregistered person cannot claim an input tax credit and therefore absorbs the GST cost.
43. The Court of Appeal discussed the effect of the GST status of the recipient on the amount of costs and disbursements awarded in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* (2016) 27 NZTC 22-058 (CA).
44. In *NZ Venue*, the Supreme Court had allowed an earlier appeal by the respondent, Worldwide, about when interest can be awarded under s 87(1) of the Judicature Act 1908.<sup>12</sup> The parties had agreed that the appellant, NZ Venue, should pay Worldwide’s

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<sup>12</sup> The decision was reported as *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2015] 1 NZLR 1 (SC).

costs and disbursements. However, the parties disagreed over GST on the disbursements.

45. Worldwide had provided invoices for disbursements totalling \$1,317.15. The invoices showed the amounts Worldwide had claimed for disbursements were GST-inclusive. NZ Venue argued that GST on the disbursements should not be included in the award. Counsel for NZ Venue submitted that Worldwide:

- would have recovered the GST element of the disbursements previously; and
- would not provide a GST invoice for the costs and disbursements award, NZ Venue could not recover GST on it, and NZ Venue did not expect Worldwide would account for GST when the award was paid.

46. The Court of Appeal ordered NZ Venue to pay Worldwide's costs, together with its **GST-exclusive** disbursements. It made this ruling on the following basis:

- A GST-registered party will generally have claimed an input tax deduction for the GST the party has paid to the solicitor representing it in litigation. In contrast, a GST input tax deduction is not available to the successful party if it is not GST-registered.
- It is well settled that all awards of scale costs are "GST neutral" (ie, GST is not added to scale costs, regardless of whether the successful party can recover GST). The successful party does not have to account for GST, and the losing party is not able to claim a GST input tax deduction. An award of scale costs should not, therefore, allow for GST on those costs, for these reasons:
  - An award of scale costs in New Zealand represents a reasonable contribution to the costs actually and reasonably incurred. Importantly, the assessment of what constitutes a reasonable contribution does not depend on the actual costs the successful party incurred. This distinguishes scale costs from other types of costs awards.
  - The losing party is not paying for a service that the successful party or its lawyers provided to it.
- The courts have an overriding discretion in making costs awards. The discretion includes a power to order increased costs. When doing so, the court uplifts from the scale, rather than awarding a percentage of the actual costs incurred. However, it may consider the costs that the successful party actually incurred including, where applicable, the GST component of the costs. If the successful party cannot recover GST, it should inform the court, so the court can take this into account. Otherwise, the court will follow its usual practice of awarding increased costs on the basis that the successful party is GST-registered and able to recover GST.

- Where it awards indemnity costs, the court aims to provide full recovery (or something close to it) rather than a reasonable contribution to costs. There cannot be a proper determination of the full recovery amount without knowing the GST liabilities of the successful party. Usually, GST recovery will simply depend on whether the successful party is GST-registered. However, if a GST-registered party cannot recover GST, for example, because it provides exempt services, it may still be awarded GST as part of the costs order. If the successful party is unable to recover GST, it should inform the court, so the court can take this into account. Otherwise, the court will follow its usual practice of awarding indemnity costs on the basis that the successful party is GST-registered and able to recover the GST component. This basis avoids double recovery and puts the onus on the successful party to inform the court of its inability to recover GST if it wants full recovery of its costs.
  - Disbursements are treated in the same way as indemnity costs. To enable full reimbursement to be made, the successful party must inform the court of its GST status. The aim when allowing disbursements is full recovery, so that the successful party is not left out of pocket.
47. While the Court of Appeal's approach means that a GST-registered, fully taxable person gets more value from their scale costs award or increased costs award than an unregistered or partially exempt person, this can be understood when the overarching aim of the costs rules is considered. This aim is that, so far as possible, the determination of costs should be predictable and expeditious (r 14.2(1)(g)).

## Employee litigants

48. The Employment Court's practice differs from that of the other courts. The Employment Court will add GST to an amount of costs and disbursements it awards to an employee as a matter of course. This is because services provided under a contract of employment are not subject to GST, so employees are not GST-registered, or at least not in relation to the services they provide under the employment contract.

