

## QUESTION WE'VE BEEN ASKED QB 14/10

### GOODS AND SERVICES TAX – WHETHER A BINDING CONTRACT ALWAYS ESTABLISHES A TRANSACTION GIVING RISE TO A SUPPLY FOR SECTION 9(1) PURPOSES

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

This Question We've Been Asked is about s 9(1).

#### Question

1. We have been asked whether a binding contract always establishes a transaction giving rise to a supply for s 9(1) time of supply purposes.

#### Answer

2. Generally such a transaction can be assumed where there is a binding contract. However, in some circumstances, the requirements for a binding contract may be satisfied but the contract will not establish there is a transaction giving rise to a supply for s 9(1) purposes. This would be the case where the making of a supply is factually or legally impossible **from the outset** or **becomes** impossible **before** s 9(1) can apply to determine the time of supply, or where the contract is used to commit fraud with no intention of making a supply, or found to be void, a sham, or otherwise legally ineffective.
3. No GST consequences can attach in such circumstances. Therefore, any output tax accounted for or input tax credit claimed by the parties to the contract in such circumstances would be incorrect and would require amendment under ss 113 or 113A of the Tax Administration Act 1994 (TAA).
4. If the supply becomes factually or legally impossible to make **after** the time of supply has been triggered under s 9(1), the contract will establish a transaction giving rise to a supply for s 9(1) purposes. However, if the supply becomes factually or legally impossible to make after the time of supply under s 9(1) has been triggered, but during the same taxable period as the one in which s 9(1) was triggered, the supply cannot be attributable to that (or any other) taxable period. The supplier is therefore not required to account for output tax and the recipient is not entitled to claim an input tax credit. If however any output tax is in fact accounted for, or input tax credit claimed, by the parties to the contract in such circumstances, this would be incorrect and would require amendment under ss 113 or 113A of the TAA.
5. If the supply becomes factually or legally impossible to make in a taxable period after the one in which s 9(1) was triggered, the supplier remains obliged to account for output tax, and the recipient remains entitled to claim an input tax credit for that supply (subject to the matters discussed at para 38 below). In such circumstances, s 25 will be the appropriate section under which to make the necessary adjustments to reflect that the supply is no longer possible to make.
6. This QWBA applies from 30 September 2014.

#### Background

7. In 2010, the Commissioner published IS 10/03: "GST: Time of supply – payments of deposits, including to a stakeholder" in *Tax Information Bulletin* Vol 22, No 6

- (July 2010): 7. IS 10/03 considered the application of the time of supply rule in s 9(1) to situations involving the payment of a deposit, including payment to a stakeholder.
8. IS 10/03 concluded that a transaction giving rise to a supply must be established before s 9(1) will apply. The item confirmed that s 9(1) is a timing-only provision; it will apply to fix the time of supply only if there is a transaction giving rise to a supply. The legal arrangements entered into between the parties must be considered to determine whether a transaction giving rise to a supply exists. IS 10/03 stated that where there is a binding contract such a transaction is assumed. Where there is no contract, the existence of a transaction giving rise to a supply will be established where there are reciprocal obligations between the parties.
  9. Since the publication of IS 10/03, we have been asked whether it can always be assumed there is a transaction giving rise to a supply for s 9(1) purposes where there is a binding contract.
  10. A transaction giving rise to a supply may be established in other ways, but the focus of this QWBA is on binding contracts.

