

GST – Court awards and out-of-court settlements

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This interpretation statement considers whether court awards and out-of-court settlements will be subject to GST. This may occur if the court award or settlement is consideration for a supply made by the person receiving the court award.

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

REPLACES | WHAKAKAPIA

- IS3387 [“Interpretation Statement: GST treatment of court awards and out of court settlements”](#), *Tax Information Bulletin* Vol 14, No 10 (October 2002): 21.

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Introduction | Whakataki

1. Not all payments a registered person receives are subject to GST. GST is charged only if a supply of goods or services exists. Payment is relevant to the extent that the calculation of GST is based on the value of the supply.¹ The value of a supply is an amount calculated based on the consideration provided for the supply. Therefore, for a payment to be subject to GST, it must be consideration for a supply.
2. Some court awards or out-of-court settlements can involve payments that are consideration for a supply. The supply may be a new supply, for example where a court order or settlement involves a transfer of property in return for a payment, or an earlier supply, which may have been a subject of the dispute.
3. This interpretation statement discusses:
 - the requirement for a sufficient connection and reciprocity between a payment and a supply to exist (see from [21]);
 - how to determine whether a sufficient connection exists and, in particular, the need to consider the legal arrangements actually entered into (see from [31]);
 - the different types of court award or out-of-court settlement, including compensation for loss, awards based on restitution, a court order varying a contract by reducing the price of the goods, payments made on the alteration or termination of a contract, payments made for an agreement not to pursue further legal proceedings (a forbearance to sue), and payments made for a continuing wrong (see from [46]);
 - the effect of different GST accounting bases (see from [75]);
 - claiming GST input tax deductions in a later period (see from [81]);
 - the special case of payments received under a contract of insurance – where a registered person receives an amount from an insurer, the amount is deemed to be consideration for a supply made by the registered person (see from [83]); and
 - apportionment of a sum that is only partly in consideration for a taxable supply (see from [95]).
4. 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 by way of reimbursement, award of the court, recovery, or otherwise,

¹ Section 8(1).

in respect of the goods and services deemed to have been acquired, s 20A(4) deems the amount received to be consideration for a supply the person made in the course of a taxable activity in the taxable period in which it was received.

Requirements for charging GST

5. Whether a payment arising from a court award or an out-of-court settlement is subject to GST depends on whether the payment is consideration for a supply that is charged with tax under s 8.

6. Section 8(1) states:

(1) Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 15% on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after 1 October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

7. For a supply to be charged with tax under s 8:

- there must be a supply of goods or services;
- the supply must not be an exempt supply;
- the supply must be in New Zealand;
- the supply must be made by a registered person; and
- the supply must be made in the course or furtherance of a taxable activity carried on by the registered person.

8. If these requirements are satisfied, GST is charged on a supply by reference to the "value of the supply". The value of the supply is an amount that is calculated based on the "consideration" provided for the supply.² This interpretation statement does not consider the above requirements in detail; instead, it concentrates on whether a payment is consideration for a supply.

² Section 10. The value of the supply is the amount that, with the addition of GST, is equal to the consideration for the supply. For example, if the consideration provided for a supply is \$115 and the GST component is \$15, the value of the supply is \$100.

Consideration for a supply

Identifying a supply of goods or services

9. Not all payments a registered person receives in the course of their taxable activity will be consideration for a supply. GST is a transaction-based tax not a tax on receipts or turnover.³
10. To determine whether a payment is consideration for a supply, it is first necessary to identify a supply of goods or services.⁴ If no supply exists, the payment is not consideration, so is not subject to GST. For example, a payment received as compensation for a loss does not involve a supply, so is not subject to GST.
11. "Supply" is defined generally in s 5(1) as including "all forms of supply". "Goods" is defined in s 2(1) as all kinds of personal or real property, but does not include choses in action, money, cryptocurrency or a product that is transmitted by means of a wire, cable, radio, optical or other electromagnetic system or by means of a similar technical system. "Services" is defined in s 2(1) as anything that is not goods or money or cryptocurrency.
12. Although the definitions of goods and services are together very wide, it is still necessary for a supply of something to have occurred.⁵
13. No supply exists if goods are stolen or taken without permission or if a person uses goods without right, even if a payment is subsequently made in respect of the wrongdoing.⁶ Any payment subsequently paid for the goods is in the nature of compensation, not consideration for the goods.
14. However, a mandatory acquisition of property under legislation can be a supply, as the transaction is accompanied by a legal transfer of ownership.⁷

³ *CIR v Databank Systems Ltd* [1989] 1 NZLR 422 (CA).

⁴ However, in special cases a payment may be deemed to be consideration for a deemed supply, in which case it is not necessary to identify a supply. An example of this arises in relation to payments received from insurers, which is discussed at [85].

⁵ *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA) at 15,081.

⁶ *Bank of New Zealand v Waewaepa Station 2002 Ltd* [2013] NZHC 3,321.

⁷ See "[QB 13/03](#): Goods and services tax – Whether a compulsory acquisition of land is a 'supply by way of sale'", *Tax Information Bulletin* Vol 25, No 7 (August 2013): 97.

15. An agreement not to do something in the future can be a supply. For example, a candy manufacturer may reach a settlement agreement with a bakery nearby, not to use noisy sugar-crushing equipment between 10am and 11am on Monday to Friday. This would be a supply of a chose in action, which is a service.
16. A forbearance to sue as a supply is discussed from [65].

Situations involving a set off of two amounts

17. Often court awards or out-of-court settlements situations will involve payment obligations going each way and an agreement may be made to set off the payment obligations. Set off merely provides a mechanism for satisfying two payment obligations. The effect of a set off is the same as if an amount were paid by one party and then handed back by the other. Set off does not change the amounts of the underlying payment obligations.⁸ This is illustrated in Example | Taura 1.

Example | Taura 1 – Compensation for loss and set off

Truck Seller sells trucks with attached freezer units. Ice Cream Seller purchases a truck for \$100,000 so it can deliver orders of ice cream. Ice Cream Seller pays \$75,000 upfront, with the remaining \$25,000 due in one month.

The truck is delivered and functions well at first. However, after two-weeks use, the freezer unit on the truck is found to be faulty. An ice cream order is lost as a result.

Ice Cream Seller takes Truck Seller to court claiming damages of \$30,000 for the loss. The judge awards the full amount claimed.

Truck Seller and Ice Cream Seller agree to set off the \$30,000 court award against the \$25,000 balance owed by Ice Cream Seller on the truck. Truck Seller then pays the \$5,000 difference to Ice Cream Seller.