## Partially exempt litigants

49. A partially exempt person is a person who makes both taxable supplies (including zero rated supplies) and exempt supplies. A partially exempt registered person can claim input tax deductions for GST on goods and services acquired for making taxable supplies, but not for GST on goods and services acquired for making exempt supplies. Where the same goods and services are acquired for making both taxable and exempt supplies, only a percentage of the GST incurred will be able to be claimed as an input tax deduction. This percentage is based on the ratio of taxable supplies to total supplies the person makes and is commonly referred to as their "GST recovery ratio".

(Other terms used include “GST apportionment rate” (GAR), or “apportionment percentage”).

50. Registered persons may prepare a GST recovery ratio calculation to support apportioned input tax deductions and annual change of use adjustments for their GST returns. They are not required to file the calculation with Inland Revenue but must retain it for 7 years after the end of the taxable period to which it relates (s 75(3) GSTA).
51. Partially exempt litigants seeking increased costs or indemnity costs should make submissions to the court on their GST recovery ratio, so the court can take into account any GST incurred on costs and disbursements that they have not been able to recover.
52. The Commissioner has been asked to comment on how a partially exempt litigant should approach disclosure to the court of their GST recovery ratio. While it is up to the court to decide what is acceptable evidence of a litigant’s GST recovery ratio, it is suggested the following might be useful to a court:
  - An affidavit from the Tax Manager, Financial Controller, or Chief Financial Officer of the registered person (as appropriate) stating the registered person’s GST recovery ratio and outlining the basis on which it has been calculated, together with one of the following:
    - If the Commissioner has approved a method for the industry in which the person operates and the person relies on it, a copy of the approved method;
    - If the registered person has agreed their own method with the Commissioner, a copy of the registered person’s agreed method; or
    - If there is neither an industry-approved nor a Commissioner-approved method, a description of the methodology the registered person has used (eg, floor area, time or turnover).
53. See Example | Tauria 1 to Example | Tauria 3.

### Example | Tauria 1 – Scale costs

ChopCo Ltd, a meat processing company, enters into an agreement to purchase a meat processing business from a trust. The trust agrees that, if the profits of the business do not exceed \$10 million in the following 12 months, it will pay the shortfall to ChopCo. After 12 months, ChopCo’s accountants prepare accounts, which show the profit fell short of the specified amount by \$565,000. The trust refuses to pay the shortfall to ChopCo as the advice from its own accountants is that the accounting treatment ChopCo’s accountants have adopted is incorrect. The trustees assert that, if the correct accounting treatment is adopted, there is no shortfall.

ChopCo sues the trust for breach of contract. The court prefers the evidence of ChopCo's expert witness and orders the trust to pay the shortfall of \$565,000 to ChopCo.

The court also awards costs and disbursements to ChopCo. The court awards costs on a scale basis, as it considers the criteria for increased costs or indemnity costs are not met.

#### ***1A – ChopCo is GST registered***

ChopCo is GST-registered, so has recovered GST on the actual costs it has incurred. However, the award is GST-neutral (ie, **GST-exclusive**). That is, in making the award, the court does not specifically consider whether ChopCo has been able to recover GST, as the award is intended to be a contribution to ChopCo's costs.

#### ***1B – ChopCo is not GST registered***

Even if ChopCo was not GST-registered (ie, not required to be registered because of making taxable supplies of over \$60,000 in a 12-month period, and not voluntarily registered for GST), so had not been able to recover GST, the award would still have been **GST-exclusive**. Awards of scale costs do not take the ability of the recipient to recover GST into account.

### **Example | Tauira 2 – Increased costs**

Red & Blue Berries Ltd (R&BB), a berry processing company, buys a small factory from a partnership. After completing the purchase, R&BB discovers the building requires repairs to its roof. In the agreement for sale and purchase, the partnership had warranted that the building was in good repair. R&BB sues the partnership for breach of warranty and is awarded damages.

The court also awards costs and disbursements to R&BB. It considers the partnership's argument in the proceeding lacked merit and the partnership contributed unnecessarily to the time and expense of the proceeding. The court awards costs on an increased basis under r 14.6(3), at an uplift of 20% from scale.

#### ***2A - R&BB has voluntarily registered for GST***

R&BB's taxable supplies are under the GST registration threshold (\$60,000 in a 12-month period) but R&BB has voluntarily registered for GST. Therefore, R&BB has recovered GST from Inland Revenue on the costs and disbursements.

R&BB does not make submissions to the court on its GST status. The court awards costs and disbursements on a **GST-exclusive** basis in line with its practice.



