TAX INFORMATION BULLETIN

Vol 14, No 10
October 2002

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This TIB has no appendix

Inland Revenue
Te Tari Taake

ISSN 0114–7161

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This *Tax Information Bulletin* is also available on the internet in PDF format. Our website is at:

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It has other Inland Revenue information that you may find useful, including any draft binding rulings and interpretation statements that are available.

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THIS MONTH'S OPPORTUNITY FOR YOU TO COMMENT

Inland Revenue produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents.

Because we are keen to produce items that accurately and fairly reflect taxation legislation, and are useful in practical situations, your input into the process—as perhaps a user of that legislation—is highly valued.

The following draft item is available for review/comment this month, having a deadline of 15 November 2002.

Ref.	Draft type	Description
IG0007	Interpretation guideline	Non-resident software suppliers' payments derived from New Zealand—income tax treatment

The following draft item is available for review/comment this month, having a deadline of 30 November 2002.

Ref.	Draft type	Description
PU0054	Public ruling	Provision of benefits by third parties: FBT consequences—section CI 2(1)

Please see page 50 for details on how to obtain a copy.

BINDING RULINGS

This section of the TIB contains binding rulings that the Commissioner of Inland Revenue has issued recently.

The Commissioner can issue binding rulings in certain situations. Inland Revenue is bound to follow such a ruling if a taxpayer to whom the ruling applies calculates tax liability based on it.

For full details of how binding rulings work, see our information booklet *Adjudication & Rulings, a guide to Binding Rulings (IR 715)* or the article on page 1 of *Tax Information Bulletin* Vol 6, No 12 (May 1995) or Vol 7, No 2 (August 1995).

You can download these publications free of charge from our website at **www.ird.govt.nz**

PRODUCT RULING – BR PRD 02/11

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by Sovereign Services (NZ) Limited ("SSNZL").

Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections BD 1, BD 2 and the definitions of "unit holders" and "unit trust" in section OB 1.

The Arrangement to which this Ruling applies

The Arrangement is the establishment, administration and carrying on of the Select Investor Service ("the Service") by SSNZL. SSNZL is the agent of Investors in the Service and the Manager of the Service. Further details of the Arrangement are set out in the paragraphs below.

1. SSNZL (formerly called Colonial Services (NZ) Limited) launched the Service (previously known as "Navigator Select Investor Service") during August 1998, and for that purpose obtained Product Ruling BR Prd 98/71, and subsequently BR Prd 00/01. This Ruling replaces BR Prd 00/01 which expired on 31 March 2002. Roll-over rulings have been issued to cover the period 1 April 2002 to 30 June 2002.

The Service

2. The Service provides access for Investors to a range of investment products and fund managers with all reporting consolidated. It is open to all potential Investors, though at the option of SSNZL where the Service is promoted through a particular distribution channel or adviser it may be co-branded with the name of the distributor, though always retaining the word "Select".

3. As stated, the Investors' agent and Manager of the Service is SSNZL. The Custodian and bare trustee of the Service, and the Nominee of the Investors, is the Public Trustee acting at all times through its nominee and wholly owned subsidiary, Select Nominees Limited ("SNL") (formerly Navigator Nominees Limited), who may also act as the trustee of any superannuation scheme made available through the Service.

4. The Administrator of the Service is Aegis Limited ("Aegis"), a subsidiary in the Sovereign group of companies. This role may be assigned to another entity in the Sovereign group from time to time without affecting in any way the duties of the Administrator. This Ruling applies only to those activities of the Administrator that are carried on in relation to the Service and are described in this Arrangement.

5. Investors come to SSNZL to use the Service through their financial advisers. Investors make their own investment selections from the product mix, and investments are traced to the relevant investor. The Manager, the Administrator and the Custodian of the Service act only as directed by Investors and do not give any investment advice or make any investment decisions under delegated authority from the Investors. The only exception is where a fund that an investor has selected ceases to be available through the Service. In that case, in some limited circumstances, the Manager may at its discretion, choose suitable replacement investment options.

6. An Investor who wishes to use the Service will be handed an Investor Information Document ("IID"), which will:

   (i) Background the structure of the Service.

   (ii) Explain in general terms the operation of the pertinent Administration, Custodian, Delegation and Cash Holding Account Agreements (together with the IID described in this Ruling as "the Agreements") by which the Service is implemented.

   (iii) Contain detachable application forms and an Investment Authority by which Investors can identify their investment selections.

7. An Investor wishing to use the Service will then make application and execute an Investment Authority under which the Investor will:

   (i) Provide a declaration pursuant to which Investors will: authorise the Manager and Custodian to act as their agent and bare trustee/nominee respectively, be bound by the Custodian Agreement, and consent to the delegation of services to the Administrator.

   (ii) Confirm the Investor's receipt of investment statements for each option selected.

8. External advisers (such as Jarden Morgan Investment Services Limited) under contract to SSNZL, or SSNZL itself, selects the product mix of the Service and makes the asset allocation decisions of the pre-mixed selection options. Neither the Custodian, nor an associate of the Custodian, will have input into the product mix. Further, Investors are offered a range of types of managed fund investments, from a variety of financial or investment organisations.

9. Investors are offered the choice of investing in:

   (i) unit trusts (New Zealand, Australia and elsewhere);

   (ii) group investment funds ("GIFs"); and

   (iii) UK Investment Trusts.

10. Investors are able to switch between investment options and make lump sum or regular contributions and withdrawals.

11. Possibly in the future a master superannuation fund will be added. The superannuation fund will in turn offer a choice of investment in wholesale superannuation funds, GIFs and unit trusts. In addition, Investors may be offered the facility to invest in "direct" investment securities on a case by case basis including: participatory securities, interest bearing securities, and shares other than unit trusts, group investment funds and Investment Trusts.

12. The Manager will approve the various unit trusts, GIFs and the Investment Trusts selected by Jarden Morgan Investment Services Limited, or other external advisers appointed for that purpose, from time to time based on performance. Investors will be entitled to select their own "direct" investments if that option is offered to the Investors.

13. In addition to the various investment options, Investors may also elect to include supplementary insurance benefits such as life cover, total and permanent disablement, trauma cover and income cover.

14. Investors in the Service may be supplied with both life and non-life insurance cover through the Service.

15. Reporting to Investors under the Service is purely to provide information to Investors on details of their investments and income from their investments as well as to deliver an annual statement for taxation purposes. The reports do not constitute what is regarded in the industry as "monitoring" nor do they contain investment advice.

16. Investors expressly acknowledge receipt of an investment statement (and at their option a prospectus) where one has been issued from their financial adviser for each product that they select, including the superannuation scheme (if made available).

The Documentation

17. The current documentation is:

   (i) The Administration Agreement, being an agreement between the Manager and the Administrator (dated 6 July 1999 and assigned to Aegis Limited on 1 May 2001).

   (ii) The Custodian Agreement, being an agreement between the Manager and the Custodian (dated 24 December 1998).

   (iii) The Cash Holding Account Agreement between the Custodian and the Manager (dated 24 December 1998).

   (iv) The IID (and the Investment Authority given under the IID by the Investor) between the Manager, the Investor and the Investor's financial adviser (dated May 2002).

   (v) The Delegation Agreement between the Manager and the Custodian (dated 6 July 1999).

18. The Investor undertakes in the IID to be bound by the Custodian Agreement.

19. The Custodian agrees to provide the following services to Investors under the Custodian Agreement on instruction from the Manager as their agent:

    - subscribe for and hold the investments as bare trustee and nominee;
    - arrange sale or realisation of investments in whole or in part;
    - process distributions and other benefits arising from holdings;
    - execute proxies and voting rights relating to investments;
    - attend to all non discretionary administrative functions in dealing with the investments and rights that flow from them;
    - attend to tax compliance obligations of the Service;
    - establish and operating a Cash Holding Account; receive funds and deposits to the Cash Holding Account.

20. The Custodian establishes the trust account under the Cash Holding Account Agreement. Pursuant to that Agreement, the management and administration of the trust account is delegated to the Manager who performs the following functions:

    - receipt of Investors' monies and crediting them to the account;
    - making payments out of the account for purposes set out in the Agreement;
    - keeping accounting records of all transactions;
    - keeping separate accounts and records for each Investor for tax and tracing purposes;
    - signing cheques and transferring money

21. Under the Delegation Agreement between the Custodian and the Manager, the Custodian delegates to the Manager the following activities:

    - arranging the acquisition, change and disposal of investments;
    - holding title to investments in safe custody;
    - record keeping of Investors and their portfolios;
    - transaction recording by Investor;
    - reconciliation of records and accounts of the Custodian;
    - allocating and processing distributions to Investors' accounts and then in accordance with their instructions;
    - providing monthly compliance reports to the Custodian;
    - execution of proxies and voting rights flowing from investments;
    - attending to non-discretionary functions;
    - complying with taxation obligations in respect of the Service;
    - complying with its delegation obligations;
    - procuring a computer system capable of meeting the needs of the Service and all attendant clerical procedures as well as enabling access to records;
    - ensuring Investors' instructions are properly completed and duly authorised;
    - promptly processing instructions of Investors;
    - ensuring compliance of the Service with all applicable law.

22. As stated, the Manager is given express power to delegate all these obligations to the Administrator and Investors acknowledge and authorise that delegation in the IID.

23. Under the Administration Agreement (and acting pursuant to appointment by and delegation from the Manager as the Investors' agent) the Administrator agrees to provide the following services to Investors, the Manager and the Custodian (as the case may be):

    - arranging the acquisition, change and disposal of investments as its prime task; and as necessary incidents of that:
    - maintaining a computer system that will deliver the Service requirements;
    - ensuring Investors' instructions are properly completed and duly authorised;
    - establishing and maintaining separate Investor accounts to maintain investment tracing;
    - promptly processing instructions in accordance with the relevant IID and Investor Authorisation;
    - ensuring the Service administration complies with relevant law;
    - ensuring maintenance of records at Investor level (as specified in a detailed schedule*) and in respect of payments received from Investors;
    - monthly reports in agreed form to the Custodian and Manager;
    - receipting all monies credited to the Cash Holding Account and making payments out of that account for investments, to the Investor, for taxes, bank charges, fees, disbursements and other payments required at law;

- record keeping all transactions processed through the Cash Holding Account at Investor level;
- signing cheques and attending to banking requirements;
- additional services identified in the schedule* include:
  - responding to advisor queries;
  - preparation of reports to Investors 6 monthly and for tax purposes;
  - providing various templates;
  - following up with financial advisors when documentation is incomplete;
  - administering Investors' portfolios including managing liquidity, reconciliation of the Cash Holding Account and obtaining information from fund managers;
  - liaising with auditors.

24. Investors in products other than the superannuation fund first pay their moneys into a Cash Holding Account of the Custodian run by the Administrator who records and identifies by Investor all deposits, investments, income, withdrawals, expenses, and tax information. From this account the Administrator as delegate of the Manager disperses funds into Investors' various investment options. Interest and dividend income as well as sale proceeds and further investment moneys are all received into the Cash Holding Account which acts as a general clearing account for all funds received from or to be disbursed to Investors. Investors are required to maintain a minimum credit balance in this account.

25. Investors in the superannuation scheme (if made available) will become direct members of the scheme, and their investment choices are activated as members of the scheme.

26. Taking into account the effect of delegations, the essence of the Agreements can be summarised as follows:

    (i) The Manager provides the entire facility and arranges for investments to be made, changed, or sold by instructing the Custodian as the Investors' agent.

    (ii) The Custodian holds title to the investments and the Cash Holding Account as bare trustee for each Investor.

    (iii) The Administrator makes, changes or sells the investments, pays and collects the resulting cash flows and attends to all consequential administration, processing, record keeping and reporting requirements of the Service.

Fees

27. The Manager will pay the Administrator fees at an agreed rate based on the value of investments in the Service at month end. An initial up-front fee was also paid to the Administrator to allow it to establish systems development and configuration and establish administration systems and templates to enable it to carry out the services required under the Agreements.

28. The Manager and the Administrator are associated parties being wholly owned subsidiaries of Sovereign. However, they are contracting with each other on an arm's-length basis and their businesses are run separately in different locations.

29. Investors pay a number of different fees when using the Service and these are identified in the IID. The services rendered in respect of each fee charged in relation to the Service are:

    (i) Investment/Contribution fee (payable to the Manager):
    - Processing applications by Investors.
    - Arranging the acquisition of investments.
    - Providing four switches per annum.
    - Providing documentation.

    (ii) Administration fee (payable to the Manager):
    - Keeping records of Investors and their portfolios.
    - Investor level transaction recording and tracing.
    - Maintaining a computer system that delivers the service requirements.
    - Allocating and processing distributions for Investors.
    - Reporting to Investors and preparation of Investor tax statements.
    - Executing proxies and voting rights of the Custodian.
    - Reporting to the Custodian.
    - Maintaining Investors' Cash Holding Accounts.
    - Responding to Investor queries about the Service.

(iii) Custodian fee (payable to the Custodian):

- Provision by the Custodian of Custodian services as holder of securities (though the tasks of subscribing, safe custody and withdrawing from investments are in fact delegated to the Administrator, the Custodian stands behind the Administrator as security holder for the investments) and acting as bare trustee.

(iv) Switching fee (payable to the Manager):

- Processing investment switches.

(v) Expense fee (payable to the Manager or Custodian in proportion to expenses incurred by each party):

- Printing and distributing Investor information documentation, investment statements and prospectuses, excluding establishment expenses of the Service.
- Audit, accounting and legal compliance services, excluding establishment expenses of the Service.

(vi) Regular withdrawal fee (payable to the Manager):

- Direct crediting money to accounts for singular/regular withdrawals.

(vii) Withdrawal fee (payable to the Manager):

- Processing withdrawal applications.

(viii) Adviser service fee (payable to Investor's advisor):

- Supplying financial planning and portfolio monitoring services.

(ix) Fund manager fee (payable to the Investor's fund manager):

- On-going charging for management (investment and administration) of GIFs or unit trusts (where charged to the Investor by the Fund Manager or trustee) for:
  - Annual management costs.
  - On-going monitoring of the investments.
  - Purchasing and selling investments.
  - Maintaining computer system to record investments.
  - Receiving and processing distributions.
  - Reporting to Investors.
  - Reporting to trustee.
  - Responding to customer queries.
  - Acting as trustee.
  - Use of the trustee/statutory supervisor's name as security holder. (The tasks of subscribing, safe custody and withdrawing from the investments are delegated to the Manager, leaving the trustee/statutory supervisor merely lending his or her name as security holder for the investment.)
  - Maintaining register of Investors.
  - Accounting and legal fees excluding establishment expenses of the fund.
  - Preparing and distributing cheques and statements.
  - Printing stationery.
  - Cost of holding Investor meetings.
  - Any other miscellaneous cost incurred in managing the funds.
  - Issuing expenses.

(x) Brokerage fee (payable to Investor's broker):

- Brokerage paid to broker to arrange entry into listed trusts.
- Brokerage paid to broker to arrange exit from listed trusts.

(xi) Insurance cover (payable to the Administrator):

- The supply of life insurance cover.
- The supply of non-life insurance cover.

30. The administration fee, payable by Investors to the Manager, covers the fees payable by the Manager to the Administrator.

31. The way in which each fee is calculated is set out in the Agreements. The rates and methods used to calculate such fees may be varied from time to time. However, any type of fee not described above, charged in the future, will not be subject to this Ruling.

32. The adviser service fee, the fund manager fee and the brokerage fee are not charged by the Manager, Custodian or the Administrator of the Service. Investors through the Service pay these fees for services supplied to them through the Service by their adviser, fund managers and brokers. All other fees listed in paragraph 29 of the Arrangement are charged by the Manager, Administrator or Custodian.

33. In respect of the fees charged by fund managers, a separate contribution fee is ordinarily charged for set-up costs. Due to the size of the investment through the Service, the fund managers have waived this fee for Investors through the Service.

Assumption made by the Commissioner

This Ruling is made subject to the following assumption:

i) The Investors are resident in New Zealand under sections OE 1 and OE 2.

Conditions stipulated by the Commissioner

This Ruling is made subject to the following conditions:

a) The documents provided to Rulings on 28 May 2002, 30 May 2002 and 28 June 2002, being the:

- IID (dated May 2002),
- Administration Agreement (dated 6 July 1999),
- Deed of Assignment of the Administration Agreement (dated 1 May 2001),
- Delegation Agreement (dated 6 July 1999),
- Custodian Agreement (dated 24 December 1998), and
- Cash Holding Account Agreement (dated 24 December 1998),

are the same as those provided on 16 March 1999 and 23 June 1999 and are copies of the current agreements/documents that apply to the Arrangement.

b) Any fee that is charged in relation to the Service is on an arm's length, stand alone commercial basis so as only to reflect the relevant services listed and will not be directly or indirectly related to or affected by any other services or fees.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any assumption or condition stated above, the Taxation Laws apply to the Arrangement as follows:

- The Service, promoted to the public by SSNZL, as the Manager and the Investors' agent, Aegis Limited as the Administrator, and SNL as the Custodian of the Service pursuant to a bare trust, is not a "unit trust" as defined in section OB 1 and the Investors are not "unit holders" as also defined in section OB 1.
- As a consequence of Investors having direct ownership of their investment choices, the income from investments made by the Investors through the Service and held by the Custodian, will be gross income of the relevant Investor under section BD 1, and shall not be gross income derived by the Manager, the Administrator or the Custodian.
- All the fees listed in the Arrangement that are paid by an Investor who is liable to be assessed pursuant to sections CD 3, CD 4, or CD 5 in respect of gross income received from investments through the Service, are deductible to that Investor under section BD 2, except to the extent that the fees are initial planning fees incurred prior to the commencement of the Investor's investment activity, and subject to the qualification that this Ruling does not consider the deduction of fees payable by Investors where the fees are:
  - in relation to investments that are a "financial arrangement" as defined in sections EH 14 or EH 22.
  - in relation to the arrangement of insurance cover.
- The following fees are not deductible under section BD 2 to an Investor who is not liable to be assessed pursuant to sections CD 3, CD 4, or CD 5 in respect of gross income received from investments through the Service:

  a) The investment/contribution fee where the Investor has no established portfolio or there is a fundamental change in investment strategy.

  b) The brokerage fee where the Investor has no established portfolio or there is a fundamental change in investment strategy.

  c) The switching fee except where no additional funds are being invested and no fundamental change in investment strategy is implemented.

  d) The adviser service fee to the extent that it relates to planning services where the Investor has no established portfolio or there is a fundamental change in investment strategy.