The only cash transfers that have been made are the initial payment of \$75,000 by Ice Cream Seller to Truck Seller and the \$5,000 payment by Truck Seller to Ice Cream Seller. However, for GST purposes, Ice Cream Seller has still provided consideration of \$100,000 for the truck. Truck seller's GST output tax, and Ice Cream Seller's input tax deduction, will be calculated based on consideration of \$100,000, not \$75,000.

The set off has the same effect as if Truck Seller paid Ice Cream Seller \$30,000, and Ice Cream Seller then paid Truck Seller the \$25,000 owing on the truck.

⁸ *FCT v Steeves Agnew and Co (Vic) Pty Ltd* (1951) 82 CLR 408.

The payment of the \$30,000 court award has no GST consequences because it is compensation for a loss, not consideration for a supply (see [49]).

Definition of consideration

18. As noted above, GST is charged on a supply by reference to the “value of the supply”. The value of the supply is an amount calculated based on the “consideration” provided for the supply.
19. Consideration is defined in s 2(1):

consideration, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body

20. Five points to note from the definition are as follows:
 - Consideration can be in the form of a payment or an action or forbearance (agreement not to exercise a right). Consideration can also be in money or money’s worth.⁹ This is illustrated in Example | Tauria 5, variation 1b. However, for ease of reference, this statement mostly limits discussion to payments of money.
 - A voluntary payment can be consideration.
 - To be consideration, a payment must be made “in respect of, in response to, or for the inducement of”, a supply.
 - To be consideration, a payment does not need to be made by the recipient of the supply.
 - A payment made as an unconditional gift to a non-profit body is not consideration.

⁹ See s 10(2).

Sufficient connection and reciprocity

21. The courts have held that the definition of consideration extends the ordinary contract law meaning.¹⁰ However, in *Taupo Ika Nui Body Corporate v CIR*,¹¹ Gallen J stated that although the statutory definition of consideration in the Act was wider than the contract law meaning, the definition did not remove the contract law requirement for an element of reciprocity to be present within a transaction in order for the payment to be “consideration” for a supply:

The question arises therefore, whether the definition is so worded that there is no need for an element of reciprocity. With some hesitation I have come to the conclusion it does not. The use of the term “consideration” imports the specialised meaning given to that term in a legal context, which would tell against a meaning involving a mere handling of the funds.

22. In *Chatham Islands*,¹² the Court of Appeal identified the need for a linkage or connection and the need for reciprocity in establishing this. Tipping J noted at [30]:

When coupled with the definitions of taxable activity and consideration, to which I shall come, and in spite of the width of those definitions, the concept of supplying services has a reciprocal connotation...

23. In *Chatham Islands*, the issue was the GST treatment of payments made to the Chatham Islands Enterprise Trust by the New Zealand Government. The payments were made for the purpose of carrying out the objects of the trust, which were related to the development of the Chatham Islands. The payments allowed the trust to provide, for its beneficiaries, services that were previously the responsibility of the Government. The Commissioner argued that the payments were consideration as they induced the trust to carry out its functions, and that this was a supply of services to the Crown. In the alternative, the Commissioner argued that the supplies were made by the trust to its beneficiaries.
24. In the judgment of Keith and Blanchard JJ (delivered by Blanchard J), Blanchard J noted at [18] that the trust had not assumed a contractual or even a voluntary obligation to the Government. The Government had merely vested money in trust for the people of the Chatham Islands:

¹⁰ *The Trustee, Executors and Agency Co NZ Ltd v CIR* (1997) 18 NZTC 13,076 (HC) at 13,085.

¹¹ (1997) 18 NZTC 13,147 (HC) at 13,150.

¹² See footnote 5.

25. Similarly, in a separate judgment, Tipping J stated that the concept of supplying services has a reciprocal connotation. The fulfilment by the trustees of their duties as trustees did not have a reciprocal connection to the payments made by the Crown.
26. The need for a sufficient connection to exist between a payment and a supply was also emphasised in *New Zealand Refining*¹³. Blanchard J stated at 13,193 that to constitute consideration for supply a payment must be made for that supply. He also stated that there is a practical necessity for a sufficient connection between the payment and the supply.
27. *New Zealand Refining* involved payments the Government made to a taxpayer who was the owner of an oil refinery. The Government had previously given the taxpayer certain assurances in relation to money the taxpayer borrowed to expand the refinery. With the deregulation of the oil industry, the Government and the taxpayer reached an agreement to end the assurances. The payments were made as part of that agreement. It was a condition of the payments that the refinery remain operational on each payment date.
28. In that case, the Commissioner argued that the words “in respect of, in response to, or for the inducement of” meant the consideration had an extremely wide definition. The Commissioner argued that the relevant supplies were the supplies the taxpayer refinery made to its customers (to be consideration for a supply, a payment does not need to be made by the recipient of the supply). The Commissioner argued that, given the wide definition of consideration, the payments the Government made were sufficiently linked to the supplies the taxpayer made to its customers.
29. However, the Court of Appeal held that the connection between those supplies and the payments made by the Government was insufficient. This was because the payments were not dependant on such supplies being made. To qualify for the payments, the refinery simply had to be operational. The necessary element of reciprocity was absent.
30. Tenuous and unrealistic connections between a supply and a payment are not sufficient for the payment to be regarded as consideration for the supply.¹⁴

¹³ *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA).

¹⁴ *CIR v Suzuki* (2000) 19 NZTC 15,819 at 15,831.

Determining whether a sufficient connection exists

31. When determining whether a sufficient connection exists between a payment and a supply, it is necessary to consider the legal arrangements actually entered into, not the economic or other consequences of the arrangements.¹⁵

Label used is not determinative

32. The label attached to a payment is not determinative of its legal nature.
33. It might be expected that the label used by a court to describe a payment would accurately reflect the legal nature of the payment. However, it may not be necessary for a court to specify the basis for a payment. This might occur where, for example, there are alternative bases on which an award could be ordered, and the basis selected does not affect the amount of the award.
34. Therefore, in determining the legal nature of a payment it may be necessary to consider the circumstances of the dispute. In the case of out-of-court settlements, it is necessary to consider the remedy that would most likely have resulted had the dispute proceeded to court. This is illustrated in Example | Taura 2.

Example | Taura 2 - Label used for payment is not determinative

A courier driver is keen to expand his operation by purchasing another van and employing a driver. The courier driver finds a suitable van that another courier (the seller) is selling and enters into a contract to purchase the van, paying a deposit of \$5,000. The courier driver agrees to take possession of the van the following month. In the meantime, the seller provides taxable supply information (previously a "tax invoice") for the sale and the courier driver (who accounts for GST on the invoice basis) claims an input tax deduction for the van.