## Explanation

11. The issue for s 9(1) purposes is whether there is a transaction giving rise to a supply, rather than whether there is a contract. The legal rights and obligations entered into by the parties must be established in the light of the factual background to the transaction to determine whether there is a supply and the nature of the supply: *Wilson & Horton Ltd v CIR* (1995) 17 NZTC 12,325 (CA); *CIR v NZ Refining Co Ltd* (1997) 18 NZTC 13,187 (CA); *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA); *CIR v Gulf Harbour Development Ltd* (2004) 21 NZTC 18,915 (CA); *Rotorua Regional Airport Ltd v CIR* (2010) 24 NZTC 23,979 (HC).
12. Section 9(1) defines the time of supply for the purpose of determining when output tax is payable or input tax is deductible: *Pine v CIR* (1998) 18 NZTC 13,570 (CA); *CIR v Capital Enterprises Ltd* (2002) 20 NZTC 17,511 (HC). As stated, s 9(1) is a timing-only provision; it will apply to fix the time of supply only if there is a transaction giving rise to a supply.
13. The operation of s 9(1) is triggered when the supplier issues an invoice or receives any payment (whichever is earlier) in respect of a supply. Its operation does not depend on the actual making of a supply (in terms of goods provided or services performed) but on there being a transaction giving rise to a supply. While such a transaction is required in all cases for s 9(1) to apply, establishing a transaction giving rise to a supply will be particularly relevant when the supply has not yet been made at the time the supplier issues an invoice or receives any payment in respect of that supply.
14. Where the supply has not yet been made (in terms of goods provided or services performed), there will still usually be a transaction giving rise to a supply for s 9(1) purposes where a binding contract exists under which the supplier has an obligation to make a supply: *Case L67* (1989) 11 NZTC 1,391; *Case N24* (1991) 13 NZTC 3,199; *Rob Mitchell Builder Ltd (in liquidation) v National Bank of New Zealand Ltd* (2004) 21 NZTC 18,397 (CA); *Nigel Mansell Sports Co Ltd* [1991] BVC 718. This is because a binding contract generally establishes there is a transaction giving rise to a supply for s 9(1) purposes. A binding contract is one where the requirements of a contract are satisfied.
15. However, in some circumstances, a binding contract may not establish a transaction giving rise to a supply. In other circumstances, a written document

that appears to be a binding contract may not, in fact, be a binding contract when considered in the light of the factual background. Such a document will also not establish a transaction giving rise to a supply.

### **When does a binding contract not establish a transaction giving rise to a supply?**

16. This question will be answered by first considering the situation where the making of a supply is factually or legally impossible from the outset. This QWBA will then consider situations where the making of a supply becomes factually or legally impossible. Finally, contracts used to commit fraud, sham and other legally ineffective contracts will be considered.

### ***The making of the supply is factually or legally impossible from the outset***

#### ***No binding contract***

17. Whether there is a binding contract (ie, offer and acceptance, an intention to be bound and certainty as to the essential terms of the contract) is judged objectively: *Wilmott v Johnson* [2003] 1 NZLR 649 (CA); *Mechenex Pacific Services Ltd v TCA Airconditioning (New Zealand) Ltd* [1991] 2 NZLR 393 (CA).
18. While it is theoretically possible to enter into a contract to do something that is impossible (*Jones v St John's College* (1870) LR 6 QB 115; *Eurico S.p.A. v Philipp Brothers* [1987] 2 Lloyd's Law Reports 215 (EWCACiv)), a binding contract will generally not arise in such instances.
19. A binding contract will not arise where an agreement is made to do something that is factually or legally impossible if the parties did not intend to be bound or consideration is not provided, or if the contract is void on the grounds of a common mistake of the parties: *Halsbury's Laws of England* (4<sup>th</sup> ed, Butterworth & Co (Publishers) Ltd, London, 1974) vol 9 at [447]; HG Beale (ed), *Chitty on Contracts* (30<sup>th</sup> ed, Thomson Reuters (Legal) Ltd, London, 2008) vol 1 at [3-023]; *Bell v Lever* [1932] AC 161 (HL). In such circumstances, a transaction giving rise to a supply for the purposes of s 9(1) will not be established.
20. **Case Z16** (2009) 24 NZTC 14,179 involved a contract for a supply that was legally impossible to make as the mortgagee did not have the right to exercise the power of sale. The High Court had previously, in separate litigation proceedings, found that the contract was void. **Case Z16** confirms that a contract that is void because the supplier does not hold, and is not able to obtain, legal rights that would enable a supply to be made, does not establish a transaction giving rise to a supply for s 9(1) purposes. If this situation exists at the time of supply under s 9(1), there will be no contract establishing a transaction giving rise to a supply.