  This Ruling does not consider the deduction of fees payable by Investors in relation to investments that are a "financial arrangement" as defined in sections EH 14 or EH 22.
- The following fees paid by an Investor who is not liable to be assessed pursuant to sections CD 3, CD 4, or CD 5 in respect of gross income received from investments through the Service, are deductible to that Investor under section BD 2:

  a) The administration fee;

  b) The custodian fee;

  c) The switching fee, where no additional funds are being invested and no fundamental change in investment strategy is implemented;

  d) The expense fee;

  e) The regular withdrawal fee;

  f) The fund manager fee;

g) The adviser service fee to the extent that it relates to monitoring services;

h) The adviser service fee to the extent that it relates to planning services where the Investor has an established portfolio and there has been no fundamental change in investment strategy;

i) The investment/contribution fee where the Investor has an established portfolio and there has been no fundamental change in investment strategy;

j) The brokerage fee where the Investor has an established portfolio and there has been no fundamental change in investment strategy;

k) The withdrawal fee;

except to the extent that the above fees are not incurred in gaining or producing gross income.

Further, this Ruling does not consider the deduction of fees payable by Investors in relation to investments that are a "financial arrangement" as defined in sections EH 14 or EH 22.

The period or income year for which this Ruling applies

This Ruling will apply for the period 1 July 2002 until 31 March 2005.

This Ruling is signed by me on the 16th day of August 2002.

Martin Smith

General Manager (Adjudication & Rulings)

PRODUCT RULING – BR PRD02/13

This is a product ruling made under section 91F of the Tax Administration Act 1994.

Name of the Person who applied for the Ruling

This Ruling has been applied for by Sovereign Assurance Company Limited.

Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CB 9(f) and BD 1(1).

The Arrangement to which this Ruling applies

The Arrangement is the payment of the Family Protection Benefit (the "FPB") by Sovereign Assurance Company Limited ("Sovereign") to policyholders under the terms of the TotalCare Policy, when a policyholder has elected to:

- receive the FPB when he or she enters the contract;
- convert their lump sum benefit to the FPB, when the FPB becomes payable;
- receive payment of a lump sum when he or she elects to convert the FPB, when it becomes payable, to a lump sum.

Further details of the Arrangement are set out in the paragraphs below:

1. Sovereign is a company incorporated in New Zealand which conducts the business of life insurance, superannuation and investment services.

2. The TotalCare Policy, including the FPB option, is documented pursuant to:

   (i) the main TotalCare Policy document; and

   (ii) the Appendix relating to the FPB.

3. Under the TotalCare Policy, Sovereign will usually pay to the policyholder a lump sum benefit, as specified in the schedule to the TotalCare Policy, upon the death of the person whose life is insured (who may be a person other than the policyholder).

4. The TotalCare Policy also permits there to be more than one person whose life is insured, and if so then Sovereign will pay a lump sum benefit to the policyholder upon the death of each such life insured.

5. The FPB is an optional benefit available to policyholders of the TotalCare Policy. Under this option, the policyholder will receive a monthly benefit that commences to be payable on the death of the life insured, instead of a lump sum.

6. Policyholders can take the monthly payments in addition to a lump sum or can choose to receive monthly payments instead of a lump sum (though the monthly benefits are not linked to the lump sum payments). In addition, at the time of claim, the FPB can itself be converted to a lump sum, or the lump sum converted to the FPB.

7. When the FPB is converted to the lump sum payment, it is calculated by multiplying the dollar value of the regular FPB payments due by a factor based on the Government Bond interest rate for the relevant term. Conversion from a monthly benefit to a lump sum benefit will only be done for the most extenuating of reasons, and only at claim time. A calculation would be required to align premiums and term remaining on the FPB.

8. When a policyholder took both the lump sum and the FPB, Sovereign would deal with it in the application, probably by issuing two policies, one for the lump sum and one for the FPB. While technically there would be two premiums, the premiums would be aggregated in to one single monthly (or quarterly etc) premium payment and allocated appropriately in Sovereign's accounting system.

9. Two lives can be insured under the FPB, and if so then Sovereign will pay monthly benefits to the policyholder commencing on the death of each such life insured. The amount of the monthly benefit payable on the death of each life insured will be the monthly benefit applicable to that life.

10. Monthly benefits are payable under the FPB from the date of death of a life insured for a term selected by the policyholder at the time the TotalCare Policy is taken out. The term can be for a minimum of 10 years from the date of the death of the life insured up to a maximum of 30 years from the date of the death of the life insured, or until when the life insured would have reached 65 years of age, or to such other age as is specified in the application form.

11. For example, where a policyholder elects to take out a policy for the period of 20 years on a life insured who is then 40 years old, and that life insured later dies at 50 years old, the TotalCare Policy will be paid out for the 20 years following the date of the death of the life insured (ie until the life insured would have reached age 70).

12. Alternatively, if the policyholder took out a policy on a life insured who was 40 years old and elected that the TotalCare Policy be paid until the life insured reaches 65 years old and the life insured later dies at age 50, then the TotalCare Policy will be paid out for 15 years (ie until the life insured would have reached age 65).

13. The TotalCare Policy defines the following key terms:

    To Age The age chosen when you selected a *to age* benefit, as shown in *the schedule*. Any benefit will be payable until the life assured would have attained that age.

    Fixed Term The period of years, from the death of the life assured, chosen when you selected a *fixed term* benefit. This will be shown in *the schedule*

14. In addition to the FPB monthly payment, a once only bereavement support benefit payment of $5,000 (or the amount of the FPB if less) is also payable.

15. As well as electing the term of the TotalCare Policy, the policyholder also elects the amount of the monthly benefits to be paid under the FPB.

16. The dollar value of the benefit received under the FPB can be level ("Level Cover"), or linked to the CPI ("Inflation Cover"). It is also possible to have a steady increase in cover regardless of the CPI ("Growth Cover").

17. Under the Level Cover, the policyholder determines the monthly benefit to be paid on the death of the life insured. For example, if a policyholder chose a monthly benefit of $500 for a term of 10 years, then the payments will remain at that level throughout the whole term.

18. Under the Inflation Cover, which is CPI linked cover, the $500 will be adjusted annually in line with the CPI as follows. Where the increase in the CPI is ten percent or less, the level of cover will increase on each anniversary of the commencement date of the TotalCare Policy by the same percentage as the percentage increase in the CPI for the proceeding year ending 30 September.

19. However, where the increase in the CPI is more than ten percent, the policyholder may apply in writing to Sovereign for the full increase. The full increase will be granted if the life insured is able to satisfy Sovereign that he or she is in good health. If the policyholder does not apply in writing, the increase will be limited to ten percent per annum.

20. If the CPI falls in any year, the CPI linked benefit levels will not change.

21. The policyholder must write to Sovereign if he or she does not want the level of cover under the CPI adjusted FPB to be increased for a particular year. If this is done for two successive years, then the policyholder loses the right to have the level of cover automatically CPI linked in the future.

22. Under the Growth Cover the level cover under the relevant benefits will increase on each anniversary date by 5%.

23. The FPB also allows the policyholder to request an increase in the monthly benefit payable for the life insured on each occasion that the life insured has a child, by birth or adoption, with a maximum of three requests. Such a request will be granted as from the date Sovereign receives a written request, provided that nothing has happened prior to that date which would entitle a claim to be made under the TotalCare Policy in respect of the life insured (ie the life insured must still be living). No evidence relating to the health of the insured person is required to process such a request.

24. Details of the FPB, including the dollar value of the benefit payable and the names of the life or lives insured, are shown in the TotalCare Policy schedule.

25. The policyholder may assign their TotalCare Policy at any time by completing the memorandum of transfer printed at the back of the TotalCare Policy document, but to be valid the assignment must be registered with Sovereign. More than one person can own or take an assignment of the TotalCare Policy; however a trust or trustee cannot own the TotalCare Policy.

26. Sovereign will pay all benefits under the TotalCare Policy to the policyholder or their estate. The TotalCare Policy has no surrender value or cash value if it is cancelled.

27. The reference in part 5 of the TotalCare document which states "Sovereign may also request you undergo further medical examinations throughout the life of the claim" does not relate to provision of lump sum payments, or to the FPB, but relates to disability insurance and therefore does not require the policyholder (being the beneficiary under the policy) to undergo further medical examinations during the life of the claim.

28. The TotalCare Policy also provides benefits payable other than on the death of the life insured, such as on disability or critical illness. However, this Ruling only applies to the lump sum benefit and to the FPB, as outlined above.

Condition stipulated by the Commissioner

This Ruling is made subject to the following condition:

> The lump sum and FPB benefits are treated by Sovereign as being the provision of life insurance and are taken into account in the policyholder base calculations under section CM 15.

How the Taxation Laws apply to the Arrangement

Subject in all respects to any assumption or condition stated above, the Taxation Laws apply to the Arrangement as follows:

- Section CB 9(f) applies to the FPB with the effect that the monthly benefit paid pursuant to the FPB is exempt income;
- If Sovereign allows a policyholder at the point of making a claim to convert the FPB to a lump sum payment, the lump sum payment would not be part of the policyholder's gross income under section BD 1(1);
- If Sovereign allows a policyholder at the point of making a claim to convert the lump sum payment otherwise payable, to the FPB, the monthly benefits paid would not be part of the policyholder's gross income under section BD 1(1) because section CB 9(f) would apply to exempt the payments from income tax.

The period or income year for which this Ruling applies

This Ruling will apply for the period 1 August 2002 to 1 August 2005.

This Ruling is signed by me on the 27th day of August 2002.

John Mora

Assistant General Manager (Adjudication & Rulings)

SUBSIDISED TRANSPORT PROVIDED BY EMPLOYERS TO EMPLOYEES – VALUE FOR FRINGE BENEFIT TAX PURPOSES

PUBLIC RULING – BR PUB02/01

Note (not part of ruling): This ruling is essentially the same as public ruling BR Pub 99/2 which was published in *TIB* Volume 11, No. 5 (May/June 1999). Its period of application is from 1 July 2002 to 1 July 2007. Some formatting and other minor changes have been made. BR Pub 99/2 applied up until 30 June 2002.

This is a public ruling made under section 91D of the Tax Administration Act 1994.

Taxation Laws

All legislative references are to the Income Tax Act 1994 unless otherwise stated.

This Ruling applies in respect of sections CI 1, CI 2(1), CI 3(6), CI 4(1), CI 4(4), and the definition of "subsidised transport" in section OB 1.

The Arrangement to which this Ruling applies

The Arrangement is the provision of:

- Transportation or entitlement to transportation to an employee by the employer of that employee, where that employer carries on a business that consists of or includes transportation of the public; or
- Transportation or entitlement to transportation to an employee by a person with whom the employer of that employee has entered into an arrangement for the provision of that transportation or entitlement to transportation, where that employer carries on a business that consists of or includes transportation of the public.

How the Taxation Laws apply to the Arrangement

The Taxation Laws apply to the Arrangement as follows:

- Where transportation or entitlement to transportation is provided by the employer to an employee, the value of the benefit for fringe benefit purposes is 25% of the highest amount charged by the employer to the public for transportation or entitlement to transportation of the same class, extent, and occasion.
- Where transportation or entitlement to transportation is provided to an employee by a third party with whom the employer has entered into an arrangement for that benefit to be so provided or granted to the employee, the value of the benefit for fringe benefit purposes is the greater of:
  - 25% of the highest amount charged by the third party to the public for transportation or entitlement to transportation of the same class, extent, and occasion; or
  - The amount that the employer is so liable to pay or has so paid to the third party for the benefit being provided by the third party.

In the definition of "subsidised transport" in section OB 1, "class" refers to the classes of transportation available, such as first, business, or economy class; "extent" refers to transportation with the same departure and destination points; and "occasion" refers to the time of carriage.

The period for which this Ruling applies

This Ruling will apply for the period 1 July 2002 to 1 July 2007.

This Ruling is signed by me on the 13th day of September 2002.

Martin Smith

General Manager (Adjudication & Rulings)

COMMENTARY ON PUBLIC RULING BR PUB 02/01

This commentary is not a legally binding statement, but is intended to provide assistance in understanding and applying the conclusions reached in Public Ruling BR Pub 02/01 ("the Ruling").

The subject matter covered in the Ruling was previously dealt with in BR Pub 99/2, which applied up until 30 June 2002.

In this commentary, the terms "transport" and "transportation" include both transportation and entitlement to transportation.

Background

Employers who are in the business of providing transportation to the public may provide transportation to their staff, either free or at a price lower than that paid by the public. These employers may also enter into arrangements with third parties to provide the employers' staff with either free transportation or transportation at a price lower than that paid by the public.

If the provision of this transportation falls within the definition of "subsidised transport", it is a fringe benefit. The employer will be liable to pay fringe benefit tax in accordance with the FBT rules.

This Ruling applies where an employer, who carries on a business that consists of or includes transportation of the public, provides transportation to an employee of that employer, or enters into an arrangement with another person for transportation to be provided or granted by that person to an employee of the employer.

Legislation

Section CI 1 states:

> In the FBT rules, "fringe benefit", in relation to an employee and to any quarter or (where fringe benefit tax is payable on an income year basis under section ND 14) income year, means any benefit that consists of—
>
> …
>
> (d) Any subsidised transport:
>
> …
>
> (h) Any benefit of any other kind whatever, received or enjoyed by the employee in the quarter or (where fringe benefit tax is payable on an income year basis under section ND 14) income year, —
>
> being, as the case may be, private use or enjoyment, availability for private use or enjoyment, a loan, subsidised transport, a contribution to a fund referred to in paragraph (e), a specified insurance premium or a contribution to an insurance fund of a friendly society, a contribution to a superannuation scheme, or a benefit that is used, enjoyed, or received, whether directly or indirectly, in relation to, in the course of, or by virtue of the employment of the employee (whether that employment will occur, is occurring, or has occurred) and which is provided or granted by the employer of the employee; but does not include …

"Subsidised transport" is defined in section OB 1:

> **"Subsidised transport"**, in the FBT rules, means the provision, in any quarter or (where fringe benefit tax is payable on an income year basis under section ND 14) income year, by an employer, being a person who carries on a business that consists of or includes the transportation, for hire or reward, of persons who are members of the general public, to an employee of the employer of carriage or entitlement to carriage in the course of the transportation (not being transportation in a motor vehicle) where the amount (if any) paid by the employee of the employer in respect of the carriage or entitlement to carriage is less than the amount that is the highest amount charged, in the quarter or (where fringe benefit tax is payable on an income year basis under section ND 14) income year in which the provision occurs, by the employer of the employee for the provision by that employer, to persons who are members of the general public, of carriage or, as the case may be, entitlement to carriage that is of the same class and extent and on or for the same occasion or occasions as the class and extent and occasion or occasions of the carriage or the entitlement to carriage first mentioned in the definition.

The main valuation provision for subsidised transport is section CI 3(6), which states:

> For the purposes of the FBT rules, the value of any fringe benefit, being a benefit that consists of subsidised transport provided in any quarter or (where fringe benefit tax is payable on an income year basis under section ND 14) income year, by an employer, shall be the greater of—
>
> (a) 25% of the amount that, in relation to the subsidised transport so provided is, within the meaning of the definition of "subsidised transport", the highest amount charged by the employer:
>
> (b) The amount that the employer is so liable to pay or has so paid for the benefit being provided.

Section CI 4(1) states:

> Subject to this section, for the purposes of the FBT rules the taxable value of any fringe benefit provided by the employer of the employee in any quarter or (where fringe benefit tax is payable on an income year basis under section ND 14) in any income year shall be the value of that fringe benefit, reduced by—
>
> (a) The amount (if any) paid by the employee (or, where section GC 15(1) applies, by the associated person) in relation to the quarter or the income year for the receipt or enjoyment of that fringe benefit (not being an amount paid for the acquisition or improvement by the employee or associated person of an asset the receipt or enjoyment of which does not constitute the fringe benefit), except where the fringe benefit is an employment related loan:

Section CI 4(4) states:

> Where any fringe benefit of the kind referred to in paragraph (d) or paragraph (h) of the definition of "fringe benefit" in section CI 1 results from any expenditure incurred by an employer in respect of accommodation or transportation provided for or to an employee, and—
>
> (a) That expenditure is incurred in relation to travel undertaken by the employee to enable the employee to perform the duties of the employee's employment and is not incurred directly (whether wholly or in part) in respect of or in relation to—
>
> (i) The providing by the employer of the employee, to or for the employee, of any period of leave or vacation:
>
> (ii) The taking by the employee of any such period of leave or vacation:
>
> (iii) The providing of any transport for the purposes of the providing by the employer of the employee or the taking by the employee of any such period of leave or vacation; and
>
> (b) Had the fringe benefit not resulted from that expenditure, that expenditure would not have been less in amount,—
>
> the taxable value of that fringe benefit shall be nil.

In relation to benefits provided by third parties, section CI 2(1) states:

> For the purposes of the FBT rules, where a benefit is provided for or granted to an employee by a person with whom the employer of the employee has entered into an arrangement for that benefit to be so provided or granted, that benefit shall be deemed to be a benefit provided for or granted to the employee by the employer of the employee.

The definition of an "arrangement" is provided in section OB 1:

> **"Arrangement"** means any contract, agreement, plan or understanding (whether enforceable or unenforceable), including all steps and transactions by which it is carried into effect.

Application of the Legislation

The legislative provisions concerning the valuation of subsidised transport provided to employees are uncertain in their application. This Ruling sets out how the Commissioner will interpret these provisions.

Subsidised transport may be provided to an employee by the employee's employer or by a third party that has an arrangement with the employer to provide the employee with a benefit. These two situations are discussed separately in the next column.

Subsidised transport provided by the employer

The valuation of subsidised transport provided by an employer to an employee of that employer is provided for in section CI 3(6). This requires the value to be the greater of:

- 25% of the highest amount charged by the employer to the public for transportation of the same class, extent, and occasion; and
- the amount that the employer is liable to pay or has so paid for the benefit being provided.

Some commentaries on the value of subsidised transport refer to the cost to the employer of providing the transportation. This has caused confusion about whether costs incurred by an employer itself in providing transportation to an employee, such as the cost of food and fuel on an airline, should be taken into account in the second limb of section CI 3(6).