However, the seller contacts the courier driver with some bad news: the van has been repossessed, so the seller is unable to provide the van.

Not knowing quite what to do to unwind the transaction, the courier driver writes a settlement agreement based on an example a friend has used in the past and presents it to the seller. The seller signs the agreement and pays the delivery driver \$5,500.

¹⁵ *New Zealand Refining*. See also *Marac Life Assurance Ltd v CIR* [1986] 1 NZLR 694 (CA) at 706, *CIR v Gulf Harbour Development Ltd* (2004) 21 NZTC 18,915 (CA) and *Rotorua Regional Airport Ltd v CIR* (2010) 24 NZTC 23,979 (HC).

The settlement agreement describes the \$5,500 payment to the courier driver as compensation for the loss suffered by the courier driver.

Despite being labelled as compensation for a loss, \$5,000 of the settlement payment should be treated as a refund of the deposit paid by the courier driver. This is because there has been a total failure¹⁶ by the seller to perform his obligation under the contract. In this situation, the normal remedy would be for a court to order a refund of the deposit. The remaining \$500 likely represents a payment for a loss, given that the courier driver was likely inconvenienced by the seller's failure to deliver the van.

The settlement results in the cancellation of the supply. Therefore, an adjustment is required under s 25. The seller must provide supply correction information (previously a "credit note") detailing the adjustment. The courier driver needs to return output tax in his next return, effectively reversing the input tax deduction claimed on the purchase of the van (in relation to the \$5,000 deposit). If the seller had returned GST on the supply of the van, the seller would be able to claim an input tax deduction on the cancellation of the supply. The remaining \$500 of the payment does not have any GST consequences.

Payment does not need to be made under a contract

35. To be consideration, a payment does not need to be made under a contract, provided the consideration is in respect of, in response to, or for the inducement of, the supply.¹⁷
36. An award of *quantum meruit* is an example of a type of award that can be consideration for a supply, despite the absence of a contract. An award of *quantum meruit* can be made where the recipient has provided something for the payer's benefit, but where there is no contractual remedy for them to pursue to receive payment. *Quantum meruit* is a generic term used to identify a right to a reasonable remuneration for goods or services that are supplied.¹⁸ Often an award of this nature is made where a contract is silent as to the price of goods or services or where a supply of something has occurred on the assumption a contract would eventuate. With this type of awards, a sufficient connection with a supply will generally exist. The payment will be ordered because of the goods or services that have been supplied and the

¹⁶ See *Laws of New Zealand* Restitution: Doctrine of total failure of consideration (LexisNexis, online edition, 2022) at [44] (accessed 17 March 2023).

¹⁷ *Turakina Maori Girls College Board of Trustees v CIR and Canterbury Jockey Club Inc v CIR* (2018) 28 NZTC 23,074 (HC).

¹⁸ *Seton Contracting Ltd v AG* [1982] 2 NZLR 368 (HC) at 376.

supply will usually have been made with an expectation of receiving payment. This is illustrated in Example | Taura 3.

Example | Taura 3 - Absence of a contract is not determinative

A GST registered carpenter hears that a business is interested in commissioning a new boardroom table from timber recovered from the business's old premises. The carpenter puts together a proposal including concept drawings and hardware and joinery options. The business likes the design and asks the carpenter to proceed.

The carpenter purchases the hardware required for the table, takes possession of the timber and stores the timber for two months so it can acclimatise to the humidity in the carpenter's workshop.

However, before the first cut is made the business cancels the order. The carpenter returns the timber to the business and retains the hardware for another job, but due to the limited space in his workshop he charges the business a fee to cover the storage of the timber. The business refuses to pay the fee as no contract was entered into.

The Disputes Tribunal decides that despite no table being produced, the carpenter has provided a benefit to the business by storing the timber for two months. The tribunal decides it is reasonable for the carpenter to charge a fee for the storage and makes an award requiring the business to pay the fee. Based on the tribunal's reason for the award, a sufficient connection exists between the award and a supply (of timber storage) for the award to be consideration for the supply. Therefore, the award is subject to GST. The absence of a contract does not prevent the award from being consideration.

The result would have been different if the carpenter had instead sought and received compensation for a loss arising from not being able to do other projects because of the lack of space.

Legally enforceable obligations do not need to exist

37. Similarly, for a payment to be consideration for a supply, legally enforceable obligations do not need to exist between the parties.
38. This is illustrated by *Case 8/2018*,¹⁹ which involved payments parents made to a taxpayer who operated a private school. The parents made the payments voluntarily and not pursuant to any contractual obligation. The taxpayer argued that for a payment to be consideration, reciprocal obligations must be "enforceable at law" and

¹⁹ (2018) 28 NZTC 4,015 (TRA).

cited *Chatham Islands* in support of this proposition. However, Judge Sinclair held that the court in *Chatham Islands* did not find or impose any requirement that the required reciprocity must be evidenced by reciprocal obligations enforceable at law. Judge Sinclair held that Blanchard J's statement in *Chatham Islands* (that the payments were not made pursuant to any covenant by the Crown involving reciprocal obligations by the trust enforceable at law) was simply a factual finding. Judge Sinclair noted that a voluntary payment can be consideration, and a voluntary obligation is, by its nature, not legally enforceable.

Adjustments to consideration

39. Section 25 requires adjustments to be made to the GST treatment of earlier supplies in certain circumstances.²⁰ Of particular relevance to court awards and out-of-court settlements, adjustments are required where taxable supply information, or a tax position taken in a return, for an earlier supply contains an incorrect amount of consideration.
40. A court award could result in an incorrect amount of consideration if the court award changes the consideration for a supply. Whether a court award has the effect of changing the consideration for a supply involves the same test that applies when determining whether a payment is consideration for a supply; that is, the payment the court orders must have a sufficient connection with the supply and involve reciprocity.
41. An example of a court award that will change the consideration for a supply and create an inaccuracy that needs to be adjusted under s 25, is an order under s 43(3)(c) of the Fair Trading Act 1986 varying a contract by reducing the price of the goods.²¹ Such an order might be made if the quality of goods purchased is misrepresented. This is illustrated in Example | Tauria 4, Scenario 2.
42. A court award could be related to the consideration for a supply without actually changing the consideration. A good example of this can be seen in *Montgomerie v CIR*.²² In that case, following a company's liquidation, the liquidator required creditors to return payments the creditors had received for supplies they had made to the company.²³ The facts, at first sight, appear to suggest an adjustment to the consideration for the supply. However, the Court of Appeal held that recoveries from

²⁰ Section 25 applies where the original supply was made by a registered person. See also ss 25AA and 25AB, which apply to imported goods and services and secondhand goods.