#### ***Binding contract does not establish a transaction giving rise to a supply***

21. It might be thought that the mere existence of a binding contract establishes a transaction giving rise to a supply, despite the supply contracted for being factually and legally impossible to make from the outset. However, as stated above, the issue is not whether there is a binding contract, but whether there is a transaction giving rise to a supply.
22. The mere existence of a binding contract for a supply that is factually or legally impossible to make from the outset will not establish a transaction giving rise to a supply for s 9(1) purposes, because:

- In circumstances where the supply is factually or legally impossible to make from the outset, it will be clear that the supply contracted for will not be made. In such circumstances, there will be a sufficiently serious breach on the part of the supplier that would entitle the recipient to cancel the contract: ss 7(3) and 7(4) of the Contractual Remedies Act 1979. Where the supply is factually or legally impossible to make from the outset, the recipient does not have to proceed to cancel the contract before it will fail to establish a transaction giving rise to a supply for s 9(1) purposes (see the discussion of *Ch'elle Properties (NZ) Ltd v CIR* (2004) 21 NZTC 18,618 (HC) below). Therefore, a contract that the recipient is entitled to cancel because the supply is factually or legally impossible to make from the outset will not establish a transaction giving rise to a supply for s 9(1) purposes.
  - A supplier cannot be required to make a supply that is factually or legally impossible. A court will not enforce the performance of an obligation under a contract to make a supply that is factually or legally impossible: *Ferguson v Wilson* (1866) LR 2 Ch App 77; *Forrer v Nash* (1865) 35 Beav 167 (RollsCt); *Hall v Vernon* 34 SE 764 (W. Va. Dec 02, 1899); *Great Peace Shipping Ltd v Tsavliris Salvage International Ltd* [2002] 4 All ER 689 (EWCACiv); *Boyarsky v Taylor* [2008] NSWSC 1415. This is the case even if the reason for the impossibility is the fault of the defendant: *Seawell v Webster* (1859) 29 LJ Ch 71. A contract for a supply that neither party has an obligation to complete will not establish a transaction giving rise to a supply for s 9(1) purposes.
23. In summary, a binding contract will generally not arise where an agreement is made to do something that is factually or legally impossible from the outset, and a transaction giving rise to a supply for s 9(1) purposes will not be established. Even if there is a binding contract, the mere existence of the binding contract will not establish a transaction giving rise to a supply for s 9(1) purposes where the supply is factually or legally impossible to make from the outset.

### ***The making of the supply becomes factually or legally impossible***

24. The previous paragraphs considered whether a binding contract establishes a transaction giving rise to a supply where the supply is factually or legally impossible to make **from the outset**. This section considers whether a binding contract for a supply that **becomes** factually or legally impossible to make will establish a transaction giving rise to a supply. The answer depends on the time at which the supply becomes factually or legally impossible to make. If the contract is for a supply that becomes factually or legally impossible to make after the time of supply has been triggered under s 9(1), the contract will establish a transaction giving rise to a supply for s 9(1) purposes. Where the supply becomes factually or legally impossible to make before s 9(1) can apply to determine the time of supply, the contract will not establish a transaction giving rise to a supply.
25. An example of a supply that could potentially become factually or legally impossible to make is one where, at the time the agreement was entered into, a supplier did not own the goods agreed to be supplied or the goods agreed to be supplied did not exist. However, the mere fact that goods did not exist or that the supplier did not own goods at the time a contract was entered into, or at the time the supplier issued an invoice or received any payment, does not mean there cannot be a supply for s 9(1) purposes. A possibility may exist that a contract for a supply will not be performed, but this does not automatically mean that no supply will take place for GST purposes. Generally, parties to a contract cannot anticipate that the supply contracted for will not be made: *Case N24*; *Rob*

*Mitchell; Bethway & Moss Ltd* (1988) 8 BVC 718. Therefore, such a contract for a supply will generally establish a transaction giving rise to a supply. However, where the making of the supply becomes factually or legally impossible before s 9(1) can apply to determine the time of supply, the contract will not establish a transaction giving rise to a supply.