It is the Commissioner's view that section CI 3(6)(b) was inserted into the valuation provision to provide for the situation where the transport is provided by a third party and the employer pays more to the third party for the transport than 25% of the highest fare. Previously, the valuation provision referred only to 25% of the highest fare. The words "liable to pay or has so paid" in section CI 3(6)(b) do not refer to the cost to the employer. Paragraph (b) of section CI 3(6) only applies when an employer actually pays a third party to provide transportation for its employees. This situation is discussed below. If an employer provides transportation itself, there will generally be no amount that the employer is liable to pay, as the employer does not charge itself for the employee's transportation. While the employer may incur costs in providing the transportation, these are not to be taken into account in determining the value of the benefit.

In summary, it is the Commissioner's view that, where the transportation is provided by an employer to an employee of that employer, the value of the benefit is 25% of the highest fare charged to the public for transportation of the same class, extent, and occasion. The meaning to be given to the "highest fare", "class", "extent", and "occasion" is discussed below.

Subsidised transport provided by a third party that has an arrangement with the employer

The valuation of subsidised transport provided by a third party that has an arrangement with the employer to provide transport to an employee of that employer is also provided for in section CI 3(6). The interpretation of this section is problematic. This is in part due to the effect of section CI 2(1). Under section CI 2(1), if an employer has entered into an arrangement with another person to provide a benefit to an employee of that employer, the benefit is deemed to be provided by the employer.

Interpreting section CI 3(6) without reference to section CI 2(1), the benefit is valued as the greater of:

- 25% of the highest amount charged by the employer to the public for transportation of the same class, extent, and occasion; and
- the amount that the employer is liable to pay or has so paid for the benefit being provided.

If the employer offers the same transportation to the public that was arranged to be provided to the employee by the third party, an amount will be charged by the employer to the public for the same transportation. In this instance, the benefit will be the greater of the two options.

However, in the majority of cases, the employer will not provide the same transportation to the public as that arranged with the third party to be provided for the benefit of the employee. In this instance, there is no amount charged by the employer to the public for that transportation. The value of the benefit depends on the amount paid by the employer for the third party to provide the benefit. That is, it is only paragraph (b) of section CI 3(6) that is relevant.

However, section CI 2(1) affects this interpretation. This section deems a benefit provided to an employee by a person with whom the employer has an arrangement to be provided by the employer. Reading section CI 3(6) in conjunction with section CI 2(1) may require ascertaining the highest amount charged by the third party to the public and the amount that the third party is liable to pay or has so paid. That is, reading the word "employer" in section CI 3(6) as the third party. In other words, the highest amount charged by the employer refers to the highest amount charged by the third party, and the amount the employer is liable to pay or has so paid is a reference to the amount that the third party is liable to pay or has so paid.

On the same reasoning that an employer does not charge itself for providing transportation to its employees, the third party does not charge itself for providing transportation to employees of the employer. Accordingly, the value of the benefit depends on the amount charged by the third party to the public for transportation of the same class, extent, and occasion. Therefore, only paragraph (a) of section CI 3(6) is relevant here.

Alternatively, section CI 2(1) may not require reading the word "employer" in section CI 3(6) as the third party. If this approach is taken, section CI 3(6) would be interpreted in the same manner as above where no account was taken of section CI 2(1). That is, it is only paragraph (b) of section CI 3(6) that is relevant here.

The above interpretations, with and without reference to section CI 2(1), with the exception of the limited instance where the employer provides the same transportation service to the public as that provided to the employee by the third party, deny the requirement that the benefit be valued at the greater of two options of any meaning. However, combining the results from the two interpretations would give this requirement meaning in all circumstances. For example, the value of the benefit is the greater of:

- 25% of the highest amount charged by the third party to the public for transportation of the same class, extent, and occasion; and
- the amount that the employer is liable to pay or has so paid for the benefit being provided by the third party.

It is acknowledged that this approach, which interprets the word "employer" in a different manner under each limb of section CI 3(6), is inconsistent with a strict literal interpretation of the section. However, it is the Commissioner's view that, as the wording used in the legislation is less than ideal, this is the better approach where a benefit is provided by a third party.

In summary, it is the Commissioner's view that if transportation is provided to an employee by a third party with whom the employer has entered into an arrangement for that benefit to be provided or granted to the employee, the value of the benefit is the greater of:

- 25% of the highest fare charged by the third party (with whom the employer has an arrangement) to the public for transportation of the same class, extent, and occasion; and
- the price the employer paid or is liable to pay to the third party with whom the employer has an arrangement for the benefit being provided.

If the employer is not required to pay the third party with whom the employer has an arrangement, ie there is no price paid or payable by the employer for the benefit, the benefit is valued at 25% of the highest fare charged to the public for transportation of the same class, extent, and occasion. That is, only paragraph (a) of section CI 3(6) has relevance in this situation.

Other issues

Carriage and entitlement to carriage

A benefit arises on the provision to an employee of carriage or an entitlement to carriage. "Carriage" refers to the actual carriage on the particular transport, whereas "entitlement to carriage" refers to a specific right to carriage in the future. For example, a bus pass and an airline ticket are both entitlements to carriage. They both provide the employee with a future right to carriage.

If the employee is not entitled to claim a specific right to carriage, eg because certain conditions must be met before the entitlement to carriage arises, there is no entitlement to carriage unless those requirements are fulfilled. For example, if an employee is provided with a standby ticket which is subject to the limitation that carriage will only be provided if special loading requirements are met, no entitlement to carriage arises until these requirements have been fulfilled and the employee is *entitled* to the future right to carriage. The employee may then choose whether or not to use the entitlement to carriage. No benefit to the employee will arise if the special conditions that the ticket is subject to are not fulfilled as no entitlement to carriage or carriage will have arisen.

Special conditions that employees may be subject to can be distinguished from intrinsic limitations that everyone is subject to, such as there being available seats on a bus when using a bus pass, for example. An employee with a bus pass has an entitlement to carriage, even though he or she may not gain carriage on the first bus that comes along because it happens to be full. In other words, the availability of seats is not a special condition that must be fulfilled before the entitlement to carriage arises, but a limitation inherent in bus travel to which everyone is subject. This situation can be contrasted with a standby fare, where certain conditions must be fulfilled before the entitlement to carriage arises at all. That is, where an employee is told that he or she will receive an entitlement to carriage or carriage *provided* certain conditions are first met.

A further issue that has been raised in relation to entitlement to carriage is the suggestion that entitlement to carriage refers only to carriage with restrictions attached. The example was given of standby type restrictions. The Commissioner does not agree with this interpretation. As discussed in the preceding paragraphs, no entitlement to carriage will arise until any prerequisites to there being a specific right to future carriage have been satisfied. Special conditions or restrictions attached to a ticket are taken into account in the legislation by the use of a 25% basis for calculating the value of the benefit. This percentage reflects that employees may be subject to special standby type conditions, and therefore the value of the benefit should not be based on the full fare paid by the public.

The benefit to the employee arises on the provision of the carriage or entitlement to carriage. It is irrelevant if the entitlement to carriage is not subsequently used by the employee. A benefit does not arise when a carriage is taken pursuant to an entitlement to carriage. For example, say an employee has been provided with a bus pass that entitles her to "free" carriage. A member of the public who has purchased a similar pass will also be provided with carriage without having to pay any more. No benefit arises to the employee in this situation. As neither the employee nor the member of the public is charged for the actual carriage, the employee does not receive the carriage for an amount less than the amount charged to the public. The legislation does not tax the one benefit as an "entitlement to carriage" and then subsequently as "carriage".

Further, such carriage would not constitute a fringe benefit under section CI 1(h), being "[a]ny benefit of any other kind whatever, received or enjoyed by the employee … ", as carriage consequent upon an entitlement to carriage cannot be considered a **benefit** additional to the benefit conferred by the entitlement to carriage. Such carriage is not the provision of a new benefit, but rather the utilisation of a benefit already in existence.

A transportation benefit will not come within the "subsidised transport" definition if the same transportation is not sold to the public. This is because the employee would not be getting transportation at a lesser amount than is charged to the public. If the service is not sold to the public, there can be no charge to the public. However, such a benefit could come within section CI 1(h) as "any benefit of any other kind".

Highest fare charged

The definition of "subsidised transport" in section OB 1 refers to the provision of carriage or entitlement to carriage where:

> … the amount (if any) paid by the employee …is less than the amount that is the highest amount charged … by the employer … to … the general public, of carriage or … entitlement to carriage that is of the same class and extent and on or for the same occasion or occasions as the class and extent and occasion or occasions of the carriage or the entitlement to carriage …

In determining the value of the subsidised transport, section CI 3(6) then refers in paragraph (a) to:

> … 25% of the amount that, in relation to the subsidised transport so provided is, within the meaning of the definition of "subsidised transport", the highest amount charged by the employer …

Accordingly, section CI 3(6) requires that the value of the benefit be determined according to the highest amount charged to the public for carriage or entitlement to carriage that is of the same class, extent, and occasion. It is the Commissioner's view that "class" refers to the classes of travel available, such as first, business, or economy class, as that term is used in the travel industry.

The Commissioner does not accept that standby is a class of travel. To include standby fares as a class is to confuse "class" with fares. The special conditions attached to a standby fare have been compensated for by valuing the benefit at only 25% of the amount charged to the public. It was stated in the second reading of the Income Tax Amendment Bill (No 2) (NZPD Vol 461, 1985: 3722) that "The exemption effectively recognises that the true benefit enjoyed by the employee is somewhat less than the full value of the fare". Further, "extent" refers to travel with the same departure and destination points, and "occasion" refers to the time of carriage.

It is arguable that the relevant fare is the highest fare charged during the *quarter* for travel of the same class and extent. However, this interpretation denies the word "occasion" in the definition of "subsidised transport" of any meaning. Both "quarter" and "occasion" need to be given meaning. It is arguable that the inclusion of the reference to "quarter" means the highest fare charged in the quarter, as it was the intention of the legislation that the fare be the highest fare charged in the quarter. However, such an intent is not made clear in the legislation and this interpretation deprives "occasion or occasions" of any meaning.

It is submitted that the words "in the quarter" are a reference to the fact that FBT is charged on a quarterly basis. This view is supported by the fact that the words "in the quarter" are followed by "or (where fringe benefit tax is payable on an income year basis under section ND 14) income year". This appears to be a reference to the time that FBT is determined. The words "quarter or income year" are repeated throughout the legislation. Apart from the legislative intent, there is no evidence that "quarter or income year" have any greater meaning in this part than they do in any other part.

There are differing views on what "occasion" means. The ordinary meaning of "occasion" is the time of occurrence of a particular event or happening. In this situation the particular event or happening is the carriage. Therefore, it would be consistent with this meaning to use the highest fare charged on the actual transportation as that is the time that the carriage occurs.

It would not be consistent with the ordinary meaning of "occasion" to define it as the *day* that the actual travel takes place or as the *time* or *season* that the employee is allowed to travel. The better meaning to be given to "occasion or occasions" is the actual time of carriage. This is consistent with the ordinary meaning of "occasion".

In relation to an entitlement to carriage, the relevant occasion is the period of time for which the entitlement to carriage is valid. For example, if the provision is of a bus pass that entitles the employee to carriage on a bus for a period of a month, the relevant value of the benefit is the highest fare charged to the public for that bus pass in that month period. If the entitlement to carriage is a ticket for carriage in the future, such as an airline ticket, the relevant value is the highest fare charged to the public for that particular transportation.

The Commissioner is of the view that the legislation requires the highest fare charged for the actual transportation to be used in valuing the benefit. However, it has been submitted that in some circumstances it may be very difficult, if not impossible, to determine this figure. Accordingly, the Commissioner will accept the highest published market fare that the employer or third party, with whom the employer has entered into an arrangement for the provision of the benefit, ever charges for the service as evidence of the highest fare charged for transportation of the same class, extent, and occasion by the employer or third party. For example, this could be by reference to the Air Tariff Worldwide Fares published by the Air Tariff Publishing Company. However, it is acknowledged that at times there are fares that are published but never charged to the public. Such fares would not satisfy this criterion. The highest actual fare charged is to be used where available in preference to the highest published market fare.

Further, the Commissioner acknowledges the compliance costs involved in complying with the valuation provisions in relation to the occasion of the transportation. Accordingly, the Commissioner will allow the use of the highest publicised market fare charged, in the particular day, week, or month in which the occasion occurs, for transportation of the same class and extent as the value to be attributed to the benefit.

Arrangement

Section CI 2(1) refers to an employer that "has entered into an arrangement" with a third party concerning the provision of benefits by the third party to employees of the employer.

An "arrangement" is defined in broad terms in the Act to mean "any contract, agreement, plan, or understanding (whether enforceable or unenforceable) …". Case law indicates that an "arrangement" includes an understanding between two or more persons in relation to an agreed course of action that may not be enforceable in law. However, it must be an arrangement "for that benefit to be so provided or granted". An employer that merely allows a third party to place promotional materials offering travel in the staff-room, for example, would probably have entered into an arrangement with that third party, but it would not be an arrangement for the provision of a benefit to the employee. It is necessarily a question of fact and degree in any given situation. Any understanding between an employer and a third party to provide a benefit to employees of the employer could constitute an arrangement to which section CI 2(1) applies. If the arrangement provides for the third party to provide numerous and ongoing benefits to employees of the employer, the employer would need a system in place to ensure that it is aware of exactly what benefits are being provided to its employees.

Employee contributions

Under section CI 4(1), if an employee pays an amount for the receipt or enjoyment of subsidised transport provided by that employee's employer, the value of the benefit provided is reduced by that amount. That is, once the benefit is valued according to section CI 3(6), any amount paid by the employee for that benefit is to be deducted from that amount. This is illustrated in the examples below.

Examples

Example 1

An airline employee takes an overseas holiday on his employer's airline. He travels economy class. The highest price charged to the public for a ticket on that flight in economy class, with the same departure and destination points, is $650. The employee pays $200.

Highest fare charged to the public for the same flight	$650
25% of this highest fare	$162.50

As the employee pays more than the value of the benefit ($200 compared to $162.50), the taxable value of the benefit is nil and no FBT is payable by the employer.

Example 2

An airline employee takes a holiday overseas on an airline that has an agreement with her employer. The highest price charged to the public for travel of the same class, extent, and occasion is $650. Under the agreement the employee's airline pays $325 to the airline that carries the employee.

Highest fare charged to the public for the same flight	$650
25% of this highest fare	$162.50
Price paid or payable by the employer	$325

The price paid by the employer is greater than 25% of the highest fare charged for the flight. As the employee does not make any contribution, the taxable value of the benefit is $325.

If the employee pays the employer $200, that amount would be deducted from $325 and the taxable value of the benefit would be $125.

Expenditure in relation to travel undertaken in performance of employee's duties

Section CI 4(4) applies in relation to fringe benefits of the kinds referred to in CI 1(d) (subsidised transport) and CI 1(h) (any benefit of any other kind whatever, received or enjoyed by the employee), which result from expenditure incurred in respect of accommodation or transportation provided for or to an employee.

Where the Commissioner is satisfied that: (a) the expenditure is incurred in relation to travel undertaken by the employee in the performance of employment duties, and is not incurred directly (whether wholly or in part) in respect of or in relation to the provision or taking of leave or vacation, and (b) had the fringe benefit not resulted from the expenditure, the expenditure would not have been less in amount, section CI 4(4) provides that the taxable value of the fringe benefit will be nil.

For instance, travel expenses arising from a work trip may fall within the definition of "subsidised transport" and constitute a fringe benefit, but that benefit will not have a taxable value, because the expenditure would have been incurred in relation to travel undertaken in the performance of the employee's employment duties, and had the fringe benefit not resulted from the expenditure, that expenditure would not have been less in amount. Another example of how section CI 4(4) may operate is where an employee takes leave in conjunction with a work trip For example, an airline employee is flown from Wellington to Auckland to attend a work conference, and subsequent to the conference takes a week of annual leave in Auckland. As the expenditure by the employer was not incurred directly in respect of or in relation to the leave taken by the employee, and the expenditure would not have been less had the fringe benefit not resulted from it (ie presuming there were no seasonal price variations resulting in an increased cost in flying the employee back to Wellington a week after the conference finished), the value of the fringe benefit would be nil.

INTERPRETATION STATEMENT

This section of the *Tax Information Bulletin* contains interpretation statements issued by the Commissioner of Inland Revenue.

These statements set out the Commissioner's view on how the law applies to a particular set of circumstances when it is either not possible or not appropriate to issue a binding public ruling.

In most cases Inland Revenue will assess taxpayers in line with the following interpretation statements. However, our statutory duty is to make correct assessments, so we may not necessarily assess taxpayers on the basis of earlier advice if at the time of the assessment we consider that the earlier advice is not consistent with the law.

GST TREATMENT OF COURT AWARDS AND OUT OF COURT SETTLEMENTS

Unless otherwise stated, all references in this interpretation statement are to the Goods and Services Tax Act 1985 ("GSTA").

Summary

Out of court settlements or court awards might arise as a result of a dispute regarding an earlier supply, and in some cases a new supply might arise such as a transfer of property in return for payment where ownership is in dispute. For GST to be payable upon a payment arising from a court award or out of court settlement the payment must be consideration for a supply, or an adjustment to consideration for an earlier supply. In order for a supply to be subject to GST, the Commissioner considers that some element of reciprocity should be present to link a consideration to that supply.

Whilst the definition of "consideration" in section 2 of the GSTA is broad, the Courts have noted that it does not dispense with the requirement that there is a linkage between the consideration and the supply. In *New Zealand Refining v CIR* (1997) 18 NZTC 13,187, Blanchard J stated that despite the wide definition of consideration, there was a "practical necessity for a sufficient connection between the payment and the supply." (p 13,193)

In order for a "sufficient connection" to be present, both the High Court and Court of Appeal have in recent cases emphasised the specific need for an element of "reciprocity" between parties in order for a consideration to be linked to a supply. In *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147 (HC), Gallen J stated that whilst the statutory definition of consideration in the GSTA was indeed broad, the definition did not remove the requirement for an element of reciprocity within a transaction for a 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. (p 13,150)

In *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 there was a stronger emphasis upon reciprocity. Blanchard J stated that: "the payments were not made pursuant to any covenant by the Crown involving reciprocal obligations enforceable at law". He then concluded that the Trust in this case was not making a supply (to the Crown or third parties) as there was "an absence of reciprocity in the relationship" (at p15,079). Tipping J agreed with the judgment of Blanchard J, and additionally stated:

> 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. It is not apt to catch the fulfilment by trustees of their duties as such, albeit that such fulfilment will necessarily, in a direct or indirect way, be of benefit to the beneficiaries and the settlor. (p 15,081)

Subsequent cases (discussed in the item below) have also used a framework based on elements of reciprocity to identify a nexus between a supply and a consideration.