Even if R&BB had made submissions to the court on its GST status, the court would have awarded costs and disbursements on a GST-exclusive basis, as R&BB has fully recovered the GST it paid on the costs and disbursements.

### ***2B – R&BB is not registered for GST***

R&BB's supplies are under the GST registration threshold, and it has not voluntarily registered for GST. Therefore, it has not recovered GST from Inland Revenue on the costs and disbursements. R&BB makes submissions to the court on this point.

The court still awards costs and disbursements on a **GST-exclusive** basis, because increased costs are awarded at an uplift from scale and are a contribution to costs.

If the uplift from scale had been more than 20%, and R&BB's actual costs had been lower than average, the increased costs award may have exceeded R&BB's actual costs. In that case, the court may decide to recognise that R&BB has not recovered the GST on its costs and disbursements when calculating R&BB's actual costs for the purposes of preventing an over-recovery or effective indemnity. For example, assume scale costs were \$5,000, and R&BB's **actual costs were \$6,000 excluding GST**. The increased costs award would have been \$6,000 with a 20% uplift, \$6,500 with a 30% uplift and \$7,500 with a 50% uplift. R&BB's actual costs were **\$6,900 including GST**. The court may decide to award a 30% uplift (ie \$6,500), recognising that R&BB has not recovered GST on the costs and disbursements from Inland Revenue, while at the same time ensuring there is no over-recovery of actual costs or effective indemnity for costs.

## **Example | Tauira 3 – Indemnity costs and disbursements**

Jamie is a well-known figure in her home city. A member of the public speaks to the media, alleging Jamie has committed a fraud. The story is published online and in the local newspaper and is broadcast on local radio.

Jamie successfully sues the member of the public for defamation, as there was no basis for the allegation. The court awards damages and orders the member of the public to pay Jamie's costs and disbursements. The court considers the member of the public has acted improperly in defending the proceeding, as there was no basis for the allegation. It awards costs on an indemnity basis under r 14.6(4).

### ***3A – Jamie is not registered for GST***

Jamie is not registered for GST, so has not recovered GST from Inland Revenue on the costs and disbursements her solicitors charged to her. Jamie's lawyer makes submissions to the court on this point. The court awards costs and disbursements on a



**GST-inclusive basis**, to recognise that Jamie has been unable to recover the GST on the costs and disbursements.

**3B – Jamie is registered for GST (fully taxable activity)**

Jamie runs a PR business and is registered for GST as a sole trader in respect of the business. The allegation relates to Jamie's business. Jamie has recovered the GST on her costs and disbursements from Inland Revenue. Jamie's lawyer does not make any submissions on GST. The court awards costs and disbursements on a **GST-exclusive** basis, in line with its practice.

Even if Jamie's lawyer had made submissions to the court on Jamie's GST status, the court would award costs and disbursements on a GST-exclusive basis, because Jamie has fully recovered the GST on them from Inland Revenue.

## **GST treatment of court awards and settlement payments**

54. The following paragraphs outline the GST treatment of court awards and out-of-court settlement payments for costs and disbursements.

### **When a payment is consideration for a supply**

55. GST is chargeable on a supply (not being an exempt supply) in New Zealand of goods and services by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of the supply (s 8).
56. For the purposes of the Act, the term "supply" includes all forms of supply (s 5(1)).
57. To be consideration for a supply, a payment must be made "in respect of, in response to, or for the inducement of" a supply (s 2(1), definition of "consideration").
58. Case law has concluded there must be reciprocity between a supply and a payment for the payment to be made "in respect of, in response to, or for the inducement of" a supply: *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147 (HC).
59. The courts have commented on the requirement for reciprocity in various cases, as follows:
- There was no reciprocity where the payment was not dependent on supplies being made: *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA).
  - Reciprocity did not exist where the recipient had not assumed a contractual obligation, and did not have any other responsibility, to supply goods and services to the payer: *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA).

- A tenuous or unrealistic connection between a supply and a payment was not sufficient for the payment to be regarded as consideration for the supply: *CIR v Suzuki* (2000) 19 NZTC 15,819 (HC).