²¹ Not all orders made under the Fair Trading Act 1986 involve adjustments to the consideration for a supply. For example, compensation orders under s 43(3)(f) do not involve adjustments to consideration.

²² (2000) 19 NZTC 15,569.

²³ Under ss 292 and 294 of the Companies Act 1993.

the creditors were not an adjustment to the consideration for the supplies. The payments were not made because the parties to the supply had agreed to adjust the consideration, nor did the Companies Act 1993 characterise the payments as an adjustment to the consideration. The creditors still retained the right to pursue payment for the supplies under the liquidation. The repayment was made in the context of a liquidation where amounts are sometimes recovered from creditors so other creditors can also receive a share of the available funds. For tax purposes, this did not alter the fact of the supply or the consideration for the supply.

43. Depending on the adjustment, s 25 may require the supplier and recipient to account for additional output tax or allow an input tax deduction to ensure the correct amounts of GST are returned or claimed.
44. Where a court award changes the consideration for a supply, the supplier may also need to issue "supply correction information"²⁴ to the recipient of the supply under s 19N.
45. However, a recipient should not wait for the supply correction information before making an adjustment. Where a recipient is required to return an amount of output tax as a result of an adjustment under s 25, the output tax is attributed to the taxable period in which the supply correction information is issued or the recipient becomes aware of the excess. In the context of a court award or out-of-court settlement, the parties will generally become aware of the inaccuracy when the order is given or settlement is reached. This is before the supply correction information is issued (and, potentially, in an earlier taxable period).

Different claims and remedies

46. Disputes can involve variety of different claims and remedies. These may result in different GST treatment depending on whether the legal nature of the remedy suggests a sufficient connection between a payment and a supply. This is illustrated in Example | Tauria 4.

Restitution and compensation for loss

47. Two different bases on which a court order might be made are compensation for loss and restitution.

²⁴ Previously referred to in the legislation as a "debit note" or "credit note".

48. Where an award is based on compensation for loss, the assessment is of a sum that will put the person who has suffered a loss in the same position as they would have been in had the relevant breach or wrong not occurred.²⁵
49. Compensation for a loss is not consideration for a supply because a person does not make a supply by suffering a loss.
50. Even if an award is related to a supply and is calculated based on the amount of consideration provided for the supply, the award will not have any GST consequences if it is compensation for a loss.
51. The GST treatment of compensation for a loss is illustrated in Example | Taura 4, scenario 1.
52. Where an award is based on restitution, the goal is to deprive the defendant of a gain which they have received at the expense of the plaintiff and which it would be unjust for them to retain.²⁶ This will often require the defendant to restore to the plaintiff what has been wrongly taken or, if that is not possible or practicable, order a payment of a monetary equivalent of the thing that was taken.²⁷
53. Restitution is a complicated area of law and many types of restitutionary remedy exist. However, generally, the Commissioner's view is that where a monetary equivalent is paid in restitution to a person from whom a thing has been taken without justification, the payment is not consideration for a supply of the thing. Reciprocity is lacking in this situation. The payment of a monetary equivalent is not made because the thing has been supplied, rather it is made because it is not possible or practicable to return the thing and it would be unconscionable to allow the person to retain the benefit of the thing. This is illustrated in Example | Taura 5.
54. Other types of restitutionary remedy may involve a supply and the required reciprocity, for example an award in *quantum meruit* (see [36]).
55. In a proceeding involving a breach of contract, the ordinary remedy at common law is not the return of part of the purchase price, but damages to compensate the innocent party for the breach. An exception is if there is a total failure of consideration by the other party, which may result in the cancellation of the supply.²⁸ In the latter case, consideration paid for the supply needs to be refunded and the adjustment rules in s 25 apply.

²⁵ *Gardiner v Metcalfe* [1994] 2 NZLR 8 (CA).

²⁶ *Laws of New Zealand: Restitution* (LexisNexis, online edition, 2022) at [1] accessed 27 June 2023.

²⁷ *Equiticorp Industries Group v The Crown* [1996] 3 NZLR 586 (HC).

²⁸ *Coxhead v Newmans Tours Ltd* (1993) 6 TCLR 1 (CA).

56. *Case S77* specifically considered whether an amount paid as compensation for a loss could be consideration for a supply subject to GST.²⁹ The taxpayers were a farming couple registered for GST. A fire they lit on their farm spread to a neighbouring farm and caused substantial damage. This led to allegations of negligence that resulted in an out-of-court settlement. The taxpayers sought an input tax credit on the amount they paid under the settlement. The Commissioner disallowed this credit on the basis that the recipient of the payment had not made a supply in return for the payment. Judge Barber held that the situation did not involve the supply of any goods and services to the taxpayers, as the payment was made on account of a loss.
57. In *Case N62*,³⁰ the taxpayer leased scaffolding equipment from another company, and some was lost. The taxpayer paid an amount to the scaffolding company under a settlement agreement and claimed an input tax deduction for the payment. The Commissioner argued that the taxpayer was not entitled to the deduction because the payment related to a debt security.
58. *Case N62* was concluded by agreement between the parties rather than by a decision by the Taxation Review Authority. The case was also a relatively early case on GST decided before cases such as *New Zealand Refining* and *Chatham Islands*, where the need for reciprocity was emphasised. Therefore, the case is of limited authority. However, the Taxation Review Authority made the comment:

After this matter had proceeded for a time, I suggested to counsel that the concept of “debt security” did not appear to me to relate to the facts of this case; that **there must have been a supply of goods and services** from the other company to the objector; that the consideration for such a supply must be the value of the settlement (and any monies paid previously) ... [Emphasis added]

59. The Taxation Review Authority did not need to give any detailed reasoning for its comment that there must have been a supply. From the facts of the case, it is not possible to determine what the legal basis for the payment was.
60. In the Commissioner’s view, *Case N62* is not authority for a general proposition that a payment to a lessor for the loss of leased property is consideration for the supply of rights in the property. To determine whether a payment is consideration for a supply, it is necessary to have regard to the legal arrangement in any particular case. However, unless some contrary indication arises from the particular legal arrangement, a payment for the loss of leased property appears to be compensation for a loss suffered by the lessor, so not subject to GST. A payment by a lessee to a lessor for lost lease property would generally be made because of the inability to return the leased

²⁹ (1996) 17 NZTC 7,483 (TRA).

