

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

Deadline for comment | Aukatinga mō te tākupu: **17 April 2025**

Please quote reference | Whakahuatia te tohutoro: **PUB00485**

Send feedback to | Tukuna mai ngā whakahokinga kōrero ki
public.consultation@ird.govt.nz

QUESTIONS WE'VE BEEN ASKED | PĀTAI KUA UIA MAI

Does GST apply to a deposit the seller retains in a cancelled land sale agreement?

Issued | Tukuna: xx

QB XX/XX

This question we've been asked explains the GST consequences when a land sale agreement is cancelled and the seller retains the deposit.

Key provisions | Whakaratonga tāpua

Goods and Services Tax Act 1985 (GST Act) – ss 9(1), 25

All legislative references are to the GST Act unless otherwise stated.

REPLACES | WHAKAKAPIA

- **GST consequences of a cancelled contract *Tax Information Bulletin* Vol 17, No 4 (May 2005): 26**

NOTES | PITOPITO KŌRERO

This QWBA has been updated at the request of submitters on **QB 23/09 Income tax – forfeited deposits from cancelled land sale agreements**.

The conclusion that GST does not apply to a deposit the seller retains in a cancelled land sale agreement is unchanged from the 2005 QWBA. This draft QWBA expands on the reasons for this view and considers:

- The relevance of *FCT v Reliance Carpet Co Pty Ltd* [2008] HCA 22.
- The effect of the introduction of the compulsory zero-rating rules.
- The legislation modernising the GST invoicing rules.

It also cross-references to more recent related public items.

Question | Pātai

Does GST apply to a deposit the seller retains in a cancelled land sale agreement?

Answer | Whakautu

No, GST does not apply to the deposit because the seller makes no supply of land or any other supply in return for the deposit.

If the seller has paid GST output tax or the buyer has claimed a GST input tax credit before the agreement was cancelled, then any amounts returned or claimed will need to be reversed in the period in which the agreement is cancelled.

Introduction

1. Two key questions are relevant when considering whether GST applies to a deposit when a land sale agreement is cancelled and the seller retains the deposit:
 - Is there a supply of goods or services (from the seller to the buyer)?
 - If so, is the deposit payment for that supply?
2. This QWBA considers those questions. It also sets out the GST consequences when a land sale agreement is cancelled and the seller retains the deposit.

An overview of deposits

3. The main function of a deposit is to guarantee performance.¹ If the sale goes ahead, the deposit is credited to the buyer on settlement as part payment of the purchase price.
4. If the sale falls through due to the buyer's default the deposit is liable to be forfeited. This means the seller can retain the deposit for their own use. If the seller also claims damages, they need to give credit for the amount of the forfeited deposit.²
5. If the sale falls through due to the seller's default, the seller is required to refund the deposit to the buyer. However, sometimes situations arise where the seller should have refunded the deposit to the buyer but, for whatever reason, they have not and have kept the deposit.

Is there a supply of goods or services if a land sale agreement is cancelled?

6. GST is a tax on transactions, not a tax on receipts or turnover.³ It can only be charged if a supply of goods or services exists (or is deemed to exist). The first step, therefore, is to identify the supply.

¹ *Howe v Smith* (1884) 27 ChD 89 (UKCA); *Soper v Arnold* (1889) 14 App Cas 429 (HL); *Garratt v Ikedo* [2002] 1 NZLR 577 (CA).

² *Ng v Ashley King (Developments) Ltd* [2010] EWHC 456 (Ch), [2010] 4 All ER 914; *Shuttleworth v Clews* [1910] 1 Ch 176.

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

7. The Goods and Services Tax Act 1985 (GST Act) defines “supply” broadly as including “all forms of supply”. “Goods” includes most forms of personal or real property. “Services” is defined as anything that is not goods or money or cryptocurrency.
8. Although the definitions of goods and services are together very wide, for GST to be charged it is still necessary for a supply of something to have occurred.
9. In analysing the nature of a supply, it is important to carefully consider the legal arrangements actually entered into and carried out, in light of the factual background.⁴

Is there a supply of land?

10. In a land sale agreement, the intended supply is land.
11. If a land sale agreement is cancelled due to the buyer’s or seller’s default, then settlement and registration do not take place. Without registration, no transfer of legal ownership occurs. In this situation, there is no supply of the legal interest in the land as intended under the contract.
12. New Zealand case law establishes that a contract for the sale of land is not divisible into equitable and legal estates for GST purposes.⁵ There is only one “supply” and that supply is for all the rights in the land contracted for.
13. In addition, the deposit is not a payment for the equitable interest in the land. It is intended to be part payment of the whole purchase price and a guarantee that the buyer will pay the balance of the purchase price on settlement.
14. In summary, the intended supply in a land sale agreement is the supply of the land. When the agreement is cancelled, no supply of land has occurred. A supply of land cannot be divided into the supply of legal and equitable interests for GST purposes. The deposit is not a payment for the equitable interest in the land.

Is there any other supply?

15. It has been suggested that *Case N24*⁶ supports the view that GST applies to a deposit that a seller retains when a land sale agreement is cancelled. *Case N24* concerned a

⁴ *Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5,086 at 5,098 per Richardson J.

⁵ *Case L67* (1989) 11 NZTC 1,391; *Nicholls v CIR* (1997) 18 NZTC 13,265, *Case W11* (2003) 21 NZTC 11,100, *Case W22* (2003) 21 NZTC 11,212 (upheld on appeal: *Ch’elle Properties (NZ) Ltd v CIR* (2004) 21 NZTC 18,618).