In order for a payment to be for a supply pursuant to section 8 of the GSTA, an identifiable supply must have been made (or agreed to) by one party and there must be an element of reciprocity in the obligation by another party to make payment for that supply. Tenuous and unrealistic connections are not sufficient to evidence the link required for a payment to be consideration for a supply. Reciprocity is evidenced by legally enforceable obligations between the payer and supplier which may arise as a result of the agreement of the parties, or be imposed between the parties by a court. Obligations may be legally enforceable via statute, common law or in equity. A payment will therefore only be consideration for a supply where such an element of reciprocity exists, and the payment is for the supply or is an adjustment to the consideration for a previous supply. Payments that *relate* to a supply, but are not *for* that supply will not be "consideration".

- If the payment is consideration for a supply, the supplier will be liable to GST if the supply was made in the course or furtherance of a taxable activity.
- If the payment is a variation of the previously agreed consideration and within the scope of section 25 GSTA, a GST adjustment may need to be made by the relevant parties.
- If a global award is made by the court and part of the award is payment for a taxable supply, apportionment must be undertaken pursuant to section 10(18) GSTA and the amount properly attributable to the taxable supply ascertained.
- If the payment is within the scope of section 20A(4) of the GSTA (being the recovery of a sum expended in determining liability to tax as defined in section 20A(2)) the Act operates to deem the payment to be in return for taxable supplies, and output tax is payable.

Background

The 1990 TIB item

An interpretation statement regarding the GST treatment of damages and out of court settlements was published in the Tax Information Bulletin (TIB) Vol 1, No 11, June 1990. This item stated that whether sums paid in settlement of a claim were GST inclusive was determined by the nature of the award or the underlying transaction.

The item raised the following questions and proposed the relevant treatment to be applied:

- Where there is an out of Court settlement and all or part of the settlement can be connected back to the original taxable supplies, does GST apply? If so, how is the GST calculated?

  The proportion of the settlement connected to the supply of the original taxable supplies would be subject to GST.

- Where there is an unscheduled global payment in full and final settlement of prior legal proceedings it may not be possible to connect this back to the original supply. Does GST still apply?

  Details of the facts of each particular case would need to be examined to ascertain whether a GST liability exists. If it is established that part of the payment relates to the original supply an apportionment may be required if the amount relating to the supply is not specified.

- Where there were no taxable supplies in the first instance, does GST apply to the settlement?

  No. There must be a supply of goods or services before GST can apply.

The Commissioner decided to review the above item owing to the development of case law since the publication date. This statement replaces the item published in the TIB in June 1990.

Legislation

Under section 8 of the GSTA GST is charged on supplies made by a registered person in the course or furtherance of their taxable activity:

> **8 Imposition of goods and services tax on supply**
>
> (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 12.5 percent on the supply (but not including an exempt supply) in New Zealand of goods and s ervices, on or after the 1st day of 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.

A taxable activity is one that is carried on "continuously or regularly" (section 6(1)(a)).

> **6 Meaning of term "taxable activity"**
>
> (1) For the purposes of this Act, the term taxable activity means—
>
> (a) Any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such activity carried on in the form of a business, trade, manufacture, profession, vocation, association or club:

"Supply" is defined in section 5 of the Act as including "all forms of supply"

The definition of consideration is found in section 2 of the Act:

> **2 Interpretation**
>
> (1) In this Act, other than in section 12, unless the context otherwise requires,—
>
> **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:

Section 10(2) of the Act defines the "value of supply" and highlights a link between consideration and supply:

> Subject to this section, the value of the supply of goods and services shall be such amount as, with the addition of tax charged, is equal to the aggregate of,—
>
> (a) To the extent that the consideration for the supply is consideration in money, the amount of the money:

(b) To the extent that the consideration for the supply is not consideration in money, the open market value of the consideration.

Section 10(18) contemplates apportionment of a payment where it only partly relates to a taxable supply:

> Where a taxable supply is not the only matter to which a consideration relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.

Section 20A deals with GST incurred in determining liability to tax:

(2) Subject to this section, any goods and services acquired by the registered person in connection with—

(a) The calculation of the taxable income of the registered person for any income year:

(b) The calculation or determination of the goods and services tax payable by the registered person for any taxable period:

(c) The preparation, institution, or presentation of an objection or challenge to or an appeal against or in consequence of any determination or assessment made, in respect of the registered person, by the Commissioner under the provisions of the Tax Administration Act 1994 or the Goods and Services Tax Act 1985:

(d) Any contribution by the registered person towards the expenditure incurred by any other taxpayer or registered person, as the case may be, where—

(i) if the expenditure were incurred by the first-mentioned registered person, it would be an allowable deduction in calculating the taxable income of that person or allowable in the calculation or determination of any goods and services tax payable by that person; and

(ii) the first-mentioned registered person has objected to or challenged or appealed against an assessment or determination made, in relation to the matter by, the Commissioner under the provisions of the Income Tax Act 1976 or the Tax Administration Act 1994 or the Goods and Services Tax Act 1985,—

shall be deemed to be goods and services acquired by the registered person for the principle purpose of making taxable supplies; and the Commissioner shall allow that person to make a deduction under section 20(3) of this Act of the tax charged thereon.

(4) Any amount received by the registered person at any time, whether by way of reimbursement, award of the Court, recovery, or otherwise howsoever in respect of goods and services deemed under this section to be acquired by the registered person for the principal purpose of making taxable supplies, shall be deemed to be supplied by that registered person in the course of their taxable activity in the taxable period in which it is received.

Section 25 of the Act deals with credit and debit notes as they relate to adjustments to the nature or consideration for a supply:

(1) This section shall apply where, in relation to the supply of goods and services by any registered person,—

(a) That supply of goods and services has been cancelled; or

(aa) The nature of that supply of goods and services has been fundamentally varied or altered; or

(b) The previously agreed consideration for that supply of goods and services has been altered, whether due to the offer of a discount or otherwise; or

(c) The goods and services or part of those goods and services supplied

have been returned to the supplier,—

and the supplier has—

(d) Provided a tax invoice in relation to that supply and as a result of any one or more of the above events, the amount shown thereon as tax charged on that supply is incorrect; or

(e) Furnished a return in relation to the taxable period for which output tax on that supply is attributable and, as a result of any one or more of the above events, has accounted for an incorrect amount of output tax on that supply.

ANALYSIS OF GST LEGISLATION AND PRINCIPLES

When is a payment sufficiently connected to a supply

Section 8 of the GSTA provides that a tax is to be charged on the supply of goods and services (but not including an exempt supply) in New Zealand. The supply must be made for a consideration by a registered person in the course or furtherance of a taxable activity.

The need to identify the "supply"

"Supply" in the GSTA is stated to include "all forms of supply".

In order to determine whether a payment is "consideration" in the GST sense, there must be a supply of something for which the payment is consideration pursuant to section 2 of the Act. It follows that if there is no supply the payment can not b e consideration. The need to identify the supply was noted by the Court of Appeal in *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075. The *Chatham Islands* case involved a payment made by the Crown to a charitable trust that was established by the Crown to provide services and promote the wellbeing of Chatham Islands residents.

Tipping J said:

> While it is clear that the services do not have to be supplied to the person providing the consideration (as defined) for them, it is still necessary for there to be a supply of services within the proper meaning of the phrase. **Although services are defined as meaning anything which is not goods, it is still necessary for there to have been a supply of something.** (p 15,081) (emphasis added)

A similar comment was made in *NZ Refining Co v CIR* (1995) 17 NZTC 12,307 (HC*),* where it was considered whether a series of payments made by the Crown to the refinery pursuant to an agreement to release the Crown from an earlier undertaking were consideration for any supply by the refinery, either to the Crown or to third parties. In order to receive the payments the refinery had to be operational on the date of payment. If the refinery did not meet the condition of being operational the only recourse to the Crown was to withhold the payment.

Henry J said:

> **The tax is chargeable against payments which go to make up the value of an identifiable supply which has been made.** Payments which are received in the course of a taxable activity are not chargeable unless they also have that additional quality or character, which these do not. GST is a consumer tax on goods and services supplied, not an activity tax on producing goods and providing the means of supplying services. (p 12,314) (emphasis added)

Supply to third parties

Whilst it is necessary for there to have been a supply of something, the supply need not be made to the person who makes the payment. In *Turakina Maori Girls College Board of Trustees v CIR* (1993) 15 NZTC 10,032 (CA), the GST treatment of payments of school fees by parents of pupils to the proprietors of integrated state schools was analysed. McKay J, referring to the definition of supply, said:

> It is clear from this definition that the supply of any service for consideration is part of a "taxable activity" under sec 6, even though it is to a person other than the person who provides the consideration. (p 10,036)

When is a payment consideration for a supply?

GST is a tax on the supply of goods and services carried on in the course of a taxable activity. It is a transaction based tax: *CIR v Databank Systems Ltd* [1989] 1 NZLR 422. It is not a tax on receipts or turnover: *NZ Refining* (1997) 18 NZTC 13,187 at 13,193.

Accordingly, not all payments received by a registered person in the course of their taxable activity will be for supplies. As Blanchard J noted in *NZ Refining*:

> **There is a practical necessity for a sufficient connection between the payment and the supply**. The mechanics of the legislation will otherwise make it impossible to collect the GST. (p 13,193)

The Act requires there be consideration for a supply in order for GST to be imposed. Section 2 defines consideration as including any payment made, or any act or forbearance, whether voluntary or involuntary, and made "in respect of, in response to or for the inducement of a supply".

A strict contractual analysis does not need to be undertaken in order to link a payment to a supply as noted by McKay J in *Turakina*. Referring to the definition of consideration in the act, the judge said:

> It is clear from this definition that the supply of any service for consideration is part of a "taxable activity" under sec 6, even though it is to a person other than the person who provides the consideration. Likewise, the value of the supply is to be measured by the consideration, whether or not the consideration is provided by the person to whom the service is supplied. **It is not necessary that there should be a contract between the supplier and the person providing the consideration,** so long as the consideration is "in respect of, in response to or for the inducement of the supply" (emphasis added)

Further, the statutory definition of consideration has been interpreted in the High Court as wider than the common law meaning:

> In the context of this matter I am not persuaded that it is helpful or appropriate to reflect upon the ordinary meaning of the word. The statutory definition extends the ordinary meaning and it is the scope of the extended statutory definition which needs to be determined.

(per Chisholm J in *The Trustee, Executors and Agency Co NZ Ltd v CI*R (1997) 18 NZTC 13,076 at 13,085)

However, in *Taupo Ika Nui Body Corporate v CIR* (1997) 18 NZTC 13,147 (HC), Gallen J stated that whilst the statutory definition of consideration in the GSTA 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. (p 13,150) (emphasis added)

The statutory focus is therefore on establishing a nexus between the supply and consideration. It is recognised that whilst the definition of consideration is broad, it does not dispense with the requirement that a linkage exist between the supply and consideration. As said by Blanchard J in *NZ Refining*:

> "to constitute consideration for a supply the payment must be for that supply" (p 13,193)

In evaluating the existence or nature of the requisite nexus for a payment to be consideration for a supply, the courts have consistently emphasised the need for reciprocity in the relationship. McGechan J stated in *CIR v Suzuki* (2000) 19 NZTC 15,819 at 15,831 that:

> The breadth of the term "consideration" – inherent in the definitional phrasing "in respect of, in response to, or for the inducement of" – is to be acknowledged; but as those terms in themselves indicate it is necessary there be a genuine connection. The legislature is not to be taken as taxing on an unrealistic or tenuous connection basis.

The *Suzuki* approach is consistent with cases such as *NZ Refining*, which essentially held that conditions upon which payment depended did not amount to a state of reciprocity between the parties. The payments could not be consideration for any supplies as the mechanics of the legislation require a "sufficient connection" between the payment and the supply. There were no obligations between the parties as if the refining company failed to meet the conditions for payment, the only recourse to the Crown was to withhold payment.

The statement of Blanchard J above appears at first glance to be more restrictive than his statement in the same case that there needed to be a sufficient connection between the consideration and the supply. However, when the phrases are placed in their order in the judgement it can be seen that the reference to "sufficiently connected" should not be construed as broadening the requirements for the linkage of a paymenta supply beyond those where the payment is made for the supply in question:

> The definition of "consideration", though broad, cannot and does not dispense with that requirement. To constitute consideration for supply a payment must be made for that supply, though it need not be made to the supplier nor does the supply have to be made to the payer.
>
> There is a practical necessity for a sufficient connection between the payment and the supply. The mechanics of the legislation will otherwise make it impossible to collect the GST. (p 13,193)

To analyse the linkage between a payment and supply, it is necessary to have regard to the legal arrangements actually entered into:

> In taxation disputes the court is concerned with the legal arrangements actually entered into, not with the economic or other consequences of the arrangements: per Blanchard J in *New Zealand Refining v CIR* (1997) 18 NZTC 13,187 at 13,192 (citing *Marac Life Assurance Ltd v CIR* [1986] 1 NZLR 694 at 706)

"In respect of"

When will a payment be made pursuant to sufficient reciprocal obligations such that the payment is consideration pursuant to its definition in section 2 GSTA? In the *New Zealand Refining* case, the Commissioner attempted to use a broad approach, as can be seen in the following extract from his argument:

> "Consideration" is defined in relation to a supply of goods and services to a person. The supply in this case was by NZ Refining to the oil companies. It was submitted that the supply was either the making available of the refinery (even if it was not used) or the actual use of the refining facilities**. "Consideration" is given an extremely wide definition in the Act, which "breathe[s] comprehensiveness", as Richardson J said in *C of IR v Databank Systems Ltd* (1989) 11 NZTC 6,093 at p 6,102; [also reported as *Databank Systems Ltd v C of IR* [1989] 1 NZLR 422 at p 431]. It includes any payment made "in respect of, in response to or for the inducement of the supply of goods or services". The payment did not have to be from the recipient of the supply (so it could be a payment by the Crown), nor did it have to be directly linked to a particular supply. It is said to be sufficient that there be a linkage "in the broadest way" between the supply and the payment. "In respect of" is a phase of wide import, as this Court has previously recognised (*Shell New Zealand Ltd v C of IR* (1994) 16 NZTC 11,303 and *C of Ir v Fraser* (1996) 17 NZRC 12,607)…..**
>
> …In the absence of evidence to the contrary it is said to be a proper inference that the payments achieved their purpose but it was enough, in fact, if it was intended to achieve it, ie if they constituted an inducement. **This, it was submitted, provided a sufficient linkage for the purposes of the GST Act; linkage can be "broad based" and "pragmatic".** (p 13,191) (emphasis added)

It can be seen from the judgment of Blanchard J in *NZ Refining* (see previous page) that the broad definition of the terms " in respect of, in response to or for the inducement of" that was contended for the Commissioner was not accepted by the Court. The lack of any element of reciprocity between NZ Refining and either the Crown or third parties meant that the payments were received in the course of NZ Refining's taxable activity but were not payments made in consideration for any supply by NZ Refining.

The meaning of "in respect of" was directly considered in the *Taupo Ika Nui* case where a body corporate collected an annual sum of money that paid for upkeep and maintenance for proprietors of a timeshare resort. The Crown alleged that the payments were "in respect of" the provision of the maintenance services. Gallen J concluded the payments were not consideration for any supply despite the term "in respect of" appearing to be broad, and stated:

> Further, while the term "in respect of" is unrestricted and wide enough to encompass a meaning which would include what took place in this case, it must be construed in relation not only to the use of the term "consideration" but to the allied concepts of "response to" or "inducement of", both of which involve an element of reciprocity.

"In respect of" has not been defined in the above cases by reference to what it includes, but what it does not. The cases both illustrate situations that are outside the scope of the phrase, yet both affirm the breadth of the phrase to be only to the extent that there are reciprocal obligations between the parties. The *NZ Refining* case further distinguishes between conditions upon which payment

depends, and reciprocal obligations between the parties; meaning that conditions upon which payment depends will not, without more, be sufficient for the payment to be consideration for any supply.

"For the inducement of"

The words "for the inducement of" were considered in the *Chatham Islands* case. In this case the Crown made a payment to a charitable trust, allowing the trust to provide for its beneficiaries services that were previously the responsibility of the Crown. 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.

Tipping J felt that duties that existed independently of any payments being made did not have the requisite reciprocal connotation required by the concept of a supply for consideration, whether the consideration was in respect of, in response to or for the inducement of the supply:

> **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. It is not apt to catch the fulfilment by the trustees of their duties as such, albeit that such fulfilment will necessarily, in a direct or indirect way, be of benefit to the beneficiaries and the settlor.** For these reasons, I do not consider that the trustees engaged in any supply of services in terms of section 8.
>
> There is a further and related difficulty in the Commissioner's argument. Any supply of services by the trustees must have been made in the course or furtherance of a taxable activity carried on by them. To constitute a taxable activity the supply of services must be for a consideration. Thus the definition of that term, which imports the concept of the supply of services already discussed (and which I am assuming for present purposes to have occurred) requires the payment or other qualifying conduct to have been made or done "in respect of, in response to, or for the inducement of the supply of the services". As Blanchard J has put it, there must be a sufficient nexus between the payment or other conduct relied on as consideration and the relevant services.
>
> If one assumes, contrary to my earlier conclusion, that what the trustees did amounted to the supply of services to the Crown as settlor and/or to the Islanders as beneficiaries, it must also be shown that the payments by the Crown had a sufficient connection with those services to fulfil at least one limb of the statutory definition.
>
> The money was not paid for any particular purpose, albeit that in terms of ordinary trustee law it had to be used within the terms of the Trust. **I therefore have difficulty in seeing how it can be said that the payments made by the Crown were in respect of or for the inducement of any services. Clearly the payments were not in response to the supply of services. With the use of the money not in any way related to any particular purpose mandated, except by the conventional requirement that the trustees should keep within broad and general powers vested in them by the Trust deed, I do not consider the relationship between the payment and the (assumed) services fulfils the definition of consideration.** As a consequence, the trustees did not make their (assumed) supply of services in the course or furtherance of a taxable activity. There is nothing I wish to add to what Blanchard J has said about s 5(6D). These are my reasons for agreeing that the appeal should be allowed with the consequences as to costs proposed in the judgment prepared by Blanchard J. (p 15,081) (emphasis added)

Also in the *Chatham Islands* case, Blanchard J stated:

> The Trust is not making a supply of anything to the settlor in exchange for, or induced by, the payments; it is the recipient of an endowment to be held upon the terms of the deed. Nor can it, consistently with well established principles, be said that the Trust is performing services for its beneficiaries in return for a consideration provided by the settlor. It acts on their behalf and in their interests. They are benefited by its activities. **In the broadest sense, therefore, it may be said that because it serves their interests it is performing services for them. But there is no consideration passing to the Trust since the payments are not properly seen as an inducement. Without them, it is true, it would not have even come into existence. But in law they cannot be properly characterised as inducing its functions nor can it be said that what the Trust did with the money was a response to the payment. There is an absence of reciprocity in the relationship** (p 15,079) (emphasis added)

Again, as with the phrase "in respect of" the scope of the phrase "for the inducement of" has been defined by what it is not in the *Chathams* case. The payments made by the Crown were not for the inducement of any supplies as there was an absence of reciprocity between the parties.