26. Another example of a supply that becomes factually or legally impossible to make is one where (without default by either party) an event happens after a contract is made that renders the supply in its entirety impossible to make and the contract does not provide for what is to happen if such an event occurs. In this situation the contract would terminate automatically: *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 All ER 161 (HL). If this situation exists before s 9(1) can apply to determine the time of supply, the contract will not establish a transaction giving rise to a supply. However, if the supply becomes factually or legally impossible to make after the time of supply has already been triggered under s 9(1), the contract will establish a transaction giving rise to a supply for s 9(1) purposes.
27. In *Ch'elle Properties*, certain vendor companies entered into agreements to purchase sections in a subdivision. They then on-sold these sections to **Ch'elle Properties (NZ) Ltd (Ch'elle)**, who claimed input tax credits. It subsequently transpired that the agreements between the vendor companies and the original vendor were cancelled because the vendor companies had failed to settle on the stipulated date. **The on-sale agreements between Ch'elle and the vendor companies were never cancelled. Ch'elle argued that, because the contracts between Ch'elle and the vendor companies had not been cancelled, the "supply" giving rise to the claims for input tax credits had not been altered under s 25 and that it therefore remained entitled to the input tax credits claimed.** The court, however, disagreed with this submission. Rodney Hanson J concluded that the basis on which the supply had originally taken place had been utterly changed when the vendor companies lost the legal right to acquire the land they were on-selling as a result of the cancellation of the agreements with the original vendor. **This was so despite the contracts between Ch'elle and the vendor companies not being cancelled.**
28. The Commissioner considers the reason for the **court's conclusion was that the supply had become impossible to make.** The fact that the contracts between **Ch'elle and the vendor companies remained on foot did not establish that a transaction giving rise to a supply existed.**
29. In summary, a binding contract for a supply that becomes factually or legally impossible to make after the time of supply has been triggered under s 9(1) will establish a transaction giving rise to a supply for s 9(1) purposes. Where the supply becomes factually or legally impossible to make before s 9(1) can apply to determine the time of supply, the contract will not establish a transaction giving rise to a supply.

### **Contracts used to commit fraud, sham and other legally ineffective contracts**

30. Where a contract is used as the means of committing a fraud and the purported supplier does not ever intend to make a supply, the contract will not establish a transaction giving rise to a supply for s 9(1) purposes: *Munn v C & E Commrs* [1989] VATTR 11; *C & E Commrs v Pennystar Ltd* (1996) BVC 125 (QBD).
31. A contract that is a sham or otherwise legally ineffective is not a binding contract and will not establish a transaction giving rise to a supply: *Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5,086 (CA); *Howard* (1981) 1 BVC 1,155. For more information about the meaning of sham and other issues relating to shams, see the Commissioner's interpretation guideline IG 12/01: "Goods and services tax;

income tax – ‘sham’ published in *Tax Information Bulletin* Vol 24, No 7 (August 2012): 3.

32. In summary, a contract used to commit fraud with no intention of making a supply, a sham or other legally ineffective contract will not establish a transaction giving rise to a supply for s 9(1) purposes.

**How is a binding contract that does not establish a transaction giving rise to a supply treated for GST?**

33. This QWBA is concerned with whether it can always be assumed there is a transaction giving rise to a supply for s 9(1) purposes where there is a binding contract. Practically, the time at which this will be most relevant is when GST is accounted for or claimed.
34. This QWBA has explained that a contract will not establish a transaction giving rise to a supply for s 9(1) purposes where the contract is:
- for a supply that is factually or legally impossible to make from the outset;
  - for a supply that has become factually or legally impossible to make before s 9(1) can apply to determine the time of supply; or
  - used to commit fraud with no intention of making a supply, void, a sham or otherwise legally ineffective.
35. Section 9(1) cannot operate where the contract does not establish a transaction giving rise to a supply because there will be no supply for s 9(1) purposes. This means that any invoice issued or payment received by the supplier cannot trigger the operation of s 9(1) because the invoice is not issued, nor is payment received, “in respect of that supply”, as is required for the operation of s 9(1). **Also, any purported invoice will not meet the definition of “invoice” under s 2** because, where there is no supply, the document cannot notify the recipient of an obligation to make payment. The supplier is not obliged to account for output tax, and the recipient is not entitled to claim input tax in this situation. Therefore, any output tax returned or input tax credit claimed by the parties to the contract in such circumstances would be incorrect and would require amendment under ss 113 or 113A of the TAA. (Section 113A of the TAA enables a taxpayer to correct certain minor errors in the return for the next taxable period.)