³⁰ *Case N62* (1991) 13 NZTC 3,480 (TRA).

property and the subsequent loss suffered by the lessor, not because of any transfer of ownership in the property. It is not sufficient that the payment arises as a result of the lease of the equipment (which was a supply). Reciprocity is lacking between a lease supply and a payment for lost leased property; such a payment is not made for the lease of the property.

Example | Taura 4 - Different legal basis can affect GST treatment

A restaurant owner purchases a pizza oven for \$3,000 (including GST), which the retailer claims is of commercial quality, so suitable for high use situations such as commercial catering operations. However, after using the oven during service, the restaurant owner finds the oven cannot reach and maintain the required heat for continual use.

The restaurant owner is unsuccessful in her attempts to persuade the retailer to replace the oven or provide a refund of the purchase price.

Scenario 1

The restaurant owner brings the case to court, claiming general damages, as she has suffered a loss in receiving goods of lesser quality than she paid for. The judge agrees and orders the retailer to pay the restaurant owner \$2,000.

The \$2,000 is compensation for the restaurant owner's loss in receiving goods of poor quality. Although a supply exists that relates to the award, the connection between the court award and the supply of the pizza oven is insufficient for the court award to be an adjustment to the consideration for the supply. This is because the court award relates to losses suffered rather than consideration for the supply of the oven. Therefore, no adjustment is made to the GST charged on the supply of the oven, and the GST output tax returned by the retailer and the input tax claimed by the restaurant owner are unaffected. There is also no other supply the award might relate to. Therefore, no GST consequences arise from the award.

Scenario 2

The restaurant owner brings the case to court, claiming the retailer made a misrepresentation about the power output of the oven, the materials it was made of and its suitability for restaurant use. The judge agrees and orders the retailer to pay \$2,000 to the restaurant owner as a partial refund of the purchase price. The judge makes this order under s 43(3)(c) of the Fair Trading Act 1986.

A sufficient connection exists between the court-ordered refund and the supply of the pizza oven. As a result, adjustments may be required to the consideration for the supply.

Both the retailer and the restaurant owner had already accounted for the \$391.30 of GST charged on the supply in their previous GST returns. For the purposes s 25(1) of the Act, there is now an “inaccuracy” (arising from an incorrect amount of consideration and tax charged) on the taxable supply information (tax invoice) that was issued by the retailer. The correct GST on the supply is only \$130.43, with the excess GST being \$260.87.

Both the retailer and the restaurant owner need to adjust their tax returns:

- The retailer can make a deduction under s 20(3) for \$260.87 in its return for the taxable period in which the inaccuracy became apparent (the period in which the court order was made);³¹
- The restaurant owner must return output tax of \$260.87 in its return for the taxable period in which the inaccuracy became apparent (the period in which the court order was made).³² The restaurant owner will be aware of the excess GST on receiving news of the court order. The restaurant owner should not wait to receive supply correction information from the retailer.

Example | Taura 5 – Payment received when property taken without justification

Happy Go Lucky Builders is building a house next door to a construction project Sensible Construction is working on. A delivery of timber is made to the street and Happy Go Lucky Builders uses the timber to construct framing, without checking that the delivery was for it, which it wasn't.

After realising the error and engaging in negotiation, the parties agree it isn't practicable to return the timber, Happy Go Lucky Builders agrees to pay Sensible Construction an amount for the timber in full and final settlement of the matter.

Variation 1a

Sensible Construction decides the simplest solution is to offer to sell the timber to Happy Go Lucky Builders and Happy Go Lucky Builders accepts this offer. Under this option, there is a supply that is subject to GST. Sensible Construction will issue an invoice for an amount including GST.

³¹ Section 25(2)(b).

³² Section 25(4).

Variation 1b

Happy Go Lucky Builders remembers that it had made an order for timber, which is due to arrive in a couple of days (coincidentally the order is of the same size as it took from Sensible Construction). Happy Go Lucky Builders and Sensible Construction agree that this timber order can be assigned to Sensible Construction as payment for the timber Sensible Construction agreed to sell to Happy Go Lucky Builders. This saves Sensible Construction from having to make a new order.

This arrangement involves two supplies: a supply of timber by Sensible Construction and a supply of timber by Happy Go Lucky Builders. The assignment of the timber order by Happy Go Lucky Builders is consideration for the supply by Sensible Construction and vice versa. This variation illustrates that consideration can be in money's worth.

Variation 2

Sensible Construction makes a claim for an award based in restitution and the Disputes Tribunal grants the award. The tribunal's decision results in Sensible Construction agreeing not to seek the return of the timber and allows Happy Go Lucky Builders to pass on good title to the timber as part of the house. However, the court award does not result in a supply of rights in the timber from Sensible Construction to Happy Go Lucky Builders. The timber was taken without right. Even if there were a supply, reciprocity between the court award and the supply would, arguably, be lacking. The court award, based on restitution, is not made for the timber, but rather because it was not practicable to restore the timber to Sensible Construction.

Payment on the alteration or termination of a contract

61. Where one party terminates an ongoing supply contract without a right to terminate and without the agreement of the other party, a settlement sum in respect of this action will typically relate to a loss that the other party suffers as a result of the early termination. In this situation, there is no supply by the other party of their rights under the contract because they did not agree to the termination and no other legal mechanism suggests a supply.
62. A settlement agreement will usually also involve an agreement not to pursue further legal proceedings (referred to as a forbearance to sue). As discussed later in this statement from [65], such an agreement can be a supply, but generally the settlement sum will be for the underlying loss, not a forbearance. As compensation for a loss, the settlement sum will not be subject to GST.

63. In contrast, where one party to a contract obtains the other party's agreement to alter or terminate the contract in exchange for a payment, there is a supply by that other party of rights under the contract, and the payment is consideration for the supply.
64. This is illustrated in Example | Tauria 6.

Example | Tauria 6 – Termination of a contract

A supplier of goods has a five-year, \$5 million contract with a customer, to make regular supplies of a fixed number of items. The contract runs smoothly for three years, when all of a sudden, the customer informs the supplier it is no longer willing to accept the contracted supply.

As the contract is extremely valuable to the ongoing viability of the supplier's business, the supplier informs the customer it will pursue its contractual rights to the fullest extent of the law.

The customer still refuses to perform its side of the contract in accepting the items, and the supplier files a claim in court for \$2 million.

The customer decides it would be sensible to offer a compromise sum as an out-of-court settlement, offering the supplier \$1.5 million to avoid the court case. The supplier accepts and agrees not to pursue court proceedings as a condition of the settlement.