"In response to"

Finally, the meaning of the term "in response to" is illustrated by the *Suzuki* case, where the Court of Appeal upheld the findings of McGechan J in the High Court. A series of documents were read as having the contractual intention of placing on one of the parties the obligation to perform repairs to vehicles under warranty, in return for an obligation by the other party to pay. The Court of Appeal stated:

> The Judge was of the view that the payment made was in discharge of the SMC warranty, in the sense that SMC would not be paying it but for that warranty, "but it also is made in respect of the SNZ repair services rendered." The SNZ repair service was thus an integral component of the situation and activity which brought about the SMC payment. That brought the supply within the GST Acts definition of "consideration" for such a payment**. "There is a clear nexus. The payment, if not "in respect of" certainly was "in response to" those repair services."** (p 17,100) (emphasis added)

In the *Suzuki* case the payment in question was by the above statement impliedly within the scope of the definition of "in response to", and as for the above cases, this was determined by reference to the existence of reciprocal obligations between the parties. The Court of Appeal upheld the High Court in all respects, and

characterised the payments as consideration for the supply of a repair service by SNZ to SMC (and simultaneously via another warranty from SNZ to its customers) rather than consideration for the supply of repair services to customers. There was a contractual intention of the parties that SNZ would carry out the repairs under the SMC warranty, and that SMC would pay SNZ after these had been completed (p 17,102).

The underlying obligation upon SMC to pay for the repairs represented the requisite reciprocal obligation (for the payment to be consideration), and this obligation to pay arose upon the occurrence of a contingent event (being the repair under warranty). The payments were "in response to" the repair of the cars, yet the service for which they were consideration was the supply of repair services from SNZ to SMC rather than the service of the actual repairs of the cars.

In addition, the *Suzuki* case is obliquely further support for the narrow view of the definition of the phrase "in respect of" (as requiring underlying reciprocal obligations between the parties in order for a payment to be consideration), adopted above. As the requisite reciprocal obligations were present between the parties, the Court of Appeal did not in detail consider the wording of the definition of consideration, nor the exact scope of each phrase within. They did however adopt the characterisation that the supplies were from SNZ to SMC, which is the adoption of a more narrow nexus between the payment and the supply. A broad definition of the term "in respect of" in this case would have been likely to characterise the payments as consideration in respect of the actual repair services.

Reciprocal obligations

As GST is a tax on transactions, ultimately the commercial reality of a transaction will aid in determination of what is actually being supplied. Once the existence of a supply is established, the relationship between the parties needs to be evaluated. If the supply cannot be connected to the payment by enforceable reciprocal obligations it can not be said the payment is consideration for the supply. The payer and the supplier must have the ability to enforce the bargain for the transaction to have the reciprocity required to impose GST. *It is not necessary for there to be a contract between the parties, but reciprocity does require some type of enforceable reciprocal or two-sided relationship that links the payment to the supply*.

Other types of legal and enforceable obligations that are not contractual include: obligations enforceable in equity, such as an award of quantum meruit; and obligations that exist via operation of statute (eg under the Fair Trading Act 1986 – see examples below). Despite statements in cases such as *Shell New Zealand v CIR* (1994) 16 NZTC 11,303 that the term "in respect of" was a phrase of the widest import, the courts in recent years have consistently rejected tenuous linkages between payments and supplies, and have reinforced the requirement there must be enforceable reciprocity between the parties in regards to the degree of linkage required. Examples where reciprocity was clearly held to be absent are the cases of *NZ Refining* and *Chatham Islands*.

In *NZ Refining*, the Crown could only cease payments if the conditions upon which to receive the payments were not fulfilled. Similarly, in the *Chatham Islands* case the Crown had no means of recourse if the Trust did not make any supplies, other than an action in equity against the trustees *based on their duties as trustees rather than on any equitable duties in relation to the payment from the Crown* (p 15,079).

The Commissioner considers that the relatively recent rejection of broad linkages in the cases mentioned above and the consistent emphasis upon reciprocity, suggests the inclusion of the words "in respect of", "in response to" or for the "inducement of" in the definition of consideration have a meaning by reference to the *time* at which the consideration passes. "In respect of" can be characterised as a contemporaneous situation where payment is given for a supply at the time of payment. "In response to" would include cases where a supply is received and later paid for, and "for the inducement of" would include cases where an enforceable supply or agreement for supply was tendered following an offer of payment for that supply.

The payments by the Crown in *NZ Refining* were not "in respect of" any supply by the refinery as there were no enforceable reciprocal obligations in return for payment. Similarly, in the *Chatham Islands* case the payments were not an inducement for any supply despite the fact that but for the payments the Chatham Islands Trust would not exist for the benefit of the Chatham Islanders. Finally, in the *Suzuki* case, the contractual obligations between the parties were the basis upon which the supply relationship was analysed, with the result that the supply was not of the end product of repair services, but was to Suzuki Japan (SMC) via the enforceable and reciprocal obligation for SMC to make payment *in response to* the contingent event of an actual repair under the SMC warranty.

Underpinning all transactions where a payment is within the definition of consideration for a supply is the requirement there are enforceable reciprocal obligations between the parties. Earlier cases such as *Databank* emphasised the broad nature of the definition yet more recently attempts to use a broad linkage have been rejected by the courts. All transactions where a payment is consideration for a supply must be based upon a platform of reciprocal obligations as noted in the cases above.

In order to determine when a payment is "sufficiently connected" to a supply to be consideration for that supply, the following principles can be drawn from the cases:

- It is the legal nature of the transaction that will define the nexus between the payment and any supply: *Chatham Islands Enterprise Trust.*

- For a payment to be consideration for a supply there must first be an identifiable supply: *NZ Refining* and *Chatham Islands Enterprise Trust.*
- The concept of supply is active; to supply is to furnish or provide: *Databank.*
- For a payment to be consideration there must be a sufficient connection between the payment and a supply of goods or services: *NZ Refining.*
- Tenuous or unrealistic connections between the payment and supply will not be sufficient: *Suzuki* (HC).
- A sufficient connection involves legally enforceable reciprocal obligations between the payer and payee: *Chatham Islands Enterprise Trust, New Zealand Refining* and *Suzuki.*
- Conditions that must be fulfilled to receive payment do not, without more, evidence a supply: *NZ Refining.*
- An expectation that the recipient of the payment would carry out a certain activity is not enough for a payment to be in respect of or for the inducement of a supply. It is not sufficient that the person who receives the payment carries out some activity that has the effect of benefiting either the person making the payment or some other person. See *Chatham Islands Enterprise Trust.*
- A supply will only be liable to tax if it is made in the course or furtherance of a taxable activity: *Chatham Islands Enterprise Trust.*

Adjustments to consideration

It is possible, where a payment is made as a result of a court award or an out of court settlement, that it will not be consideration for a supply but will be an adjustment to the previous consideration provided for a supply, such as a partial refund of the consideration for a supply.

Section 25 of the GSTA deals with situations where a supplier has either issued a tax invoice or furnished a return with the incorrect amount of output tax shown (section 25(1)(d) or section 25(1)(e)) due to subsequent changes to a taxable supply transaction. After specified adjustment events (section 25(1)(a) to 25(1)(c) inclusive) the supplier must issue a credit or debit note to the recipient of the supply and both parties (if registered) must adjust their output and input tax amounts where required.

Output tax is required to be charged upon the supply of goods or services in the course or furtherance of a taxable activity pursuant to section 8 GSTA. An invoice or tax return will only have been furnished where a taxable supply has already occurred or been agreed to, as for a supply to be taxable it must also be made for a consideration, or no tax is payable (section 10(19) GSTA).

In order to make an adjustment under section 25, one of the following must be satisfied:

- The supply has been cancelled, or
- The supply has been fundamentally varied or altered, or
- The previously agreed consideration has been altered, or
- The goods or part of those goods have been returned.

In order for section 25 to apply there must have been either a taxable supply, or an agreement for a taxable supply between the parties to the transaction, and the output tax must be either incorrectly provided for on the invoice, or incorrectly returned.

(a) cancelled

The meanings of "cancelled", "fundamentally varied" and "altered" are not defined in the Act. The *Concise Oxford Dictionary* (9th ed, Clarendon Press, Oxford 1995) defines cancel as:

> **cancel** *.v* **1** *tr.* **a** withdraw or revoke (*a previous arrangement*). **b** discontinue (*an arrangement in progress*).

The Commissioner considers the above definition of "cancel" (including discontinuance as well as withdrawal or revocation) can be appropriately applied to section 25(1)(a) as in the GST context the cancellation is of a supply, not a contract. Situations where a supply could no longer be performed would be within the above definition, even if the parties had not agreed to a formal contractual cancellation.

(b) alteration of consideration

Section 25(1)(b) applies where the previously agreed consideration is altered.

Consideration must already have passed or been agreed to for output tax on a taxable supply to require adjustment pursuant to section 25. As the courts have emphasised the need for reciprocity between the parties in order for a payment to be consideration for a supply, reciprocity must be established in order for the supply to be taxable. Once a supply is taxable, if the consideration has not passed, it will be due as a debt (being payment owing for a supply).

Looking at section 25 and the GSTA as a whole, the Commissioner considers that in order for the previously agreed consideration to be altered the parties or a court must actually alter the consideration; rather than an event having the economic effect of altering the price for a supply being included within the meaning of the subsection.

Aside from the constant citation of the *Marac* case that the court must look into the legal arrangements actually entered into in determining liability to tax, this approach is consistent with the context of consideration in the GSTA which requires reciprocity in order for a payment to be linked to a supply. A payment that passes between parties (although nominally because of a supply) will not alter the consideration unless it involves reciprocity between the parties in regards to altering the consideration for the supply. Commonly this would occur by agreement of the parties, but it could also for example be imposed by Court order, or by a Commission of Inquiry (pursuant to section 15 Taxation Review Authorities Act 1994).

Support for the statement above is found in the judgment of the Court of Appeal in *Montgomerie v CIR* (2000) 19 NZTC 15,569. This case considered whether payments received by a liquidator of a company for transactions made void by the operation of section 292 of the Companies Act 1993 were alterations to consideration previously provided by the company for supplies it received. The High Court held that partial recoveries were alterations to the consideration as part of the value provided by the company was returned. The Court of Appeal did not favour this analysis, and stated:

> We are not attracted to the concept that a recovery in part only amounts in itself to alteration of consideration provided for in the underlying agreement in terms of s25(1)(b). **The contract price is not reduced merely because pursuant to Court order or agreement reached between liquidator and creditor the latter restores to the company all or part of the value received from the company during the "specified period" in s 292.** (p 15,369) (emphasis added)

In *Montgomerie* the payments made by the creditor appear to have been viewed by the High Court as an alteration to the consideration. Yet whilst the transactions appear to have had the economic effect of reducing the contract price, the Court of Appeal pointed out that the payments were made owing to the provisions of the Companies Act, and this in itself did not mean there was an alteration of consideration for the previous supplies. The reasoning of the Court of Appeal is founded upon the principles behind consideration, including the requirement that there is reciprocity present within a transaction in order to link a payment to a supply. If as in the above case, a payment is made that is in some way connected to an original supply and has the appearance of reducing the consideration previously provided for that supply, it will not alter the consideration unless the parties to the transaction agree to do so. The payment made in the above case was as a result of a one-sided transaction as distinguished from one that is reciprocal; as the liquidator had a statutory right to void previous transactions and require payment from the creditors. Although the statute provided a link between the payment and the previous supply, the link was by reference to issues that were different to those that would reduce the contract price for the supply, and the Court of Appeal held accordingly.

(aa) fundamentally varied or altered

Section 25(1)(aa) was included in the Act by amendment in 1986 and states that an adjustment of output tax might be made if the nature of a supply has been fundamentally varied or altered.

There is a mention in the Public Information Bulletin #150, July 1986 regarding the introduction of the subsection:

Where goods are hired with an option to purchase within a set period the arrangement normally falls within the terms of the Hire Purchase Act 1971. The GST is therefore payable at the commencement of the hire. However, a potential anomaly existed where the option to buy was not taken up *The agreement then would have become a mere agreement to hire and the wrong amount of output tax accounted for.* Section 25 as previously drafted did not provide scope for this. This amendment ensures that in the above situation and any similar circumstances an adjustment can be made. (emphasis added)The necessity for the amendment is illustrated by the hire purchase example given above. Changing the hire purchase agreement into a mere agreement to hire would not necessarily have the effect of altering the overall consideration. If the consideration was not altered, the (then) existing section 25(1)(b) could not be applied.

When a hire purchase agreement is entered into, GST on the whole supply amount is calculated at the beginning of the agreement (section 9(3)(b) GSTA as the supply is deemed to take place at this time. Where the option to purchase is subsequently not exercised the nature of the supply is no longer that of a purchase, it is merely a hire with the GST payable in instalments (section 9(3)(a)), and the successive supplies are deemed to take place each time a payment becomes due or is received, whichever is the earlier. In a situation where a hire purchase agreement changes to become a mere agreement to hire, a supplier would be disadvantaged by having initially returned the full amount of tax on the transaction, instead of progressive returns of smaller tax amounts.

"Fundamental", "vary" and "alter" are defined in the *Concise Oxford Dictionary* (10th ed, Oxford University Press, Oxford 1999) as:

> **fundamental** *adj.* of or serving as a foundation or core; of central importance. *n.* **1** a central or primary rule or principle.
>
> **vary** *v.* **1** differ in size, degree, or nature from something else of the same general class. **2** change from one form or state to another. Modify or change (something) to make it less uniform.
>
> **alter** *v.* **1** change in character, appearance, direction, etc.

In order for GST consequences to arise in section 25, the amount of tax due and payable must alter in order for the invoice or return to be incorrect. (section 25(1)(d) and 25(1)(e)). The critical aspect of section 25(1)(aa) is that the alteration to the nature of the supply affects the tax amount payable in the period to which the invoice or return relates. Where an alteration to the nature of a supply had output tax implications it would often also involve an alteration to the consideration and thus be within subsection 25(1)(b), this would be the usual section applied where the nature of the supply changes. However, where timing or other issues arise as a result of a variation or alteration to the nature of a supply, and they are not within the scope of section 25(1)(b), subsection 25(1)(aa) can be applied.

Apportionment of a sum only partly consideration for a taxable supply.

Section 10(18) of the GSTA states 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 that is properly attributable to it.

When can section 10(18) be applied?

The term "properly attributable" is not defined in the Act.

"Properly" is defined in the *Concise Oxford Dictionary* (10th ed, Clarendon Press, Oxford 1995) as "correctly, suitably or completely".

Section 10(1) of the GSTA states:

> For the purposes of this Act the following provisions of this section shall apply for determining the value of any supply of goods and services.

Section 10(18) only applies where a *taxable* supply is not the only matter to which a consideration relates, so establishing that there is a taxable supply as well as something else for the consideration is a prerequisite to its application.

There have been no cases decided specifically pursuant to this section, however two cases have commented upon its application and scope: *CIR v Smiths City Group Limited* (1992) 14 NZTC 9,140 (HC) and *CIR v Coveney* (1994) 16 NZTC 11,328 (CA).

In the *Smiths City* case the taxpayer had purchased a commercial property which included an area of bare land. The purchase price was inclusive of GST, and the taxpayer accordingly sought a credit for input tax. The claim was disallowed by the Commissioner on the basis that the supply was one of a going concern and was accordingly zero-rated. The Taxation Review Authority held that two-thirds of the land represented the sale of a going concern and should be zero-rated, and the taxpayer was entitled to an input tax credit based on the amount of the purchase price that related to the bare land. The Commissioner appealed to the High Court where the appeal was dismissed.

In the High Court, Tipping J found a case for apportionment was made out under a different section of the Act. In regard to section 10(18) and apportionment of consideration he stated:

> The framers of the Act have not incorporated any statutory definition of the expression "going concern". Nor is there any statutory guidance, so far as I am aware, for when and how the apportionment exercise should take place.
>
> The only assistance, on the material to which I was referred, seems to derive from section 10(18) which, as earlier noted, provides that where a taxable supply is not the only matter to which a consideration relates the supply shall be deemed to be for such part of the consideration as is properly attributable to it. That of course relates to the distinction between a supply which is taxable and one which is not. It would seem logical however to apply the same approach to a supply which is in part liable for tax and is in part zero-rated. (p 9,144)

The comments above might be taken to suggest that a single consideration must relate to a taxable supply and a non taxable supply, however it was recognised in *Coveney* that part of a consideration could relate to some other matter without being restricted only to non taxable *supplies*. In *Coveney* the application to allow apportionment of items that comprised part of one supply was rejected. This case concerned the Commissioner's attempt to disallow part of an input deduction for the purchase of a farm property, on the basis that the transaction involved two supplies—one of the farm and one of the domestic dwelling on the farm.

In the High Court, Fraser J concluded there was only a single supply, and that section 10(18) can only apply where a single consideration relates to more than a single taxable supply. This ruling was upheld by the Court of Appeal, where Richardson J stated in regard to section 10(18):

The provision applies where, and only where, "the supply is not the only matter to which the consideration relates". To come within the proviso it is necessary to identify a matter, other than the supply in question, to which the consideration relates. Thus on the supply of land with late settlement, the consideration may contain an interest equivalent component which may fairly be described as a second matter to which the consideration relates.