**How is a binding contract for a supply that becomes factually or legally impossible to make after the time of supply has been triggered under s 9(1) treated for GST?**

36. If the contract is for a supply that becomes factually or legally impossible to make after the time of supply has been triggered under s 9(1), the contract will establish a transaction giving rise to a supply for s 9(1) purposes. However, if the supply becomes factually or legally impossible to make after the time of supply under s 9(1) has been triggered, but during the same taxable period as the one in which s 9(1) was triggered, no supply can be attributed to that (or any other) taxable period under s 20. (Section 20 requires a person to calculate the amount of tax payable in respect of each taxable period by deducting input tax in relation to supplies made to that person during that taxable period from the amount of output tax attributable to the taxable period.) As no supply can be attributed to any taxable period, the supplier is not required to account for output tax and the recipient is not entitled to claim an input tax credit. Therefore, any output tax accounted for or input tax credit claimed by the parties to the contract

in such circumstances would be incorrect and would require amendment under ss 113 or 113A of the TAA.

37. If the supply becomes factually or legally impossible to make in a taxable period **after** the one in which s 9(1) was triggered, the supply remains attributable to the taxable period in which s 9(1) was triggered. The supplier is therefore obliged to account for output tax, and the recipient is entitled to claim an input tax credit for that supply. Section 25 will then apply to reverse the GST consequences in the taxable period during which it becomes apparent that the output tax returned or input tax claimed is incorrect. The supplier will also be required, under s 25(3), to issue a credit note where the supplier has issued a tax invoice for that supply.
38. However, it must be noted that:
- **Any refund claim made is subject to the Commissioner's right to withhold** payment of a GST refund under s 46 where the Commissioner investigates the circumstances of the return, or requests further information concerning the return. This is provided the Commissioner notifies the taxpayer of her intention to investigate, or requests further information, within 15 days of receipt of the return.
  - If, before the refund is paid out, it comes to the Commissioner's **attention** that the contract cannot proceed and a supply will not be made, the Commissioner is not required to ignore that fact and pay out the refund (**subject to the Commissioner's obligation to act in accordance with s 46** as set out above and ss 89B and 89C of the TAA). This is because any refund paid out would be immediately recoverable: **Case X12** (2005) 22 NZTC 12,189 and **Riccarton Construction Ltd v CIR** (2010) 24 NZTC 24,191 (HC).
39. **The Commissioner's view in Question We've Been Asked:** "GST consequences of a cancelled contract" published in *Tax information Bulletin* Vol 17, No 4 (May 2005): 26 (the 2005 QWBA) could be interpreted as being inconsistent with the view expressed in this QWBA. The 2005 QWBA states that where a contract for the sale and purchase of land is cancelled after the time of supply under s 9(1) has been triggered, the supplier remains obliged to account for GST on the sale of that land and the recipient remains entitled to an input tax credit on the purchase of the land. This QWBA expresses the view that if the supply becomes factually or legally impossible to make after the time of supply under s 9(1) has been triggered, but during the same taxable period as the one in which s 9(1) was triggered, the supply cannot be attributable to that (or any other) taxable period. The supplier is therefore not required to account for output tax and the recipient is not entitled to claim an input tax credit. To the extent that the 2005 QWBA could be interpreted as being inconsistent with the view expressed in this QWBA, **this QWBA should be relied on as representing the Commissioner's view.**

## Examples

40. The following examples assume transactions between registered persons in the course of carrying on taxable activities.

### Example one: Auckland Harbour Bridge

41. Two individuals enter into an agreement for the sale and purchase of the Auckland Harbour Bridge. An invoice is issued, but no payment is due until settlement in 50 years.
42. A transaction giving rise to a supply has not been established. This is because the factual background suggests any supposed contract did not create genuine

legal rights and obligations. As it is general knowledge that the Bridge is in public ownership, is part of the State highway network and is unlikely to be offered for sale, it is unlikely the parties intended to be bound to make a supply that is impossible.

43. Even if there is a binding contract, the contract would not establish a transaction giving rise to a supply. As the vendor does not hold legal rights and would be unable to obtain legal rights that would enable the supply to be performed, the vendor could not be required to supply the Bridge. The purchaser would be entitled to cancel the contract. The existence of a contract under which the parties do not have reciprocal obligations involving a supply in return for payment will not establish a transaction giving rise to a supply for the purposes of s 9(1).
44. In this example an invoice can neither **be issued "in respect of that supply"**, as is required for the operation of s 9(1), nor can it meet the **s 2 definition of "invoice"**. This means that the issue of a purported invoice cannot trigger the operation of s 9(1). The vendor is not obliged to account for output tax and the purchaser is not entitled to claim an input tax credit. Should the parties incorrectly either account for output tax or claim an input tax credit in such circumstances, the assessment would require amendment under s 113 of the TAA.