60. For more detailed discussion on the above cases, see **IS 23/07** from [21].

## Court awards

61. Where a court awards costs and disbursements against the unsuccessful party in a litigation, there is no reciprocity between any supply by the successful party and the payment they receive from the unsuccessful party.
62. The payment is not dependent on any supply being made. The payment is instead compensatory in nature, with no underlying supply being made. Further, there is no deeming provision specific to court awards that makes them consideration for a supply. Therefore, there is usually no obligation on the recipient of the award to return GST. (However, see from [7] on s 20A and from [75] on payments under contracts of insurance.)
63. The Court of Appeal confirmed this conclusion in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, at [7]. See also *Dunedin Catering Supplies v Mr Chips Ltd* [2013] NZHC 1815 at [34] and *Burrows v Rental Space Ltd* [2001] NZHC 770 at [14].
64. If a court award is not consideration for a supply (because no supply is made) then the payer cannot claim an input tax deduction.<sup>13</sup> This is because the payer has not acquired a supply of goods or services from the recipient of the payment.
65. These outcomes are unaffected by a court including an amount in the award for GST previously incurred by the successful party that the successful party has been unable to recover from Inland Revenue - whether because the recipient is unregistered or partially exempt in a civil claim, or is an employee bringing a claim against their employer in the Employment Court.
66. There is no requirement for the successful party to issue taxable supply information.
67. See Example | Tauira 4 and Example | Tauira 5.

### Example | Tauira 4 – Whether GST is payable on an award

ChopCo Ltd, from Example | Tauira 1, asks whether it must pay GST to Inland Revenue on the court award it has received for costs and disbursements.

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<sup>13</sup> "Input tax" is defined as tax charged under s 8(1) on a supply of goods or services acquired by the person (s 3A(1)(a)).

**4A – ChopCo is GST registered**

Although ChopCo is GST registered, the award of costs and disbursements is compensatory in nature. The award is not consideration for any supply ChopCo made to the trust. ChopCo is not required to return GST on the award for costs and disbursements.

**4B – If ChopCo was not GST registered**

If ChopCo was not GST registered (or required to be registered) the award would still be considered compensatory in nature. The award is not consideration for any supply ChopCo made to the trust. ChopCo would not be required to register for GST or to return GST in relation to the award for costs and disbursements.

**Example | Tauira 5 – Whether the payer can claim an input tax deduction**

The trust from Example | Tauira 1 asks whether it can claim an input tax deduction in respect of the payment it makes to ChopCo on account of the award for costs and disbursements.

**5A – The trust is GST registered**

Although the trust is GST registered, the award of costs and disbursements is considered compensatory in nature. The award is not consideration for any supply ChopCo made to the trust. The trust cannot recover input tax on the payment it makes in respect of the award.

**5B – The trust is not GST registered**

If the trust was not GST registered (or required to be registered for GST), the award would still be considered compensatory in nature. The award is not consideration for any supply ChopCo made to the trust. The trust would not be able to voluntarily register for GST and claim an input tax deduction in respect of the payment it made to ChopCo for costs and disbursements.

**Out-of-court settlement payments**

68. The same principles and outcome apply to an out-of-court settlement payment for costs and disbursements. The recipient of the payment is not making any supply for which the settlement payment is consideration. The payment is instead compensatory in nature. Therefore, there is usually no obligation on the recipient of the payment to return GST on the payment (subject to s 5(13) or s 20A applying), and no input tax for the payer to claim.

69. These outcomes are unaffected if the unsuccessful party agrees to include an amount in the settlement payment for GST previously incurred by the successful party on costs and disbursements that the successful party has been unable to recover from Inland Revenue.
70. There is no requirement for the successful party to issue taxable supply information.
71. It has been suggested to the Commissioner that where an unsuccessful party agrees in a settlement agreement to pay the successful party's disbursements, there is a supply from the successful party's supplier to the unsuccessful party, even though it is the successful party who benefits from the supply. It is understood the view is based on the decisions in *Turakina Maori Girls College Board of Trustees and others v CIR* (1993) 15 NZTC 10,032 (CA) and *Television New Zealand v CIR* (1994) 16 NZTC 11,295 (HC).
72. The Commissioner disagrees with this view. The *Turakina Maori Girls College* and *TVNZ* cases establish that it is necessary to look to the contractual obligations the supplier assumes to determine both the nature of the supply and the amount of consideration given for the supply. In the end, the decisive factor is to whom the supplier has assumed a contractual obligation. In the case of disbursements, the successful party's supplier has assumed a contractual obligation to provide goods and services to the successful party. In the case of disbursements, it is also the successful party who benefits from the supply. There is no third party who benefits. The unsuccessful party does not become the recipient of the supply simply by paying for the disbursements. The unsuccessful party is not a party to the contract between the supplier and the successful party, and the supplier has not assumed any contractual obligation to provide goods and services to the unsuccessful party.
73. Out-of-court settlement payments will usually cover more than just costs and disbursements. If a settlement agreement provides for a global sum, and part of the sum relates to a taxable supply, the parties will need to apportion the global sum. The amount apportioned to a taxable supply must be the amount that is properly attributable to it (s 10(18)). **IS 23/07** from [95] provides further information on how to apportion a sum that partly relates to a taxable supply.
74. See Example | Tauira 6 and Example | Tauira 7.