Section 10(18) applies in order to apportion the part of the consideration that is for the taxable supply. As section 10 GSTA as a whole deals with valuation of supplies, the inclusion of the words "properly attributable" in section 10(18) suggest the valuation of the supply is the amount of consideration that would suitably or correctly be provided for the supply in isolation, taking into account the overall consideration provided and if necessary, pro-rating the various amounts.

Application of section 20A of the GSTA

Section 20A(2) of the GSTA allows a taxpayer to claim an input tax deduction for GST incurred on goods and services acquired for determining liability to tax, by operating as a deeming provision and deeming these goods and services as being acquired for the "principle purpose of making taxable supplies".

Where a taxpayer receives any recovery or reimbursement of costs incurred in determining liability to tax (such as an award of costs in a successful appeal to the TRA), section 20A(4) operates to *deem* the receipt of the award to be in return for taxable supplies, and requires the taxpayer receiving the award to account for output tax. Such awards or payments are not within the scope of this statement, as the focus of this provision is upon the recovery or award of costs incurred in determining liability to tax rather than awards in settlement of disputes.

TAX TREATMENT OF COURT AWARDS AND OUT OF COURT SETTLEMENT

When a court award is made it is likely that a wrongful act will be involved at some stage of the dispute. However owing to the emphasis placed in the *NZ Refining* and *Chathams* cases upon reciprocity and the requirement that a payment must be for a supply, the Commissioner considers that the appropriate focus is whether the award is payment for any supply that has been made, and not the action that gave rise to the award. In order to identify potential GST consequences, every transaction must always be analysed upon its individual facts and will involve the application of GST principles relating to supply and consideration.

As the degree of linkage identified above is narrower than in the previous statement for a payment to be consideration for a supply, a broad classification of classes of transactions in the awards and settlement context will be attempted below, rather than stating only that GST principles must be applied to the facts of each transaction. Whilst every transaction must always be analysed upon its individual facts the exercise will involve the application of *principles* relating to supply and consideration, which have become increasingly conceptual in regards to reciprocity and the required link between supply and consideration. When a payment is made under a court award or out of court settlement and it is consideration for a taxable supply (or an adjustment to a consideration for a taxable supply) this will be taxable. If the payment is made for compensation or damages it is not taxable.

Court awards, remedies and GST liability

For the purposes of this statement, the term "court awards" refers to all awards made by a binding decision of a third party, including awards of the courts, awards made by tribunals and settlements reached in binding arbitration, that are *not* within the scope of section 20A(4) GSTA. Where the parties themselves agree on the nature of a settlement, including via mediation or at the invitation of a court, and these are not within the scope of section 20A(4) GSTA, they are referred to in this report as "out of court settlements". The same GST principles will apply in an analysis of any settlement transaction, whether it is the result of a court award or an out of court settlement.

Courts have powers to grant relief pursuant to statute as well as common law. A dispute might result in a number of potential claims and different remedies being available for a party to pursue. The nature of any court awarded payment will be influenced by the claim that is made by the recipient, and determined by the type of remedial award the court makes if the claim is made out.

Statutory provisions can provide specific remedies, in addition to preserving the right of a party to receive a common law measure of damages. For example, where a trader has received goods of a lesser quality than they contracted for, they can either claim at common law for damages to be awarded in compensation for the loss they have suffered (relative to the value of the supply), or claim the goods had a "lack of merchantable quality" pursuant to section 43(2) of the Fair Trading Act 1986 ("FTA"). Under the statutory provision, the court can make a specific order to vary or adjust the consideration or order the supplier to refund the purchase price. It is the legal nature of the court award, rather than the economic effect that is the basis for an analysis of reciprocal relations between the parties in regards to the payment and therefore liability to GST.

Example

An Italian chef purchases an expensive pot for $500, which the retailer claims is of commercial quality and therefore suitable for high use situations such as commercial catering operations.

The large pot is used on three occasions. On the occasion of its fourth use one of the handles breaks.

The chef is unsuccessful in his attempts to persuade the retailer to replace the pot, as there are no longer any available. Additionally, the retailer refuses to refund the purchase price, owing to its policy only to offer refunds on unused goods.

Scenario #1

The chef brings the case to court, claiming general damages, as he has suffered a loss in receiving goods of lesser quality than he paid for. The judge agrees, and orders the retailer to pay the chef $300.

- The $300 is compensation for the chef's loss in receiving goods of poor quality. As the payment is for a loss, the GST consequences are nil.

Scenario #2

The chef brings the case to court, claiming that pursuant to section 43(2) of the FTA, the pot had a "lack of merchantable quality" as the handles were not secured by rivets. The judge agrees, and pursuant to section 43(2) of the FTA orders the retailer to refund $300 to the Chef.

- The $300 is a refund of the purchase price owing to the *specific order* of the court. The retailer will need to make a GST adjustment pursuant to section 25 of the GSTA if output tax was paid prior to the time the refund is ordered by the court. The chef (if a registered person) is also required to make an adjustment to their GST return.

Whilst damages for loss appear to have the same economic effect as a variation of the purchase price, the two awards above give rise to different treatment for GST purposes. Where damages are awarded for a loss, the nexus of the payment for GST purposes is with the loss, rather than the supply that gave rise to the damages claim. Where a refund of the purchase price is ordered this will give rise to an adjustment for GST purposes regardless of whether the goods are returned to the supplier.

Debts and adjustments to consideration

If a judgment debt is received that is payment for a previous supply, that payment is consideration for that supply and not a new supply. Even in situations where liability is unclear, where a judgment debt is ordered paid by the court the court is recognising the existence of reciprocal obligations between the parties. By virtue of judgment being ordered the payment is linked to the supply and the requisite element of reciprocity is present. Therefore, the payment will be consideration for the earlier supply. If the supplier accounts for GST on an invoice basis, receipt of the payment will not trigger any GST implications as the GST will have been returned following the issue of the invoice. If the supplier accounts for GST on a payments (cash) basis, receipt of the judgment sum will trigger liability for GST on the original supply.

Example

B responds to an advertisement offering a 30-day free trial of a new stereo costing $500, and places an order with A. (A, a mail order retailer, accounts for GST on a payments basis.) B understands that if she retains the stereo after 30 days then she has accepted A's offer to sell it, and B must then make payment of $500 to A.

As A is overly trusting, he does not require any credit card details or cash bonds before sending any goods to potential purchasers.

A sends the goods to B, and the 30-day period passes (indicating that the offer to sell is accepted). A receives no payment from B, and is unsuccessful in his attempts to contact her or collect the money owing.

A brings the case to court, seeking judgment for the $500 owing. The court duly enters judgment for the sum requested. B pays on the day the judgment is entered.

- The $500 is consideration for the supply of the stereo. As A accounts for GST on a payments basis, he has not returned GST on the supply of the stereo prior to the award of the judgment sum by the Court. Once B pays A, GST liability is triggered, and A must return the GST on the $500.
- If instead, A accounted for GST on an invoice basis, and issued an invoice to B at the time the purchase became finalised (ie, after the 30 day period elapsed), the GST would have been returned under the normal time of supply rules. The subsequent judgment and payment of the $500 would not have any new GST consequences.

Awards in restitution

Where restitution is received by a party that made a supply (and the supply was made in the course or furtherance of a taxable activity) the payment will be consideration for a supply. The legal nature of the transaction will be that the court is recognising obligations exist between the parties. For example, an award for 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 in order to receive payment.

> "Quantum meruit is the generic term used to identify a right to a reasonable remuneration for goods supplied or services rendered; the same expression is used irrespective of whether the right to remuneration is an incident attached by implication to a contractual relationship or whether it arises independently of contract in one of the assortment of situations which are classified, for lack of a better term, as quasi-contractual". (per Prichard J, *Seton Contracting Ltd v Attorney-General* [1982] 2 NZLR 368,376.

Often an award of this nature is made where a contract is silent as to the price of goods or services, where there has been a supply of something upon the assumption that a contract would eventuate.

The above analysis might seem inconsistent with one of the principles drawn from the *Chatham Islands* case noted above, which states that:

> An expectation that the recipient of the payment would carry out a certain activity is not enough. It is not sufficient that the person who receives the payment carries out some activity that has the effect of benefiting either the person making the payment or some other person.

This statement however refers to a situation where a payment is made, but in return the existence of any potential supply is unclear and uncertain. Where a payment is made but any supply is uncertain there are problems in identifying liability to GST and therefore collecting GST. Therefore the statutory focus is on supplies and not payments, as was identified in *Databank*. Awards of quantum meruit are made where something of value has been provided by one party, and there is an inability to enforce payment for this owing to a lack of formal contractual relations. Where an award is made for quantum meruit the payment awarded will be consideration for a supply made by the other party.

Example

A Ltd hears B Ltd is looking for new office accommodation, and puts together a proposal whereby A Ltd will purchase a site, and design and build office space to B Ltd's requirements. B Ltd chooses the site, and informs A Ltd that its directors have approved A Ltd's proposal. B Ltd requests A Ltd proceed rapidly as the timing of the completion of the building is important.

A Ltd purchases an option to buy the site chosen by B Ltd, and starts work immediately. Ten days later B Ltd informs A Ltd they wish to proceed with an alternative site. Meanwhile the option to purchase the site expires.

Despite not having a contract with B Ltd, A Ltd claims in court for the cost of the work performed for B Ltd up to the time of B Ltd's advice regarding the alternative site. The court holds that despite the absence of a concluded contract, A Ltd proceeded upon the representation of B Ltd, and is entitled to judgment for its normal charge out rates.

- The judgment sum is consideration for the supply of services by A Ltd to B Ltd.

If a supply is made for consideration then GST is payable. In the above example the recipient of the award had made a supply for which the payer was liable. Rather than in the *Chatham Islands* case, where any supply was uncertain following payment, in this example the supply is certain and has occurred in order for the supplier to receive a court awarded payment, as the award can only be made retrospectively. The concept of consideration in the GSTA does not require the existence of a contract (see principles above). The court's action links the (eventual) payment of the award to the supply and the requisite element of reciprocity for a payment to be consideration is present. The payment is thus consideration for a supply, which will be taxable if made in the course or furtherance of a taxable activity.

Using the fact situation in the above example, if A Ltd had merely heard B Ltd required the office space, and proceeded having had no communication with B Ltd regarding its proposed requirements, a court would be unlikely to order an award based on quantum meruit as the work could not fairly be said to be at B Ltd's request. In this situation there is no supply from A Ltd to B Ltd, as there is an absence of reciprocity.

Payment awarded for continuing wrong

Under section 16A of the Judicature Act 1908, a court can award prospective damages for a continuing wrong, instead of granting an injunction or specific performance.

Example

A council constructs a sewer pipe on private property without permission of the owners. The owners take the case to court and request the removal of the pipe.

The court refuses to order removal of the pipe but exercises its power under section 16A of the Judicature Act 1908, and awards the owners a sum based on the amount they could reasonably expect if the council had agreed to pay for the use of the land.

- The payment by the council to the owners is a payment of damages and is not consideration for any supply.

It might be argued that the award in the above example is consideration for a supply, as it is for the use of the land. However, the damages are in lieu of the court's refusal to enforce the plaintiff's rights via an injunction. On the basis of the *Databank* characterisation of a supply as being something that is "furnish[ed] or provid[ed]" there cannot have been a supply in the above case. The court did not require the plaintiffs to make any supply to the defendant, only that they accepted payment in return for non-enforcement of their property rights. Neither the plaintiffs (nor the court on their behalf) have furnished or provided anything to the defendant. What has occurred is that the court has declined to enforce the plaintiffs' property rights, and the payment merely has a nexus with the continuing trespass.

Awards in respect of loss (compensatory damages)

The basic principle that governs compensatory damages was stated by Cooke P in Gardiner *v Metcalfe* [1994] 2 NZLR 8 (CA):

In general terms there can be no doubt that, as was said in the High Court of Australia in *Haines v Bendall* (1991) 172 CLR 60,63:

> "The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed…"

Compensatory damages are awarded for loss, however the label attached to a payment is not determinative of its nature in terms of liability to GST, as the Act imposes a tax upon goods and services supplied rather than payments received.

Where compensatory damages are awarded for a loss, reciprocity will be absent from the transaction. Unlike situations where the payer has gained something at the expense of the recipient, where loss is the basis for an award the recipient can not be said to have supplied anything to the payer in return for the payment. The payer's causation of the loss gives rise to liability to make payment, but the basis for the other party's receipt of payment is the fact they have suffered loss rather than made any supply. It is the legal nature of a transaction not its economic effect that determines liability to tax (*Marac Life Assurance Ltd v CIR* [1986] 1 NZLR 694 at 706). The payment cannot be consideration for a supply if it is not reciprocal to the supply of *something* by the other party.

An award for a loss arising from an earlier supply may appear to be an adjustment to consideration. However whilst the calculation of a compensatory award might induce this appearance it will not affect the legal nature of the award. In *Coxhead v Newmans Tours Ltd* (1993) 6 TCLR 1 (CA) it was said that:

> …at common law the purchaser could not recover the purchase price except on a total failure of consideration as money had and received. **The ordinary remedy at common law is not the return of a proportion of the purchase price, but damages to compensate the innocent party for the wrong which he has suffered.** Where that wrong is the breach of a contract, his loss is measured by the amount which would put him as far as practicable in the position he would have been in if the contract had been performed. If the breach is the failure to complete the sale of a business, then the purchaser has lost the value of the business, which may be greater or less than the agreed purchase price. (p 12) (emphasis added)

In the *Montgomerie* case the distinction between the effect of an award or settlement and its legal nature (upon which liability to tax rests) was emphasised. The court stated:

> We are not attracted to the concept that a recovery in part only amounts in itself to alteration of consideration provided for in the underlying agreement in terms of section 25(1)(b). **The contract price is not reduced merely because pursuant to Court order or agreement reached between liquidator and creditor the latter restores to the company all or part of the value received from the company during the "specified period" in section 292.** (p 15,369) (emphasis added)

Case S77 (1996) 17 NZTC 7,483 specifically considered the issue whether an amount received for damages could be consideration for any supply subject to GST. The taxpayers were a farming couple registered for GST. A fire they lit on their farm spread to the neighbouring farm and caused substantial damage, leading to allegations of negligence which resulted in an out of court settlement. The taxpayers sought an input tax credit on the amount they paid and this was disallowed by the Commissioner on the basis that the recipient of the payment had made no taxable supplies in return. Barber DJ held that the transaction did not involve the supply of any goods and services to the taxpayers, as the payment was made on account of a loss:

> While I find that the L partners issued the court proceedings in the course of their taxable activity as agricultural contractors, they have merely received payment of a liability of and from the objectors. The L partners made no supply in return for the payment. They merely received a debt due to them in recompense for the loss they suffered from the fire for which the objectors were responsible.

Case S77 emphasised the importance of the distinction between payments and receipts made in the course of a taxable activity and the requirement these are linked to supplies in order for GST liability to arise. Loss may be suffered in connection with a supply. Where payments are compensatory, and relate to loss, the nexus is with the loss, rather than the supply that caused the loss.

Example

A Ltd sells trucks with freezer units on board. B Ltd, an expanding icecream company purchases a truck for $100,000 so it can deliver its own outgoing orders of icecream, and pays $75,000, with the remaining $25,000 due in one month.

The truck is delivered and functions well for two weeks as B Ltd transports icecream from its factory in Invercargill to retailers in Christchurch. One day however, the truck driver arrives in Christchurch to find the entire consignment melted. Upon investigation, the freezer unit on the truck is found to be faulty.

B Ltd takes A Ltd to court claiming $20,000 for the loss of the icecream, and a further $10,000 for inconvenience and loss of trade associated with the breakdown. The judge awards the full amount claimed as well as ordering A Ltd to remedy the freezer fault at its own cost.

As B Ltd had a payment arrangement with A Ltd for the purchase price of the truck, B Ltd still owes A Ltd $25,000. A Ltd proposes to set off the $30,000 award of the court against the balance owed by B Ltd on the truck. B Ltd agrees, and receives the difference of $5,000 in cash.

- The entire award is for the loss B Ltd has suffered, and is not consideration for any supplies it has made.
- The set off of $25,000 against the amount owing for the truck does not affect the amount of consideration provided for the truck. The set off has the same effect as if A Ltd paid B Ltd $30,000, and B Ltd then in return paid A Ltd the $25,000 owing on the truck, and thus the consideration for the supply of the truck is $100,000.

Applying GST principles, awards made for a loss must be contrasted from reciprocal awards where the payer (or a third party) has gained something as a result of the recipient's actions and is making the payment in return. Reciprocity is absent where a payment is for loss even if the loss is directly attributable to an earlier supply, as the nature of the payment is that it is for the loss rather than the supply. If a payment is received for a loss the payment will be compensatory and outside the scope of GST.

GST treatment of out of court settlements

As for court awards, where a payment is for loss or damage it will not be consideration for a supply and there will be no element of reciprocity between the parties in regards to the payment; rather the payment is to compensate one party for the loss caused by the wrongful act of the other. The following section provides examples of out of court settlements that may or may not give rise to GST consequences, rather than providing a conclusive guide to categories of settlement giving rise to GST liability.

Where earlier supplies have been made

If a debt is recovered that is payment for a previous taxable supply, that payment is consideration for the supply.

Example

A shop sells groceries to a customer and accepts a cheque for $100 in payment. The shop returns GST on an invoice basis. Five days later it is informed that the cheque has been dishonoured.

The shop engages the services of a debt collection company, which some weeks later collects the sum of $110 (including a debt collection fee) in cash from the customer. $100 is passed on to the supermarket, and the agency keeps $10 as its fee.

- As the shop has already returned GST after receiving the cheque, there are no additional GST consequences in regards to the $100. The shop is merely collecting the consideration for the original supply.
- The debt collection company must return GST on the $10 it has charged for the supply of services it has made to the supermarket, for which the defaulting customer has paid. The supply by the debt collection company to the shop is not an exempt supply of a "financial service" as debt collection services are expressly excluded from the definition of "financial service" pursuant to section 3(4)(b) GSTA.

Adjustments to GST

If an earlier taxable supply has been made, and the nature of that supply has been fundamentally altered or cancelled, or the consideration for that supply has been adjusted, section 25 will apply.