#### **Example two: movie car**

45. A dealer enters into contracts for the purchase and on-sale of a unique car used in a famous movie. Invoices are issued and deposits paid under each contract. At the time the contracts were entered into, unbeknown to the parties, the car had been destroyed by fire and neither of the contracts provided for what was to happen if the car could not be supplied. As a result, the contracts are void on the grounds of a common mistake.
46. In this example, neither of the contracts establishes a transaction giving rise to a supply for the purposes of s 9(1). A supply is not treated as having taken place. The issue of the purported invoices cannot trigger the operation of s 9(1) because, in these circumstances, an invoice can neither **be issued "in respect of that supply"**, as is required for the operation of s 9(1), nor can it meet the **s 2 definition of "invoice"**. Similarly, the deposit payments cannot be made **"in respect of that supply"**, as is required for the operation of s 9(1). Therefore, the dealer would not be entitled to an input tax credit on the purchase of the car and would not be required to account for output tax on the sale of the car. Should the dealer either account for output tax or claim an input tax credit, the assessment would require amendment under s 113.

#### **Example three: copyright issues**

47. Company A grants a licence to use a patent to Company B, believing it has the right to do so. Company A issues an invoice and Company B claims an input tax credit on the purchase of the licence resulting in a GST refund. It later transpires that Company A never in fact held any rights in the patent and is unable to obtain rights, so no rights could be licenced to Company B. As it is clear that the making of the supply is impossible, neither party can be held to the contract.
48. Therefore, the contract does not establish a transaction giving rise to a supply for the purposes of section 9(1). In this example the invoice can neither be made **"in respect of that supply"**, as is required for the operation of s 9(1), nor can it meet the **s 2 definition of "invoice"**. This means that the issue of the purported invoice by Company A cannot trigger the operation of s 9(1). Therefore, Company A is not obliged to account for output tax and Company B was not entitled to an input tax credit (even if the invoice complied with all the requirements for a tax invoice under s 24).

49. As Company B was not entitled to claim an input tax credit, the refund has been incorrectly obtained and requires amendment under s 113 of the TAA.

#### **Example four: delayed delivery**

50. A registered person enters into an agreement to purchase a number of computers and related PC hardware from **Ned's** PC Supplies. The terms of the agreement are that **Ned's** PC Supplies will order the computer equipment from its supplier and will invoice the registered person upon receipt of the equipment at its warehouse. Delivery of the equipment to the purchaser is to take place on an agreed date, with payment of the full purchase price to be made on delivery. An implied term of the contract is that **Ned's** PC Supplies will be able to supply the equipment and it is factually and legally possible to make the supply. **Ned's** PC Supplies experiences delays in obtaining the equipment and is unable to supply the equipment on the delivery date, so the purchaser decides not to go ahead with the purchase.
51. In this situation, there was a contract under which **Ned's** PC Supplies had a genuine legal obligation to supply the equipment. As a result of events that occurred after the contract was made, **Ned's** PC Supplies was unable to supply the equipment on time. The purchaser therefore had the right to, and did, cancel the contract. Since **Ned's** PC Supplies' **breach of the contract** occurred before the time of supply (because **Ned's** PC Supplies had neither issued an invoice yet, nor had it received any payment for the equipment) the contract fails to establish a transaction giving rise to a supply for the purposes of s 9(1).
52. **Ned's** PC Supplies is not obliged to account for output tax and the purchaser is not entitled to claim an input tax credit. However, should the parties mistakenly either account for output tax or claim an input tax credit in such circumstances, the assessment would require amendment under s 113 of the TAA or under s 113A of the TAA.