### Example | Tauira 6 – Out-of-court settlement

Jamie from Example | Tauira 3 accepts a settlement offer from the member of the public before the defamation case goes to court. The payment is for damages, costs and disbursements. Jamie asks whether she must return GST on the out-of-court settlement payment for damages, costs and disbursements.

**6A – Jamie is GST registered**

The payment is not consideration for any supply that Jamie made to the member of the public. The payment is instead regarded as compensatory in nature. Jamie is not required to return GST on the payment. Likewise, there is no input tax for the member of the public to claim as an input tax deduction (even if they are GST-registered and the allegations related to their taxable activity).

**6B – Jamie is not GST registered**

The payment is not consideration for any supply that Jamie made to the member of the public. There is no requirement for Jamie to register and return GST on the payment. Likewise, there is no input tax for the member of the public to claim as an input tax deduction (even if they are GST-registered and the allegations related to their taxable activity).

**Variation - Payment of specific disbursements**

Jamie is a lawyer and has represented herself in the dispute so far (ie, she has not incurred any lawyer's costs). The member of the public is GST-registered as a sole trader selling used motor vehicles. Sales have dropped dramatically due to Jamie publicly advocating for electric vehicles and hybrids (ie, the allegation is connected to the taxable activity of selling used motor vehicles).

During the dispute, it becomes clear that, due to the used car dealer's financial situation, they will not offer any settlement payment. Instead of pursuing the dispute further, Jamie agrees to settle the dispute if the used car dealer publishes an apology and pays Jamie's disbursements in the dispute directly to her suppliers.

There is no supply of goods and services from Jamie to the used car dealer. The right to have the disbursements paid is compensatory in nature. Similarly, there is no supply from Jamie's suppliers to the used car dealer. As a result, the used car dealer cannot claim an input tax deduction for the GST on Jamie's disbursements. The suppliers have assumed a contractual obligation to supply goods and services to Jamie, not to the used car dealer. The used car dealer is not the recipient of any supplies of goods and services in this case.

**Example | Tauria 7 – Apportionment of out-of-court settlement payment**

Instead of going to court, ChopCo from Example | Tauria 1 agrees to accept an out-of-court settlement payment from the trust. Under the agreement for sale and purchase, any payment the trust later made for a shortfall in profits was to be treated as a reduction in the consideration ChopCo paid for the business. However, the settlement

agreement simply provides for a global sum which includes an amount for the shortfall in profits plus an amount on account of ChopCo's costs and disbursements.

To the extent it relates to ChopCo's costs and disbursements, the settlement payment is not consideration for any supply that ChopCo makes to the trust. The settlement payment is instead regarded to this extent as compensatory in nature. ChopCo is not required to return GST to Inland Revenue on the payment to the extent it relates to the costs and disbursements. Likewise, the trust cannot claim an input tax deduction in respect of the payment to the extent it relates to ChopCo's costs and disbursements (even though the trust is GST-registered and the payment relates to its taxable activity).

Therefore, ChopCo and the trust must apportion the global sum between an amount for the shortfall in profits and an amount for costs and disbursements. The amount apportioned to the shortfall and to the costs and disbursements respectively must be the amount that is properly attributable to each of them. The trust must issue supply correction information (within the meaning of s 19N) to ChopCo in respect of the amount that is properly attributable to the shortfall in profits. This will mean ChopCo will return GST on the settlement payment to the extent it is properly attributable to the shortfall in profits but not to the extent it is attributable to costs and disbursements.

## Payments received under a contract of insurance

75. A specific rule in s 5(13) applies to payments received under a contract of insurance. For s 5(13) to apply:

- a registered person must receive a payment;
- the payment must be made under a contract of insurance; and
- the payment must relate to a loss incurred in the course or furtherance of the registered person's taxable activity (the section applies "to the extent" the payment is related to such a loss).