Example

A purchases a kilo of roasted coffee beans from B for $50. The coffee was advertised as being "premium quality", however when A opens the bag one week later he can see the beans are clearly of a cheap and inferior quality. Outraged, A returns to B's roastery, and demands that B refund the difference in price between what he paid for and what he actually received.

B apologises profusely, explaining that a mistake in labelling the coffee must have occurred. B agrees to refund $25, which is the difference in price between the two grades of beans.

- The original consideration for the coffee ($50) has been varied as a result of the partial refund B has given to A. The variation is because the parties agreed to a partial refund, not because the amount B paid to A represented the difference in price between the goods. (It is the legal nature of the transaction that will determine liability to tax, not its economic consequences.)

If GST has already been returned on the $50, B will need to make a GST adjustment and issue a credit note to correct the original tax invoice issued. The result of the above refund means the consideration for the original supply of the coffee has been *varied*, and is in fact $25, meaning that B will have returned too much output tax. B will be able to claim a credit for the amount of tax already returned that corresponds to the refund given to A. If B did not issue a tax invoice at the time of the original supply (and has not returned GST on the value of the original consideration) he will not need to make a GST adjustment. B will return output tax on the $25 sale that is the ultimate result of the above transaction.

Example

A purchases B's truck for $10,000 plus GST. Only B is GST registered. B provides A with a tax invoice, and A takes possession of the truck. B returns GST on the supply of the truck.

A does not register the change of ownership papers immediately. Two weeks later A finds the truck has disappeared from its usual parking spot, and after making inquiries finds out that it has been repossessed. A discovers that 5 days after she purchased the truck B's bank had served B with papers to exercise its rights as holder of a registered security interest in the truck to repossess it for B's non payment of its business loan.

Rather than waste time arguing in court over ownership of the truck, A accepts a refund from B of the $10,000 plus GST paid for the truck (which is now in the possession and ownership of the bank).

- The original supply of the truck has been cancelled and section 25(1)(a) GSTA will apply. As B has already furnished a return for $1,250 (being the GST portion of the $10,000), a tax adjustment is necessary. B must issue a credit note to correct the tax invoice originally issued. Pursuant to section 25(2)(b) (and under section 20(3) of the GSTA), B can make a corresponding deduction of input tax to the value of $1,250.

Payment connected to a unilateral action – eg termination of a contract where there is no "right" to terminate

Where one party terminates an ongoing supply contract without a right to terminate or the agreement of the other party, any settlement sum in respect of this action will be outside the scope of GST. This is because the party receiving payment is being compensated for the wrongful or unilateral act of the other party, and has made no supply in return. An example of such a payment was in *NZ Refining*, where the Crown removed various concessions enjoyed by *NZ Refining* unilaterally, without needing the agreement of *NZ Refining*. As no supply was made in return the payment from the Crown to *NZ Refining* was compensatory and no GST liability attached. GST liability for supplies made for consideration up to the point of termination will not be affected, owing to the timing of supply for GST purposes being set at the time payment is received or an invoice provided (section 9).

Example

A has a 5 year, five million dollar contract with B, to make regular supplies of a fixed number of items. The contract runs smoothly for 3 years, when all of a sudden B informs A it is no longer willing to accept the contracted supply.

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

B still refuses to perform its side of the contract in accepting the items, and A files a claim in court for two million dollars.

B decides that it would be sensible to offer a compromise sum as an out of court settlement, offering A $1,500,000 to avoid the court case. A accepts.

- The payment is not made for any supplies and is therefore not consideration. The payment is made to compensate A for the wrongful act of B in refusing to be bound by the contract.

Termination or modification of contract by agreement

Where there is no provision in the contract to alter or terminate, and the parties reach agreement to do so, this will be a supply for consideration if payment is made. The passage of rights and obligations in this situation will constitute a supply of services for GST purposes. The requirements from *NZ Refining* and *Chatham Islands* that there are reciprocal obligations and a nexus between the payment and supply are met in this case; as the payment is given in return for the agreement to alter or release from the contract.

Example

A has a 5 year, five million dollar contract with B to make regular supplies of items. After 3 years, B no longer wishes to receive these supplies, and contacts A in order to negotiate an early termination to the contract.

A informs B that it will terminate the contract in return for a one-off payment of $1,000,000. B agrees, and makes payment.

- The payment is consideration for A's supply of a service to B—being the early release from a fixed term contract—and is subject to GST.

Where there has been no supply

For a supply to take place, something of value must be "furnish[ed] or provide[d]" (*Databank*). The supply must additionally involve enforceable reciprocal obligations (*Chatham Islands*). If something has been used, but there was no agreement for its supply between the relevant parties, any payment subsequently received by the aggrieved party is not consideration for the supply. The receipt of payment does not involve any reciprocal obligations between the parties, and cannot be retrospectively linked to there having been a "supply" for GST purposes. Any payment received relating to a previous use of an item where there has been no agreement to supply will be by nature compensatory, and thus outside the scope of GST. (eg, of theft and wrongful use of trade name)

Agreement to allow an act in the future

Where agreement is reached that payment will be given in return for one party's forbearance in relation to the future conduct of another party, the payment will be consideration for the supply of a right or obligation provided the agreement is binding and enforceable, rather than a mere understanding or assumption. (*NZ Refining, Chatham Islands*)

Example

A is a manufacturer and 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 totals.

A finds out from a local contact that for the past two years another company B has been using the technology patented by A to create and sell an almost identical product. A is provided with ample evidence of the unauthorised use of the patent, and approaches B, informing B that a court case is imminent.

B accepts that it has made wrongful use of the patent, and offers $100,000 as compensation to A. A accepts the compensation offered and makes an offer to B to sell it the patent rights in return for an additional $50,000. B accepts and makes payment.

- The $100,000 is not consideration for any supply—rather it is to compensate A for B's wrongful use of the patent. The $50,000 however, is consideration for the supply of the patent rights by A to B and A must return output tax, with B entitled to claim a corresponding input tax deduction.

Forbearance to sue as part of an out of court settlement

A settlement including payment for loss caused by an earlier supply might include a clause where the recipient of the payment accepts "full and final payment", and forbears to sue in future. Forbearances are explicitly mentioned as satisfying the definition of "consideration" in section 2 GSTA.

The principles identified above that relate to supply and consideration illustrate that a nexus in the form of reciprocal obligations is required in order for a payment to be consideration for GST purposes. The *Databank* case stated that to supply is to "furnish or provide", and the definition of services in section 2 GSTA is "anything that is not goods or money". Forbearance to sue would thus appear to be *capable* of being a supply of a service within the GST definition, regardless of whether it is seen as the giving up of a "right" or the provision of something of value to the other party (being a service). If supply of forbearance to sue is the supply of a service, it will only be taxable if it is made in the course or furtherance of a taxable activity, and is given in return for consideration.

Where a forbearance to sue is undertaken there will usually be an underlying dispute in settlement of which the payment is made, and any GST inquiry will commence with a determination of what the payment is for. The usual result will be that the payment is for something other than the forbearance, and the forbearance is merely a mechanism to ensure finality in the dispute. Whilst the forbearance is *capable* of being a supply for GST purposes, in such cases it might fairly be said it is given for no *consideration*. Accordingly, in the majority of cases there will not be a separate and ascribable value attached to a forbearance to sue, and it will not be given in return for any consideration as the payment will not be linked to the forbearance, but some other issue such as a loss or damage. If however, one party to the dispute is making an identifiable payment that is reciprocal and directly linked to the obligation of forbearing to sue, the payment will be consideration for the supply of forbearance and will be taxable (provided the supply is made in the course or furtherance of a taxable activity (section 8 GSTA)).

Example

A and B are both GST registered. A causes B to lose thousands of dollars as a direct result of B relying upon A's negligent business advice. B believes he has a solid case to take to court, but is persuaded by A to settle out of court as A wishes to avoid adverse publicity.

Scenario #1

The parties settle the claim for loss for $10,000, and the settlement agreement includes a clause whereby B accepts the sum in "full and final settlement" of his claim against A.

- The GST consequences of the payment for loss are nil. The agreement not to sue is merely a mechanism in order for A to ensure finality in the dispute, and does not have a separately attributable sum ascribed to it.

Scenario #2

The parties settle the claim for loss for $10,000, with an additional payment of $5,000 by A to B in order for B undertaking to refrain from pursuing his claim by bringing the matter before the courts, as A believes his reputation would be seriously damaged by the resulting publicity.

- The GST consequences of the payment for loss are nil. The payment of $10,000 is not payment for any supply.
- GST consequences do arise as a result of the $5,000 payment as the payment is clearly made by A in return for the enforceable obligation undertaken by B in his agreement not to sue A. The payment is consideration for a taxable supply by B as B is accepting payment in the course of his taxable business activity. B must accordingly return output tax of $650, and A will be able to claim an input tax deduction pursuant to section 20(3).

Overseas treatment - Australia

The ATO have recently issued a ruling on the GST treatment of court orders and out of court settlements. The ruling does not distinguish between court awards and out of court settlements for the purpose of liability to GST. Payments made pursuant to either a court order or out of court settlement are characterised in the ruling as relating to either "Earlier supplies", "Current supplies" or "Discontinuance supplies". These categories recognise that an award or settlement might relate to an earlier supply, be for a supply made as a result of the award or settlement, or be a payment made in return for refraining from doing something. As is the case in New Zealand, where a payment is compensatory (eg. for a loss suffered) it will not be for any supply and will not attract GST in Australia.

The Australian ruling however, differs from this Interpretation Statement in regard to the degree of linkage required for a payment to be consideration for a supply. The recent introduction of GST in Australia means there is little judicial guidance in regards to the degree of connection required for a payment to be consideration for a supply. Whilst the Australian statutory scheme is similar to the NZ Act there is a degree of difference between the two interpretations of the relevant statutory definition of "consideration". The Australian Act uses the phrase "in connection with" (in regard to the link between a payment and a supply), which differs from the New Zealand wording "in respect of".

The words "in connection with" have been interpreted in the Australian ruling as having the same meaning as in *Berry v FCT* (1953) 89 CLR 653. This case considered the meaning of "in connection with" in the context of a provision in the Income Tax Act 1936, which considered consideration "for or in connection with goodwill in a lease premium". Kitto J held that consideration will be "in connection with" property where "*the receipt of the payment has a substantial relation, in a practical business sense, to that property*" (at p 659).

Recent judicial direction in New Zealand diverges somewhat from the Australian interpretive position in this regard, due to an emphasis upon the concept of reciprocal obligations between parties being evidence of a sufficient connection between a payment and a supply. In particular, the *NZ Refining* and *Chatham Islands* cases suggest that this approach should be followed in New Zealand.

Conclusions

A court award in relation to a claim that relates to an earlier supply or alleged supply will give rise to GST consequences where it is payment *for* that supply and therefore "consideration". It has also been concluded that in most cases forbearance to sue will not be given for any consideration. However it has been concluded that forbearance to sue is capable of being a supply if it is given pursuant to a binding obligation, and that a payment will be capable of being consideration for this supply if it has the requisite linkage and a clear value ascribed to it.

Examples where a payment will be consideration include an award at common law in quantum meruit, and orders made pursuant to statutory authority for a variation, adjustment or refund of consideration. Awards of the court that have a nexus to something other than a taxable supply, such as loss caused by a taxable supply or negligence, will not attract GST liability as they will not be consideration for any supplies.

In an out of court settlement the legal nature of the settlement and what the parties have agreed will provide the basis on which to identify any reciprocal obligations and determine liability to GST. Where a decision is made by the court the relevant reciprocal obligations will be those that arise as a result of the judgment of the court. The remedy itself will be determinative of the nature of the transaction rather than the cause of action upon which it is awarded, as a court may have a number of potential remedies at their disposal for one cause of action.

Finally, where a number of disputes between the parties give rise to the set off of monies owing between the parties, there is no change to consideration. Set off can only occur after any liability between the parties has been quantified, meaning the value of any consideration and the GST portion will not change, rather the actual amount of money that is received will differ.

LEGISLATION AND DETERMINATIONS

This section of the TIB covers items such as recent tax legislation, accrual and depreciation determinations, livestock values and changes in FBT and GST interest rates.

MODULAR NYLON TILE CARPETS – GENERAL DEPRECIATION DETERMINATION DEP46

In *Tax Information Bulletin* Vol 14, No 5 (May 2002) on page 22 we published a draft general depreciation determination proposing the setting of a general depreciation rate for modular nylon tile carpets.

We received a number of submissions on the draft. Those submissions principally questioned the rate of depreciation proposed for modular nylon tile carpets and the reasons for setting a different depreciation rate for those carpet systems to that for ordinary carpet.

Modular nylon carpet tile systems have the capability for tiles to be individually uplifted, rotated, removed, replaced or shifted as required and we were asked to set a depreciation rate that recognised the longer useful life of these carpet systems.

In assessing the estimated useful life of modular nylon tile carpet we took into account information from several sources including that from manufacturers of the tiles and advice from valuers. The information included experience from the use of the tile carpet in a number of actual cases overseas as well as in New Zealand and showed modular nylon tile carpet to have a useful life of about 15 years. The depreciation rate for ordinary carpet is based on an estimated useful life of 5 years. With that level of difference between the estimated useful lives of the two types of carpet we considered it would not be appropriate for the Commissioner to set a single rate of depreciation for the two types of carpet.

Following careful consideration of all the submissions, we have decided that there should be no change to the draft determination and the Commissioner has now issued the determination which confirms the rates set out in the draft. The general depreciation rate for modular nylon tile carpets applies to carpet acquired on or after the date the depreciation determination was made.

The general depreciation determination inserts a new asset class "Carpets (modular nylon tile construction)" into the "Residential Rental Property Chattels", "Hotels, Motels, Restaurants, Cafes, Taverns and Takeaway Bars" and "Shops" industry categories and the "Building Fit-out" asset category. The determination also amends the description of the existing "Carpets" asset class to "Carpets (other than modular nylon tile construction)" in those same industry and asset categories. The "Carpets (modular nylon tile construction)" will have a depreciation rate of 12% DV (8% SL), based on an estimated useful life of 15.5 years while the depreciation rate for "Carpets (other than modular nylon tile construction)" of 33% DV (24% SL) based on an estimated useful life of 5 years, remains unchanged.

The general depreciation determination is reproduced below. The new depreciation rate is based on the estimated useful life set out in the determination and a residual value of 13.5%.

GENERAL DEPRECIATION DETERMINATION DEP46

This determination may be cited as "Determination DEP46Tax Depreciation Rates General Determination Number 46

1. Application

This determination applies to taxpayers who own the asset classes listed below.

This determination applies to "depreciable property" other than "excluded depreciable property" acquired on or after the date this determination is made.

2. Determination

Pursuant to section EG 4 of the Income Tax Act 1994 I hereby amend Determination DEP1: Tax Depreciation Rates General Determination Number 1 (as previously amended) by:

- Deleting from the "Residential Rental Property Chattels", "Hotels, Motels, Restaurants, Cafes, Taverns and Takeaway Bars" and "Shops" industry categories and the "Building Fit-out" asset category, the general asset class, estimated useful life, and diminishing value and straight-line depreciation rates listed below:

General asset class	Estimated useful life (years)	DV banded dep'n rate (%)	SL equiv banded dep'n rate (%)
Carpets	5	33	24

- Inserting into the "Residential Rental Property Chattels", "Hotels, Motels, Restaurants, Cafes, Taverns and Takeaway Bars" and "Shops" industry categories and the "Building Fit-out" asset category, the general asset classes, estimated useful lives, and diminishing value and straight-line depreciation rates listed below

General asset class	Estimated useful life (years)	DV banded dep'n rate (%)	SL equiv banded dep'n rate (%)
Carpets (modular nylon tile construction)	15.5	12	8
Carpets (other than modular nylon tile construction)	5	33	24

3. Interpretation

In this determination, unless the context otherwise requires, expressions have the same meaning as in the Income Tax Act 1994.

This determination is signed by me on the 19th day of September 2002.

Martin Smith

General Manager (Adjudication & Rulings)

FOREIGN CURRENCY AMOUNTS – CONVERSION TO NEW ZEALAND CURRENCY

The tables in this item list exchange rates acceptable to Inland Revenue for converting foreign currency amounts to New Zealand currency under the controlled foreign company (CFC) and foreign investment fund (FIF) rules for the six months ending 30 September 2002.

The conversion rates for the first six months of each income year are published in the *Tax Information Bulletin* following the end of the September quarter and the rates for the full 12 months rates at the end of each income year.

To convert foreign currency amounts to New Zealand dollars for any country listed, divide the foreign currency amount by the exchange rate shown.

Table A

Use this table to convert foreign currency amounts to New Zealand dollars for:

- branch equivalent income or loss under the CFC or FIF rules under section CG 11(3) of the Income Tax Act 1994
- foreign tax credits calculated under the branch equivalent method for a CFC or FIF under section LC 4(1)(b) of the Income Tax Act 1994
- FIF income or loss calculated under the accounting profits, comparative value (except if Table B applies) or deemed rate of return methods under section CG 16(11) of the Income Tax Act 1994.

Key

$$\frac{X}{Y}$$

"x" is the exchange rate on the 15th day of the month, or if no exchange rates were quoted on that day, on the next day on which they were quoted.

"y" is the average of the mid-month exchange rates for that month and the previous 11 months.

Example 1

A CFC resident in Hong Kong has an accounting period ending on 30 September 2002. Branch equivalent income for the period 1 October 2001 to 30 September 2002 is 200,000 Hong Kong dollars (HKD).

HKD 200,000 ÷ 3.4624 = NZ$ 57,763.40

A similar calculation would be needed for an FIF using the branch equivalent or accounting profits methods.

Example 2

A taxpayer with a 31 March balance date purchases shares in a Philippines company (which is an FIF) for 350,000 pesos (PHP) on 7 September 2002. Using the comparative value or deemed rate of return methods, the cost is converted as follows:

PHP 350,000 ÷ 24.4034 = NZ$ 14,342.26

Alternatively, the exchange rate can be calculated by averaging the exchange rates "x" that apply to each complete month in the foreign company's accounting period.

Example 3

A CFC resident in Singapore was formed on 21 April 2002 and has a balance date of 30 September 2002. During this period, branch equivalent income of 500,000 Singapore dollars was derived.