#### **Example five: shipping disaster**

53. A registered person enters into a contract with a car dealer to buy a new car and pays a deposit. The car dealer issues a tax invoice and accounts for and pays GST on the sale of the car. The purchaser claims an input tax credit on the purchase of the car resulting in a GST refund. The car needs to be shipped to New Zealand from Japan. The car falls off the boat in rough seas on the way to New Zealand. When it becomes clear that the car has been lost at sea and will not be provided to the purchaser, the dealer notifies the purchaser and refunds the deposit to the purchaser at the same time.
54. In this example, there were genuine contractual obligations for the supply of the car at the time of supply (being the earlier of the time the deposit was paid or the tax invoice issued). Therefore, the contract establishes a transaction giving rise to a supply for the purposes of s 9(1). As it became factually impossible to make the supply after the s 9(1) time of supply, s 25 would apply to adjust the car **dealer's** GST liability in the taxable period during which it has become apparent that the car will not be supplied. The car dealer would also be required to issue a credit note to the purchaser under s 25(3).
55. Section 25 would similarly apply to reverse the refund obtained by the purchaser in the taxable period in which the dealer notified the purchaser that the car had been lost at sea.
56. However, note that if, before the refund is paid out, it comes to the Commissioner's **attention** that the contract cannot proceed and the supply will not be performed, the Commissioner is not required to ignore that fact and pay out the refund.

## References

### Related rulings/statements

- "GST consequences of a cancelled contract", *Tax Information Bulletin* Vol 17, No 4 (May 2005): 26
- IS 10/03: "GST: Time of supply – payments of deposits, including to a stakeholder", *Tax Information Bulletin* Vol 22, No 6 (July 2010): 7
- IG 12/01: "Goods and services tax: income tax-‘sham’", *Tax Information Bulletin* Vol 24, No 7 (August 2012): 3

### Subject references

- GST  
Supply  
Time of supply

### Legislative references

- Contractual Remedies Act 1979, ss 7(3)(c), 7(4)  
Goods and Services Tax Act 1985, ss 9(1), 25, 46  
Tax Administration Act 1994, ss 89B, 89C, 113, 113A

### Case references

- Bell v Lever* [1932] AC 161 (HL)  
*Bethway & Moss Ltd* (1988) 8 BVC 718  
*Boyarsky v Taylor* [2008] NSWSC 1415  
*C & E Commrs v Pennystar Ltd* (1996) BVC 125 (QBD)  
*Case L67* (1989) 11 NZTC 1,391  
*Case N24* (1991) 13 NZTC 3,199  
*Case X12* (2005) 22 NZTC 12,189  
*Case Z16* (2009) 24 NZTC 14,179  
*Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA)  
*Ch'elle Properties (NZ) Ltd v CIR* (2004) 21 NZTC 18,618 (HC)  
*CIR v Capital Enterprises Ltd* (2002) 20 NZTC 17,511 (HC)

- CIR v Gulf Harbour Development Ltd* (2004) 21 NZTC 18,915 (CA)  
*CIR v NZ Refining Co Ltd* (1997) 18 NZTC 13,187 (CA)  
*Eurico S.p.A. v Philipp Brothers* [1987] 2 Lloyds Law Reports 215 (EWCACiv)  
*Ferguson v Wilson* (1866) LR 2 Ch App 77  
*Forrer v Nash* (1865) 35 Beav 167 (RollsCt)  
*Great Peace Shipping Ltd v Tsavliris Salvage International Ltd* [2002] 4 All ER 689 (EWCACiv)  
*Hall v Vernon* 34 SE 764 (W. Va. Dec 02, 1899)  
*Howard* (1981) 1 BVC 1,155  
*Jones v St John's College* (1870) LR 6 QB 115  
*Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5,086 (CA)  
*Mechenex Pacific Services Ltd v TCA Airconditioning (New Zealand) Ltd* [1991] 2 NZLR 393 (CA)  
*Munn v C & E Commrs* [1989] VATTR 11  
*National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 All ER 161 (HL)  
*Nigel Mansell Sports Co Ltd* [1991] BVC 718  
*Pine v CIR* (1998) 18 NZTC 13,570 (CA)  
*Riccarton Construction Ltd v CIR* (2010) 24 NZTC 24,191 (HC)  
*Rob Mitchell Builder Ltd (in liquidation) v National Bank of New Zealand Ltd* (2004) 21 NZTC 18,397 (CA)  
*Rotorua Regional Airport Ltd v CIR* (2010) 24 NZTC 23,979 (HC)  
*Seawell v Webster* (1859) 29 LJ Ch 71  
*Wilmott v Johnson* [2003] 1 NZLR 649 (CA)  
*Wilson & Horton Ltd v CIR* (1995) 17 NZTC 12,325 (CA)