76. Where the requirements of s 5(13) are satisfied, the payment is **deemed** to be consideration for a supply performed by the person in the course or furtherance of the person's taxable activity on the day the registered person receives the payment.

77. Section 5(13) does **not** apply if one or more of the following exclusions applies:

- The supply of the contract of insurance is not a supply charged with tax under s 8(1). For example, tax will not be charged if the supply of the contract of insurance was not made "in New Zealand" because the insurer is not resident in

New Zealand and the insurer does not choose to treat the supply as made in New Zealand (s 8(3)(c) and (4D)).

- The payment is in respect of an entitlement for any loss of “earnings”, being earnings within the meaning of the accident compensation acts listed in s 5(13). These can include (among others) amounts earned as an employee, a self-employed person or a shareholder-employee.
- The supply of the contract of insurance is a supply that is chargeable with tax only because ss 5B and 8(4B) apply to it. (These provisions apply to a supply of remote services by a non-resident where it is estimated or determined that the percentage of intended use or the percentage of actual use of the supply for making taxable supplies is less than 95%.)
- The supply of the contract of insurance is a supply of remote services that is zero-rated under s 11A(1)(x) as a result of the supplier’s decision to treat the supply as made in New Zealand under s 8(4D).

78. Section 5(13) applies to a registered person who receives a payment under a contract of insurance “whether or not the person is a party to the contract”. Therefore, the section can apply, for example, where the insurer pays an amount directly to a third party as a result of damage caused by the person insured under the contract of insurance, or directly into the trust account of the solicitors acting for the third party. In such a case, assuming the other requirements of s 5(13) are met, the Commissioner’s view is that the third party must return GST on receipt of that payment.
79. This includes a payment received from an insurer to cover costs and disbursements. Although s 5(13) refers to a “loss” and not to “expenditure”, it is considered the term “loss” in s 5(13) means an amount capable of being insured against, and, therefore, covers costs and disbursements in respect of which a party receives a costs award where the liability is met by a payment from the unsuccessful party’s insurer. There is no distinction in GST law between “expenditure” and “loss” (which have been held to have different meanings in an income tax context).
80. For more information, see IS 23/07 from [83] and [CS 20/01: GST liability for insurance and settlement payments to third party claimants – Section 5\(13\) of the Goods and Services Tax Act 1985](#).
81. See Example | Tauira 8.

### Example | Tauira 8 – Payment under a contract of insurance

ChopCo Ltd, a meat processing company, has entered into an agreement for sale and purchase of a meat processing business with a trust. ChopCo and the trust have become involved in litigation over the agreement (see Example | Tauira 1).

The trust has taken out insurance in relation to the litigation. The insurer is resident in New Zealand for GST purposes. Under the contract with the trust's insurer, if the trust is the unsuccessful party in the litigation, the insurer agrees to pay the amount the court awards against the trust for the costs and disbursements of the successful party (ChopCo).

The insurer pays the amount of the costs and disbursements award directly to ChopCo as the successful party.

**8A – ChopCo is GST registered**

ChopCo is registered for GST, the payment relates to a loss incurred in the course or furtherance of ChopCo's taxable activity, and the contract of insurance is a supply in New Zealand under s 8 (as the insurer is resident in New Zealand for GST purposes). Therefore, ChopCo must return GST on the costs and disbursements award to Inland Revenue.

**8B – ChopCo is not GST registered (or required to be registered)**

If ChopCo was not a "registered person" (ie, neither registered nor required to be registered for GST), s 5(13) would not apply. ChopCo would not be required to return GST on the costs and disbursements award to Inland Revenue.

## Record keeping

82. Registered persons are required to keep records for a period of 7 years after the end of the taxable period to which they relate. The records must be sufficient to enable Inland Revenue to readily ascertain the registered person's liability to GST (s 75(3)).
83. Both the recipient and payer of a court award, settlement payment, or payment under a contract of insurance in respect of costs and disbursements will need to keep sufficient evidence of the payment and of the reason for which it has been made or received in support of their GST return for the relevant taxable period. The evidence will need to be kept for 7 years after the end of the relevant taxable period.