The circumstances suggest the payment relates to the loss of revenue and damage to the viability of the supplier's business that will result from the termination. Therefore, the payment is not consideration for any supply.

Variation

If the customer had instead reached an agreement with the supplier for the early termination of the contract in consideration for a payment of \$1.5 million, then the payment would have been consideration for a supply. The difference in this variation is that there would be a supply of rights under the contract by the supplier to the customer.

Agreement not to pursue further legal proceedings

65. A settlement agreement usually includes an agreement by the parties not to pursue further legal proceedings. This is sometimes referred to as a forbearance to sue.

66. The question of whether a forbearance to sue can be a supply was considered in *Case S77* and *Case T22*.³³ In *Case S77*, the Taxation Review Authority stated at 7,487:

In my view no taxable supply was made between the parties. The objectors paid money to the L partnership (an exempt supply of a financial service) and **the latter accepted it in full settlement of their damages claim and agreed to take no further enforcement steps** and have the then court proceedings struck out. That does not seem to me to involve a supply of any good or service from the L partnership to the objectors. All that has passed between the objectors and the L partners physically is the payment or handing over of a cheque. **In the abstract, all that has passed between them is the surrendering by the L partners of their right to proceed with their claim against the objectors. That surrender is not a supply. The L partnership has not forgone any legal right or anything else – it has achieved enforcement of its legal right to damages.** It merely ceased the legal recovery mechanism provided for the enforcement of legal rights... [Emphasis added]

67. In *Case S77*, the Taxation Review Authority made the point that the agreement by the L partnership (the party who suffered the loss) not to take further enforcement steps did not involve the partnership forgoing any legal right. This is because the partnership had achieved enforcement of its legal rights through the settlement payment. The payment was fully attributable to the underlying loss, not to the surrender of a particular enforcement mechanism.
68. In *Case T22*, the Commissioner tried to argue that the payment was consideration for the taxpayer refraining from suing the Crown. The Commissioner was actually precluded from relying on this ground as it was not a ground relied on in its assessment of the taxpayer that was the subject of the objection. Nevertheless, as an obiter comment, the Taxation Review Authority stated that the taxpayer's forbearance to sue was not a supply of a service. The Crown may have considered that it derived some benefit from the taxpayer's decision not to exercise those rights, but that did not convert the taxpayer's decision into a provision of services to the Crown.
69. Although, the Taxation Review Authority suggested that the forbearance to sue was not a supply, the Commissioner's view is that a forbearance to sue is capable of being a supply (given the wide definition of supply), but a settlement payment is generally for something other than the forbearance. The forbearance to sue is generally incidental to the resolution of the underlying dispute and merely a mechanism to ensure finality in the dispute. Therefore, generally, no part of the settlement payment will be attributable to the forbearance.

³³ (1997) 18 NZTC 8,124 (TRA).

70. However, sometimes, the facts may suggest that part of a settlement payment is consideration for the forbearance to sue. Relevant factors in this regard might include the:
- attribution of part of the payment to the forbearance under the settlement agreement;
 - extent to which the total payment cannot be attributed to other matters, for example compensation for loss;
 - risk of reputational damage from court action;
 - risk of costs being awarded against the defendant; and
 - strength of the plaintiff's claim and their willingness to take the case.
71. This is illustrated in Example | Taurira 7.

Example | Taurira 7 - Agreement not to sue

An advisor and a client are both GST registered. The advisor causes the client to lose thousands of dollars as a direct result of the client relying on negligent business advice the advisor provided.

The client believes he has a solid case to take to court, but the advisor persuades the client to settle out of court.

Scenario 1

The parties agree to a settlement under which the advisor pays \$10,000 to the client for the loss suffered. Under the settlement, the client accepts the payment in "full and final settlement" of his claim against the advisor, which means the client agrees not to sue the advisor.

The payment has no GST consequences because the payment is compensation for a loss. The agreement not to sue is merely a mechanism to ensure finality in the dispute so no part of the consideration is attributable to the agreement not to sue.

Scenario 2

The parties agree to a settlement under which the advisor pays \$15,000 to the client. The client accepts the payment in "full and final settlement" of his claim against the advisor.

The settlement agreement specifies that \$10,000 of the payment is compensation for the client's loss and \$5,000 is consideration for agreeing not to take the claim to court.

The \$10,000 attributed to compensation for the client's loss has no GST consequences. However, the agreement not to sue is a supply and the \$5,000 is consideration for that

supply. Further, the supply is a taxable supply as it was made in course or furtherance of the client's taxable activity. Therefore, the client must return output tax on the supply ($\$5,000 - (\$5,000/(1+0.15)) = \$652.17$), and the advisor can claim a corresponding input tax deduction.

Payment awarded for continuing wrong

72. Under s 13 of the Senior Courts Act 2016, the High Court can award damages for a continuing wrong (including an infringement of property rights) instead of granting an injunction. In substance, a continuing infringement of property rights can appear similar to a supply of those property rights, and damages can appear similar to consideration for a supply of those property rights. However, in determining the GST treatment of a payment it is necessary to have regard to the legal arrangements actually entered into, not the economic or other consequences of what has occurred. Property rights are not supplied merely because a court refuses to grant an injunction preventing the continued infringement of the rights. Therefore, a payment of damages awarded instead of granting an injunction, is not consideration for a supply.
73. This is illustrated in Example | Taurira 8.
74. The involuntariness aspect might invite comparison between a payment awarded for a continuing wrong and a payment received in compensation for the compulsory acquisition of land (which is treated as consideration for a supply and potentially subject to GST).³⁴ However, these situations are distinguishable because, as noted above, with a payment awarded for a continuing wrong, no property rights are transferred. With a compulsory acquisition of land, the land is legally transferred, so there can be a supply.

Example | Taurira 8 – Payment for continuing wrong

A council constructs a sewer pipe on private property without the property owner's permission. The owner takes the case to court and requests removal of the pipe.

The court refuses to order removal of the pipe, but it does exercise its power under s 13 of the Senior Courts Act 2016 to award damages. The amount of the damages is calculated by reference to the amount the owner could reasonably expect if the council had agreed to pay for the use of the land.

The council payment to the owner is not consideration for any supply.

³⁴ See [QB 13/03](#).

It might be argued that the award in this example is consideration for a supply because it is related to the use of the land. However, the owner has not supplied any property rights to the council. The owner still has the relevant property rights, but they are being infringed by the continued presence of the sewer pipe. The court has merely refused to give the owner a remedy (injunction) that will stop the infringement. The damages are awarded instead of an injunction and compensate the owner for the continued infringement of the property rights.