(i) Calculating the average monthly exchange rate for the complete months May-September 2002:

(0.8216 + 0.8627 + 0.8440 + 0.8047 + 0.8349) ÷ 5 = 0.83358

(ii) Conversion to New Zealand currency:

SGD 500,000 ÷ 0.83358 = NZ$ 599,822.45

Table B

Table B lists the end-of-month exchange rates acceptable to Inland Revenue for the six month period ending 30 September 2002. Use this table for converting foreign currency amounts to New Zealand dollars for:

- items "a" (market value of the FIF interest on the last day of the income year) and "c" (market value of the FIF interest on the last day of the previous income year) of the comparative value formula
- foreign tax credits paid on the last day of any month calculated under the branch equivalent method for a CFC or FIF under section LC 4(1)(a) of the Income Tax Act 1994.

Example 4

A New Zealand resident with a balance date of 30 September 2002 held an interest in an FIF resident in Thailand. The market value of the FIF interest at 30 September 2002 (item "a" of the comparative value formula) was 500,000 Thailand baht (THB).

THB 500,000 ÷ 20.0730 = NZ$ 24,909.08

Note: If you need an exchange rate for a country or a day not listed in these tables, contact one of New Zealand's major trading banks.

Round the exchange rate calculations to four decimal places wherever possible.

Table A: Mid-month and 12-month cumulative exchange rates

Country	Foreign currency to NZ $		15-Apr-02 12-month rate	15-May-02 12-month rate	17-Jun-02 12-month rate	15 -Jul-02 12-month rate	15 -Aug-02 12-month rate	17-Sep-02 12-month rate
Australia	Dollar	AUD	0.8264	0.8316	0.8613	0.8671	0.8594	0.8591
			0.8132	0.8153	0.8210	0.8267	0.8297	0.8329
Bahrain	Dollar	BHD	0.1665	0.1715	0.1820	0.1828	0.1740	0.1781
			0.1588	0.1600	0.1620	0.1644	0.1654	0.1674
Canada	Dollar	CAD	0.7006	0.7093	0.7469	0.7427	0.7211	0.7460
			0.6613	0.6663	0.6756	0.6854	0.6904	0.6974
China	Yuan	CNY	3.6598	3.7707	3.9990	4.0130	3.8210	3.9113
			3.4981	3.5229	3.5682	3.6219	3.6431	3.6767
Denmark	Krone	DKK	3.7321	3.7496	3.7957	3.6299	3.4950	3.6055
			3.5436	3.5581	3.5736	3.5811	3.5767	3.5923
European Community	Euro	EUR	0.5023	0.5043	0.5111	0.4888	0.4714	0.4864
			0.4761	0.4782	0.4804	0.4815	0.4811	0.4834
Fiji	Dollar	FJD	0.9869	1.0018	1.0254	1.0254	0.9975	1.0090
			0.9599	0.9641	0.9705	0.9773	0.9791	0.9835
French Polynesia	Franc	XPF	59.7052	60.1474	60.9176	58.0953	56.0110	57.8054
			56.4317	56.6807	56.9457	57.0552	56.9846	57.2388
Hong Kong	Dollar	HKD	3.4465	3.5506	3.7690	3.7791	3.5986	3.6817
			3.2940	3.3174	3.3601	3.4107	3.4308	3.4624
India	Rupee	INR	21.4744	22.0578	23.4145	23.4205	22.2745	22.7323
			20.1058	20.3111	20.6358	20.9991	21.1754	21.3953
Indonesia	Rupiah	IDR	4,220.5000	4,223.0900	4,187.7550	4,400.1900	4,051.2450	4,241.3000
			4,310.3133	4,263.6525	4,222.1817	4,204.5346	4,237.4771	4,269.0983
Japan	Yen	JPY	58.2986	58.5050	59.9791	56.6314	54.1180	57.4808
			52.9319	53.5000	54.2767	54.7668	54.9088	55.5620
Korea	Won	KOR	584.5000	578.2100	590.4450	566.1900	543.0200	573.1850
			547.1854	550.0254	554.3258	557.4813	556.9929	558.9792
Kuwait	Dollar	KWD	0.1347	0.1390	0.1467	0.1460	0.1392	0.1429
			0.1294	0.1302	0.1317	0.1335	0.1341	0.1353
Malaysia	Ringgit	MYR	1.6801	1.7310	1.8374	1.8423	1.7542	1.7956
			1.6059	1.6173	1.6382	1.6628	1.6726	1.6880
Norway	Krone	NOK	3.8230	3.8065	3.7974	3.5820	3.5070	3.5661
			3.7673	3.7648	3.7590	3.7422	3.7135	3.7039
Pakistan	Rupee	PKR	26.4536	27.0839	28.7644	28.6915	27.2301	27.8403
			25.8954	26.0232	26.2468	26.4860	26.4870	26.5548
Papua New Guinea	Kina	PGK	1.5123	1.6792	1.7726	1.8893	1.8296	1.8586
			1.3795	1.4199	1.4630	1.5144	1.5535	1.5952
Philippines	Peso	PHP	22.3963	22.4249	24.1078	24.1868	23.6613	24.4034
			21.6089	21.7265	21.9638	22.1983	22.3410	22.5743
Singapore	Dollar	SGD	0.8108	0.8216	0.8627	0.8440	0.8047	0.8349
			0.7646	0.7695	0.7783	0.7865	0.7907	0.7992
Solomon Islands	Dollar	SBD	2.5644	2.9199	3.2032	3.4292	3.4004	3.4158
			2.2738	2.3374	2.4238	2.5335	2.6306	2.7313
South Africa	Rand	ZAR	4.9343	4.6249	5.0563	4.8175	4.8604	4.9619
			4.1523	4.2594	4.4010	4.5225	4.6309	4.7406
Sri Lanka	Rupee	LKR	42.1127	43.5509	46.3046	46.3419	44.0762	45.0899
			38.6043	39.1179	39.8640	40.6848	41.1502	41.7409
Sweden	Krona	SEK	4.5552	4.6622	4.6658	4.5172	4.3421	4.5016
			4.4166	4.4455	4.4617	4.4726	4.4676	4.4736
Switzerland	Franc	CHF	0.7362	0.7347	0.7535	0.7183	0.6895	0.7126
			0.7104	0.7104	0.7115	0.7114	0.7086	0.7108
Taiwan	Dollar	TAI	15.4300	15.7100	16.3950	16.0400	15.4600	16.2150
			14.5863	14.7475	14.9196	15.0717	15.1196	15.2521

Country	Foreign currency to NZ $		15-Apr-02 12-month rate	15-May-02 12-month rate	17-Jun-02 12-month rate	15 -Jul-02 12-month rate	15 -Aug-02 12-month rate	17-Sep-02 12-month rate
Thailand	Baht	THB	19.0888	19.3984	20.3038	19.7746	19.1427	19.9609
			18.6394	18.6738	18.7951	18.9059	18.9012	19.0127
Tonga	Pa'anga	TOP	0.9489	0.9883	1.0344	1.0232	1.0140	1.0444
			0.9121	0.9217	0.9344	0.9467	0.9540	0.9643
United States	Dollar	USD	0.4420	0.4553	0.4833	0.4846	0.4615	0.4721
			0.4224	0.4254	0.4308	0.4373	0.4399	0.4440
United Kingdom	Pound	GBP	0.3074	0.3141	0.3270	0.3119	0.3000	0.3042
			0.2944	0.2960	0.2984	0.3003	0.3002	0.3016
Vanuatu	Vatu	VUV	62.5139	63.1594	65.0988	65.1272	63.5269	64.1108
			60.8973	61.0720	61.5130	61.9640	62.0877	62.3888
Western Samoa	Tala	WST	1.5305	1.5547	1.5934	1.6002	1.5608	1.5809
			1.4594	1.4735	1.4915	1.5110	1.5163	1.5256

Table B: End-of-month exchange rates

Country	Currencies	Code	15-Apr-02	15-May-02	17-Jun-02	15 -Jul-02	15 -Aug-02	17-Sep-02
Australia	Dollar	AUD	0.8309	0.8415	0.8677	0.8607	0.8485	0.8648
Bahrain	Dollar	BHD	0.1686	0.1792	0.1839	0.1763	0.1766	0.1774
Canada	Dollar	CAD	0.7011	0.7286	0.7382	0.7364	0.7299	0.7424
China	Yuan	CNY	3.7077	3.9335	4.0439	3.8756	3.8806	3.8966
Denmark	Krone	DKK	3.6820	3.7595	3.6685	3.5304	3.5318	3.5663
European Community	Euro	EUR	0.4952	0.5066	0.4939	0.4754	0.4760	0.4797
Fiji	Dollar	FJD	0.9867	1.0145	1.0339	1.0085	1.0037	1.0143
French Polynesia	Franc	XPF	59.0495	60.3962	58.7268	56.5173	56.5911	57.0126
Hong Kong	Dollar	HKD	3.4907	3.7057	3.8083	3.6487	3.6544	3.6691
India	Rupee	INR	21.6830	23.0207	23.6224	22.5859	22.5874	22.6328
Indonesia	Rupiah	IDR	4,177.2800	4,202.8300	4,221.2900	4,268.3150	4,156.5150	4,245.1350
Japan	Yen	JPY	57.3079	58.5721	58.2865	56.2054	55.3642	57.6266
Korea	Won	KOR	574.9650	576.2200	580.3300	551.6250	558.1950	573.3050
Kuwait	Dollar	KWD	0.1369	0.1445	0.1471	0.1411	0.1414	0.1422
Malaysia	Ringgit	MYR	1.7021	1.8059	1.8564	1.7792	1.7815	1.7887
Norway	Krone	NOK	3.7535	3.7683	3.6566	3.5384	3.5166	3.5115
Pakistan	Rupee	PKR	26.5380	28.2641	28.9901	27.5441	27.6172	27.6993
Papua New Guinea	Kina	PGK	1.6344	1.7380	1.8886	1.8485	1.8523	1.8523
Philippines	Peso	PHP	22.3811	23.5180	24.3157	23.6187	24.0417	24.3946
Singapore	Dollar	SGD	0.8084	0.8472	0.8614	0.8236	0.8182	0.8350
Solomon Islands	Dollar	SBD	2.6019	3.0881	3.4044	3.4196	3.4615	3.3992
South Africa	Rand	ZAR	4.7192	4.5955	5.0626	4.7447	4.9663	4.9667
Sri Lanka	Rupee	LKR	42.6480	45.4442	46.7409	44.7025	44.7945	45.0170
Sweden	Krona	SEK	4.5660	4.6245	4.4853	4.3924	4.3584	4.3606
Switzerland	Franc	CHF	0.7247	0.7416	0.7276	0.6931	0.7005	0.7035
Taiwan	Dollar	TAI	15.5150	16.1350	16.3150	15.7100	15.9750	16.3900
Thailand	Baht	THB	19.1985	20.0488	20.1234	19.3510	19.5558	20.0730
Tonga	Pa'anga	TOP	0.9628	1.0175	1.0464	1.0179	1.0292	1.0467
United Kingdom	Pound	GBP	0.3068	0.3241	0.3195	0.2977	0.3026	0.3019
United States	Dollar	USD	0.4477	0.4752	0.4883	0.4679	0.4686	0.4705
Vanuatu	Vatu	VUV	62.2021	64.9691	65.5857	63.7614	63.7590	64.3775
Western Samoa	Tala	WST	1.5363	1.5829	1.6081	1.5713	1.5708	1.5771

LEGAL DECISIONS – CASE NOTES

This section of the *TIB* sets out brief notes of recent tax decisions made by the Taxation Review Authority, the High Court, the Court of Appeal and the Privy Council.

We've given full references to each case, including the citation details where it has already been reported. Details of the relevant Act and section will help you to quickly identify the legislation at issue. Short case summaries and keywords deliver the bare essentials for busy readers. The notes also outline the principal facts and grounds for the decision. Where possible, we have indicated if an appeal will be forthcoming.

These case reviews do not set out Inland Revenue policy, nor do they represent our attitude to the decision. These are purely brief factual reviews of decisions for the general interest of our readers.

GOING CONCERN

Case: Fatac Limited (In Liquidation) v CIR

Decision date: 23 September 2002

Act: GST Act 1985

Keywords: Taxable activity, going concern, agreement in writing, leasehold, licence

Facts

Fatac was the representative member of the McConnell Dowell GST group, of which Puhinui Quarries Limited ("Puhinui") was a member. Fatac was therefore responsible for Puhinui's GST obligations.

Puhinui owned 9.9 hectares of land in Wiri, South Auckland. Part of the land was a quarry. In 1991 Puhinui granted Atlas the right to operate the quarry for 12 years, renewable for a further 3 years. The agreement provided (inter alia) that if Atlas exhausted the material from the quarry before the expiration of the 12 year period the agreement would be terminable at Puhinui's option. By 1 July 1996 only a third of the entire property remained to be quarried.

On 1 July 1996 Puhinui entered into an agreement to sell the entire property to Mt Wellington Nurseries. The agreement was in the standard Real Estate Institute of NZ/ADLS form.

The sale was settled on 13 September 1996 and the purchasers claimed a GST refund, which was accepted by the Commissioner. The Commissioner then sought the output tax from Fatac.

TRA Decision

The Authority on 21 June 2000 found in Fatac's favour. (*Case U43* (2000) 19 NZTC 9,389)

The decision was based on the assumption that the relevant taxable activity was quarrying and that the goods and services necessary for the continued operation of that activity had been supplied. Willy J found that the agreement contained the required agreement in writing for the supply of a going concern as there was referral to the licence agreement in the "Details of tenancies" section on the front page of the sale and purchase agreement.

High Court Judgment

Hansen J on 22 August 2001 found for the Commissioner. (*CIR v Fatac Limited (in liquidation)* (2001) 20 NZTC 17,348)

He accepted that Puhinui supplied the licensing activity as a going concern for the purposes of s 11(1)(c)(i). Hansen J held however, that the parties had not agreed in writing that there was to be a supply of a going concern for the purposes of s 11(1)(c)(ii) as the agreement between Puhinui and Atlas constituted a licence and not a tenancy.

Clause 14 provided that the supply of a going concern was dependent on the existence of a "tenanted property" and as the property was not a "tenanted" one of the elements necessary for the zero-rating exception in section 11(1)(c) were not satisfied and output tax remained payable on the transaction.

Issues

1 Whether the taxable activity was supplied as a going concern?

The High Court found for Fatac on this point. The Commissioner cross-appealed the finding on the basis that the licence to quarry was not transferred from the vendor to the purchaser as a matter of law it is not possible to transfer a licence. In consequence the taxable activity was not transferred from supplier to recipient as a going concern.

The Court of Appeal did not find it necessary to address this argument.

2. Whether the parties agreed in writing that the supply was of a going concern?

(The supply could be zero-rated only if there was an agreement in writing that the supply was of a going concern for the purposes of s 11(1)(c)(i).)

Decision

Fisher J agreed with the Commissioner in that the whole point of s 11(1)(c)(ii) would be subverted if the inquiry of whether there was an agreement in writing could wander off into contemporaneous oral communications, subjective intentions and post-contract conduct. The history and wording of the section indicates a legislative desire for certainty. Its implied purpose was to remove the confusion and uncertainty that tended to occur before its introduction. The words "agreed by the supplier and recipient in writing" is to be interpreted as requiring agreement in clear and unequivocal terms.

On the facts, if there was any written agreement to the effect that the supply was of a going concern it would need to be found in Clause 14 of the sale and purchase agreement. The GST consequences under cl 14 were triggered if the agreement related to the sale of a tenanted property.

The test for determining whether there is a lease or a licence is to be returned to that of the test of exclusive possession. This test the English Courts departed from and then returned, the Australian Courts never departed from, and the New Zealand Courts departed from, and unlike England did not return. The Court of Appeal held therefore that the cases of *John Fuller and Sons Ltd v Brooks* [1950] NZLR 94 (CA) and *Baikie v Fullerton-Smith* [1961] NZLR 901 (CA) would not be followed as they could not be supported in principle and were no longer supported by overseas authority.

The Court held that the fundamental distinction between a tenant and a licensee is that the former alone has the right to exclusive possession. Terminology is immaterial and restrictions upon use of the land are not inconsistent with exclusive possession. There will be no tenancy where the occupier's right to possession may be terminated for reasons extraneous to the occupation of the land.

The Court held that on the facts of this case Atlas's right of occupation was far from exclusive and accordingly concluded that the arrangement with Atlas was a licence in the strict sense. It was not a tenancy.

REGULAR FEATURES

DUE DATES REMINDER

October 2002

7 Employer deductions and employer monthly schedule

Large employers ($100,000 or more PAYE and SSCWT deduction per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

21 Employer deductions

Large employers ($100,000 or more PAYE and SSCWT deduction per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due

Employer deductions and employer monthly schedule

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

FBT return and payment due

31 GST return and payment due

November 2002

5 Employer deductions and employer monthly schedule

Large employers ($100,000 or more PAYE and SSCWT deduction per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* du

7 Provisional tax instalments due for people and organisations with a March balance date

20 Employer deductions

Large employers ($100,000 or more PAYE and SSCWT deduction per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due

Employer deductions and employer monthly schedule

Small employers (less than $100,000 PAYE and SSCWT deductions per annum)

- *Employer deductions (IR 345)* or *(IR 346)* form and payment due
- *Employer monthly schedule (IR 348)* due

29 GST return and payment due

These dates are taken from Inland Revenue's Smart business tax due date calendar 2002 - 2003

YOUR CHANCE TO COMMENT ON DRAFT TAXATION ITEMS BEFORE THEY ARE FINALISED

This page shows the draft binding rulings, interpretation statements, standard practice statements and other items that we now have available for your review. You can get a copy and give us your comments in these ways.

By post: Tick the drafts you want below, fill in your name and address, and return this page to the address below. We'll send you the drafts by return post. Please send any comments in writing , to the address below. We don't have facilities to deal with your comments by phone or at our other offices.

By internet: Visit **www.ird.govt.nz.**
On the homepage, click on "The Rulings Unit welcomes your comment on drafts of public rulings/interpretation statements before they are finalised . . ." Below the heading "Think about the issues", click on the drafts that interest you. You can return your comments by internet.

Name _____

Address _____

_____

	Draft interpretation guideline	*Comment deadline*
☐	IG0007: Non-resident software suppliers' payments derived from New Zealand—Income tax treatment	15 November 2002
	Draft public ruling	
☐	PU0054: Provision of benefits by third parties: FBT consequences—Section CI 2(1)	30 November 2002

Items are not generally available once the comment deadline has passed

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