## Table | Tūtohi – Rules for costs and disbursements awards

84. Table | Tūtohi 2 shows where to find the rules on the amounts of costs and disbursements awarded in the New Zealand courts.<sup>14</sup>

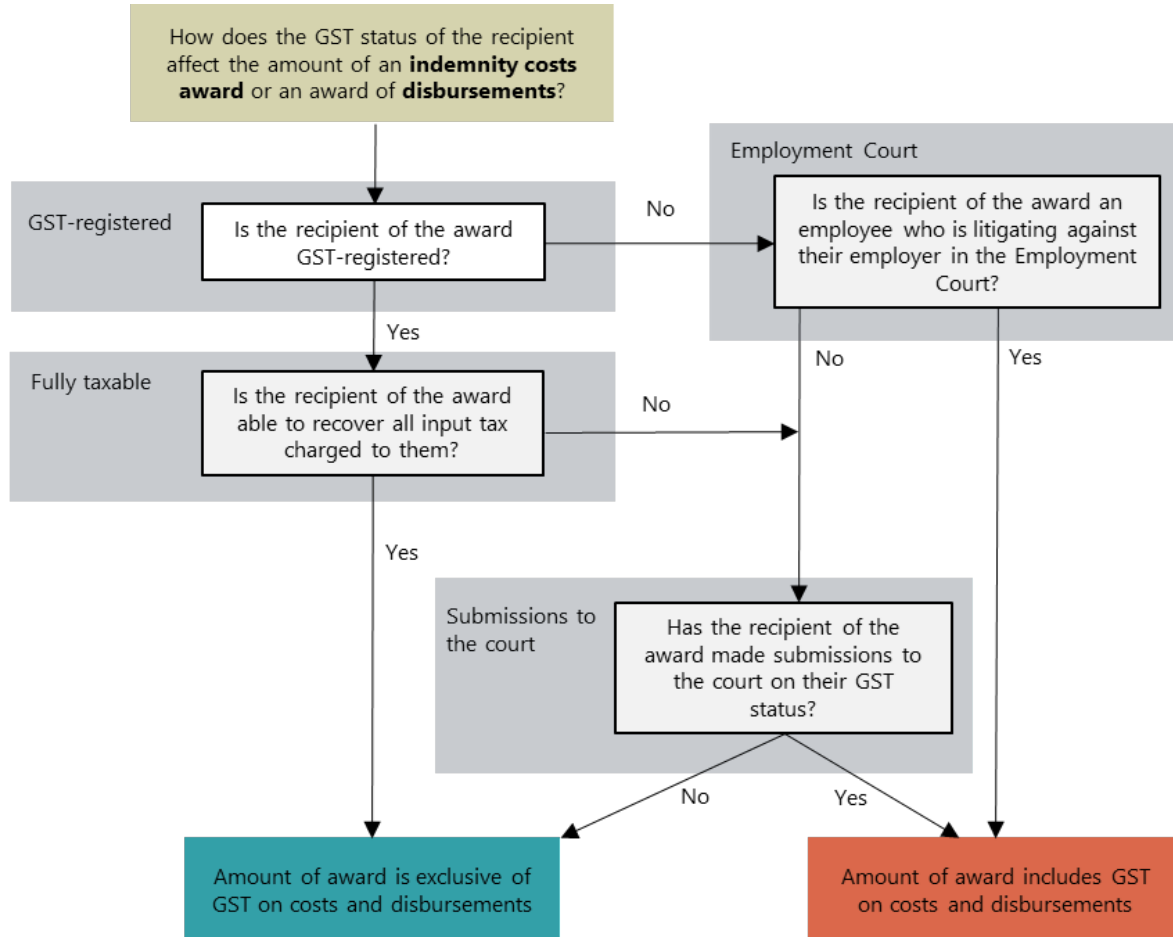
**Table | Tūtohi 2 2 – Amounts of costs and disbursements in the New Zealand courts**

Rule	District Court Rules 2014	High Court Rules (HCR) 2016	Court of Appeal (Civil) Rules 2005	Supreme Court Rules 2004
Overriding discretion as to costs	r 14.1	r 14.1	r 53	r 44(1)
Scale costs	rr 14.2–14.5	rr 14.2–14.5	rr 53A–53D	–
Increased costs	r 14.6(1), (3)	r 14.6(1), (3)	r 53E(1), (2)	–
Indemnity costs	r 14.6(1), (4)	r 14.6(1), (4)	r 53E(1), (3)	–
Refusal of or reduction in costs	r 14.7	r 14.7	r 53F	–
Disbursements	r 14.12	r 14.12	r 53H	r 44(4)–(6)
Appropriate daily recovery rates	sch 5	sch 2	r 53C and HCR sch 2	–
Time allocations	sch 4	sch 3	sch 2	–