The fact damages are calculated by reference to the amount the owner could reasonably expect if the council had agreed to pay for the use of the land, does not mean this is what the payment is for.

Accounting basis

75. The GST consequences of a court award or out-of-court settlement that is consideration for a supply depends on whether the supplier or recipient account for GST on an invoice basis or a payments basis.
76. If the supplier accounts for GST on an invoice basis and receives a court award or out-of-court settlement, the supplier will likely already have returned the GST following the issue of an invoice for the supply. If so, receipt of the payment will not trigger any further GST implications.
77. If the supplier accounts for GST on a payments basis, receipt of the payment may trigger liability for GST.
78. If the recipient of a supply accounts for GST on an invoice basis, an input tax deduction may have already been claimed when the invoice was received. However, given that the payment for the supply may have been in dispute, in practice the recipient might not have claimed a deduction on receiving the invoice. In this case, it may be possible to claim a deduction in a later period (discussed further from [81]).
79. If the recipient of a supply accounts for GST on a payments basis, the receipt of a court award or out-of-court settlement may trigger the ability to claim a deduction for the period in which the amount is received.
80. This is illustrated in Example | Tauira 9.

Claiming a deduction in a later taxable period

81. If the recipient of a supply has not claimed an input tax deduction in the relevant period (the period in which the time of supply occurs), in some limited circumstances,

set out in the proviso to s 20(3), the recipient can claim a deduction in a later period. This is discussed in QB 09/04,³⁵ which deals with the relationship between s 113 of the Tax Administration Act 1994 and the proviso. Briefly, the item finds the following:

- Without qualification, a deduction can be made in a later period that **begins** within a defined two-year period. This two-year period begins on either the date the invoice is issued or the date the payment is made, whichever is earlier. For example, a registered person with a two-monthly filing frequency could claim an input tax deduction in the GST return for the taxable period ended 31 March 2025 (which begins on 1 February 2025) if the invoice for the supply was issued on or after 1 February 2023.³⁶
- A deduction can also be made in a later taxable period (with no time restriction) where the registered person's failure to make the deduction in the earlier taxable period arises from:
 - the recipient's inability to obtain taxable supply information (previously "a tax invoice");
 - a dispute over the proper amount of the payment for the taxable supply to which the deduction relates;
 - the recipient's mistaken understanding that the supply was not a taxable supply; or
 - a clear mistake or simple oversight by the recipient.

82. This is illustrated in Example | Taurira 9.

Example | Taurira 9 - Claiming a deduction in a later period

A contractor takes her van to a mechanic for repairs. The mechanic carries out repairs and the contractor collects the van and returns to work. After a few days, the contractor observes a new fault. The contractor believes the mechanic caused the new fault. The mechanic disagrees and invoices the contractor \$1,150 including GST for the repairs. However, the contractor refuses to pay the invoice.

After failing to resolve the dispute, the mechanic takes the contractor to the Disputes Tribunal. The mechanic is able to prove that the new fault is unrelated to the repairs, and the contractor agrees to pay the amount invoiced.

³⁵ "QB 09/04: The relationship between section 113 of the Tax Administration Act 1994 and the proviso to section 20(3) of the Goods and Services Tax Act 1985 when a registered person has not claimed an input tax deduction in an earlier taxable period", *Tax Information Bulletin* Vol 21, No 6 (August 2009): 53.

³⁶ Again, assuming payment was made after the invoice was issued.

The invoice for \$1,150 was issued on 2 February 2022. The agreement at the Disputes Tribunal is reached on 23 November 2022 and payment of \$1,150 is made on the same day.

The mechanic accounts for GST on the invoice basis, and the contractor accounts for GST on the payments basis. Both have a two-monthly payment frequency with the same end dates.

GST treatment

In their returns for the period ended 31 March 2022, the:

- mechanic needs to account for \$150 of GST on the supply of repair services invoiced to the contractor; and
- contractor cannot claim an input tax deduction because she has not made any payment and accounts for GST on the payments basis.

In their returns for the period ended 30 November 2022, the:

- mechanic does not need to do anything in relation to the supply as they have already returned GST on the supply in the March return; and
- contractor can claim an input tax deduction of \$150 because she made the payment in the November period.

Variation

Same facts as above, but the contractor accounts for GST on the invoice basis rather than the payments basis. Also, the contractor did not claim an input tax deduction in the March period because she intended to dispute the fee.

Despite the supply relating to the March period and, in this variation, accounting for GST on an invoice basis, the contractor can claim the input tax deduction in the November period because the:

- November period began before the two-year anniversary of the invoice being issued for the supply; and/or
- failure to claim the input tax deduction in the March period was due to a dispute over the proper amount of the payment for the supply.

Payments received under a contract of insurance

83. A specific rule in s 5(13) may apply to payments received under a contract of insurance.

84. The requirements of the rule in s 5(13) are discussed below. Where a payment is received by a registered person under a contract of insurance, and the requirements of s 5(13) are satisfied, the payment is **deemed** to be consideration for a supply made by the person in the course or furtherance of the person's taxable activity.
85. Under s 5(13), it is not necessary for an actual supply to occur or to establish that a sufficient connection or reciprocity exists between the payment from the insurer and a supply. This means payments that would otherwise not be subject to GST (for example, a payment made as compensation for a loss) can be subject to GST if the payment is made under a contract of insurance.
86. 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).
87. Section 5(13) does not apply if any of the following are true:
- 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) (see s 8(3)(c) and (4D)).³⁷
 - 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).³⁸ The meaning given under those acts is too detailed to fully discuss in this statement. However, without being exhaustive and with some exclusions, "earnings" under the accident compensation acts can include amounts earned as an employee, a self-employed person or as a shareholder employee.

³⁷ Often, particularly in larger settlement payments, there may be several insurers involved in a claim. For each insurer there is a separate supply of insurance services. The recipient of a payment from multiple insurers will need to determine how much is received from each insurer and whether the supply from each insurer is subject to GST under s 8, which will depend on the residence of the insurer and, if non-resident, whether the insurer has chosen to treat the supply as made in New Zealand.

³⁸ Including the Accident Compensation Act 2001 and predecessor legislation: Accident Compensation Act 1982, the Accident Rehabilitation and Compensation Insurance Act 1992 and the Accident Insurance Act 1998.