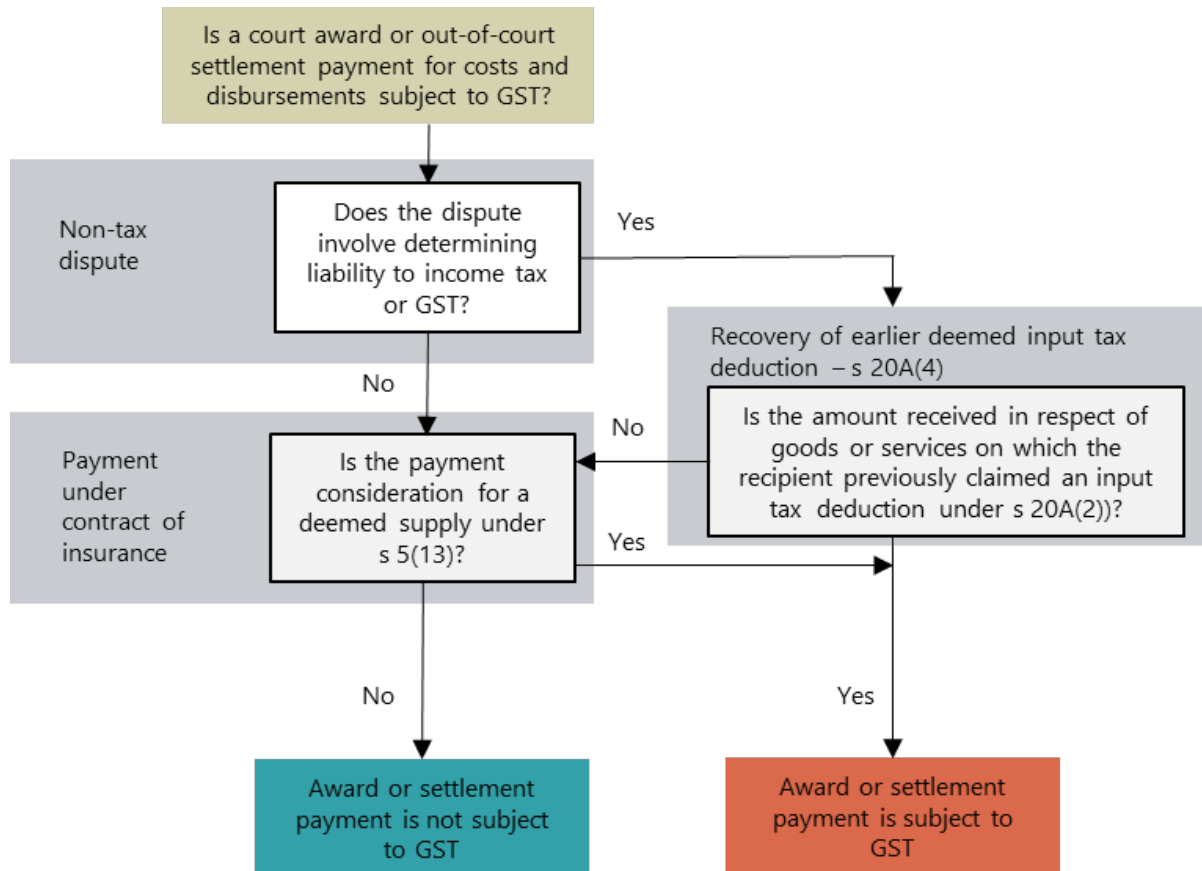
<sup>14</sup> To access these rules, go to [legislation.govt.nz](http://legislation.govt.nz).

## Flowcharts | Hoahoa

**Figure | Hoahoa 1 – How the recipient’s GST status affects the amount awarded – indemnity costs and disbursements**



**Figure | Hoahoa 2 – Whether payments for costs and disbursements are subject to GST**



*Draft items produced by the Tax Counsel Office represent the preliminary, though considered, views of the Commissioner of Inland Revenue.*

*In draft form these items may not be relied on by taxation officers, taxpayers, or practitioners. Only finalised items represent authoritative statements by Inland Revenue of its stance on the particular issues covered.*

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## References | Tohutoro

### Legislative references | Tohutoro whakatureture

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*Beecher v Mills* [1993] MCLR 19 (CA)

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## About this document | Mō tēnei tuhinga

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