- 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 a decision by the supplier to treat the supply as made in New Zealand under s 8(4D).
 - 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 intended use or percentage actual use of the supply of insurance for making taxable supplies is less than 95%).
88. The registered person to whom s 5(13) applies does not need to be party to the contract of insurance. The section 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. 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.
89. A payment is made by an insurer “under” a contract of insurance where there is a disagreement between the insurer and the insured person about the insurer’s liability under the contract and the insurer makes a payment in settlement of the dispute, whether or not the insurer admits liability under the contract.
90. Section 5(13) applies to a registered person who “receives” a payment. Under a wide interpretation of “receive” it could be argued that the person insured under a contract of insurance “receives” a payment when an amount is paid by an insurer to a third party that discharges a liability owed by the insured person to the third party (sometimes described as a constructive payment). However, in the context of s 5(13), it is considered that “receives” does not include a constructive payment. A constructive payment interpretation would be inconsistent with the section specifically stating that the section applies to an amount received by a registered person under a contract of insurance “whether or not the person is a party to the contract”.
91. An insurance payment may be paid into the trust account of a solicitor before being paid to the person who has suffered the loss, for example. This might be the solicitor acting for the party who is making the settlement payment or the solicitor acting for the person who has suffered the loss. If an insurance payment is made this way, the party who has the GST obligation under s 5(13) is the party into whose solicitor’s trust account the insurance payment is made. This is because s 5(13) applies to the registered person who receives the insurance payout. A solicitor in this context receives the insurance payment as agent for their client, so the client is treated as receiving the payment.

92. Sometimes, it might not be clear to the recipient of a payment that the payment is made by an insurer under a contract of insurance. An insurer may not admit any liability under the insurance contract until the facts of the dispute become more apparent. Even when the facts of the dispute become clearer and the insurer determines that they have, or may have, a liability, they may not wish to disclose their involvement as doing so might influence a plaintiff's expectations about the size of a settlement.
93. Third-parties who are seeking a remedy from a person, should seek clarification during negotiations with the person to understand whether a payment will be made by an insurer under a contract of insurance and, therefore, whether the amount received will be subject to GST as a result of s 5(13).
94. See CS 20/01 for the Commissioner's operational position on this topic.³⁹

Apportionment of a sum that is only partly in consideration for a taxable supply

95. In some cases, a payment can be made for more than one thing. Part of the payment may relate to a taxable supply and the remainder of the payment to something else. The part of the payment that is not attributable to a taxable supply could be attributable to an exempt supply or it may not relate to a supply at all.⁴⁰
96. Section 10(18) provides that where a taxable supply is not the only matter to which a payment relates, the supply shall be deemed to be for the part of the payment that is properly attributable to the supply.
97. "Properly attributable" is not defined in the Act, so takes its ordinary meaning. "Properly" in this context appears to mean in an appropriate or suitable manner.⁴¹
98. In *Auckland Institute of Studies Ltd v CIR*,⁴² the High Court discussed how to determine what part of a payment is properly attributable to supply. The court noted that other parts of the Act, including ss 4(2) and 10(2)(b), indicate that the open market value of the supply is an appropriate basis on which to fix value. The court also suggested that values could initially be assessed on the basis of the actual cost of providing the separate supply, plus a reasonable allowance for profit (a "cost plus" approach).

³⁹ "[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", *Tax Information Bulletin* Vol 32, No 2 (March 2020): 7.

⁴⁰ *CIR v Coveney* (1994) 16 NZTC 11,328 (CA).

⁴¹ [Oxford English Dictionary](#) (Oxford University Press, online version, 2022, accessed 31 January 2023).

⁴² (2002) 20 NZTC 17,685 (HC).

However, the court stated that, ultimately, the appropriate value for a separate supply would have to be tested against the market. The court accepted the argument for the Commissioner that the value of a separate supply could not exceed the sum a hypothetical consumer would be prepared to pay.

99. It may be appropriate to attribute a global sum on a prorated basis between the various matters to which the global sum relates, if valuations of the various matters total an amount different to the global sum received.
100. Where multiple elements are supplied with potentially different GST treatments, the parties may also need to determine whether they have a single composite supply (of all the elements) with a single GST treatment, or multiple separate supplies with different GST treatments. See IS 18/04 "[Interpretation Statement Goods and services tax – Single supply or multiple supplies](#)", *Tax Information Bulletin* Vol 30, No 10 (November 2018): 5.
101. This is illustrated in Example | Taura 10.

Example | Taura 10 – Apportionment of global settlement amount

A patent owner has a patent for a lucrative product. For three years business is booming, with global exports increasing every year. However, in the subsequent two years business suddenly drops, and export volumes are only 20% of the earlier volumes. The patent owner finds out from a local contact that for the past two years a competitor has been using the technology patented by the patent owner to create and sell an almost identical product. The patent owner has ample evidence of the unauthorised use of the patent and informs the competitor that a court case is imminent. The competitor accepts it has made wrongful use of the patent and is prepared to compensate the patent owner.

During discussions, the patent owner also agrees to sell the patent rights to the competitor.

The parties agree to a global sum of \$150,000 in settlement of the wrongful use of the patent and to transfer the patent rights to the competitor.

This payment needs to be apportioned between the compensation for the loss suffered and the consideration for the supply of the patent rights. After considering the matter more carefully, the patent owner calculates that their losses arising from the wrongful use of the patent are \$120,000 and the value of the patent is \$60,000.

Based on these values, the appropriate apportionment, on a prorated basis, is to attribute \$100,000 of the settlement payment to compensation and \$50,000 to consideration for the supply of the patent rights. The patent owner must return output

tax on the supply of the patent rights by reference to the consideration of \$50,000, and the competitor can claim a corresponding input tax deduction.

Whether a person has suffered the cost of GST as part of their loss

102. When a person is claiming compensation for a loss they have suffered, it is worthwhile considering whether their loss includes GST. If a person has suffered loss or damage to property and they need to replace or repair the property, the replacement or repair costs may be subject to GST. If the costs are subject to GST, and the person cannot claim a deduction for the GST (for example, if they are not registered for GST), then they bear the cost of the GST and it is part of the loss they have suffered. If the person can claim a deduction for GST, then GST is not part of the loss they have suffered.

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Interpretation Statements are issued by the Tax Counsel Office. They set out the Commissioner's views and guidance on how New Zealand's tax laws apply. They may address specific situations we have been asked to provide guidance on, or they may be about how legislative provisions apply more generally. While they set out the Commissioner's considered views, interpretation statements are not binding on the Commissioner. However, taxpayers can generally rely on them in determining their tax affairs. See further [Status of Commissioner's advice](#) (December 2012). It is important to note that a general similarity between a taxpayer's circumstances and an example in an interpretation statement will not necessarily lead to the same tax result. Each case must be considered on its own facts.