⁶ *Case N24* (1991) 13 NZTC 3,199.

land sale agreement where the buyer defaulted, the contract was cancelled and the deposits were forfeited to the seller.

16. In that case, Judge Barber found that when the buyer first paid the deposit, the seller made “a supply of some type” to the buyer. Later in the judgment, Judge Barber said that a supply of some type remained when the contract was cancelled.
17. The Commissioner’s view is that the most evident supply that the parties contemplated was the transfer of the land that was the subject of the now cancelled contract. Any other obligations under the contract (eg, to maintain the property in good condition and insure the property) are ancillary to the supply of the land.
18. As discussed above, subsequent case law has held the supply of land cannot be separated into a supply of legal and equitable interests for GST purposes. Judge Barber does not state in *Case N24* that the supply is a supply of an equitable interest in land merely that there is “some type” of supply which must have been a service. In the Commissioner’s view, it is necessary to identify the supply if GST is to attach to that supply. It is also noted that the later case of *Case W11* questioned the comments in *Case N24*.
19. For there to be a supply of services to the buyer in return for the deposit, the seller must have done something for the buyer rather than against the buyer.⁷
20. Because the seller retains the deposit only after the contract is cancelled, it is difficult to identify any particular rights the seller might be supplying to the buyer in terms of the now cancelled contract. The buyer could be liable for damages if the seller’s losses were more than the deposit they retained – although again that would not be readily classified as a supply that the buyer made to the seller.
21. In summary, the Commissioner has been unable to identify any other type of supply that the deposit could be payment for when a land sale agreement is cancelled and the seller retains the deposit.

Is the deposit payment for a supply if the agreement is cancelled?

22. The deposit must be made “in respect of, in response to, or for the inducement of” the supply. In other words, a link between the payment and the supply must exist.⁸

⁷ *Case S65* (1996) 17 NZTC 7,408.

⁸ *CIR v New Zealand Refining Co Ltd* (1997) 18 NZTC 13,187 (CA).

23. As discussed from [6] to [21], where a land sale agreement is cancelled and the seller retains the deposit, they have made no supply of land and make no other supply in return for the deposit. As the seller makes no supply of goods or services for which the deposit is consideration, GST does not apply.
24. In this section, we make additional comments on the nature of the deposit depending on whether it is the buyer or the seller who cancels the agreement. The relevance of the Australian case of *FCT v Reliance Carpet Co Pty Ltd* [2008] HCA 22 is also considered.

The contract is cancelled due to the buyer's default and the seller retains the deposit

25. If the buyer defaults and the deposit is forfeited, the character of the deposit changes. In the Commissioner's view, the forfeited deposit is compensation for the buyer's failure to pay the balance of the purchase price on settlement as promised.⁹
26. A forfeited deposit does not replace a claim for breach of contract. The seller can retain a deposit and also make a claim for damages. However, the seller must give credit for the amount of the deposit and can only claim damages in excess of this amount. In the Commissioner's view, the fact that the seller gives credit for the amount of the deposit in a claim for damages supports the view that a deposit is compensatory in nature.
27. A payment that is compensatory in nature does not generally involve a supply and is not subject to GST. In this situation, the buyer has agreed that if they fail to pay the balance of the purchase price the deposit may be forfeited. The seller does not make any supply in return for retaining the deposit. It relates to compensation for the buyer's breach and not to any supply under the contract.

The contract is cancelled due to the seller's default and the seller retains the deposit

28. Where a contract for the sale of land is cancelled because of the seller's default, the seller is required to refund the deposit to the buyer.
29. In the situation where the seller does not refund the deposit (eg, where the seller is a company that goes into liquidation and no funds are available), the seller has still made no supply of land or any other supply to which GST can attach. The fact that the buyer

⁹ *Coumat Ltd v Whitford Properties Ltd* [2018] NZCA 15 supports this view.

is unable to recover the deposit does not change the conclusion that no supply exists for which the deposit is consideration.¹⁰

What is the relevance of *FCT v Reliance Carpet Ltd*?

30. It has been suggested that the 2008 decision of the High Court of Australia (HCA) in *FCT v Reliance Carpet Co Pty Ltd* [2008] HCA 22 could be relevant to the question of whether a forfeited deposit is consideration for a supply in New Zealand.
31. The issue in *Reliance Carpet* was whether the seller was liable to pay GST on a forfeited deposit. The answer depended on whether the seller had made a “taxable supply” – that is, a “supply for consideration”. The HCA found that the seller made a supply to the buyer on the making of the contract and that the deposit the buyer paid was consideration for that supply where the deposit was forfeited.
32. While the factual scenario and the key issues are similar to those considered in this QWBA, the decision in *Reliance Carpet* must be considered in light of the fact that Australia has specific legislation governing the treatment of forfeited deposits (Division 99 of A New Tax System (Goods and Services Tax) Act 1999). New Zealand does not have equivalent provisions.
33. When presented with New Zealand (and Canadian) materials about the treatment of deposits in *Reliance Carpet*, the HCA said “these systems appear to lack any sufficiently close analogue to Div 99 of the Act for assistance to be derived from them in the present case”.
34. For this reason, the Commissioner considers that the HCA’s decision in *Reliance Carpet* is not applicable in New Zealand.

GST consequences when a land sale agreement is cancelled and the seller retains the deposit

35. Where a land sale agreement is cancelled, the seller will not make a supply of land or any other supply in return for the deposit. As the seller has made no supply of goods or services for which the deposit is consideration, GST does not apply.

¹⁰ *Case W9* (2003) 21 NZTC 11,083 and *Case W11*.

Situations where you may have already paid or claimed GST

36. In limited situations before a land sale agreement has been cancelled, the seller may have paid GST or the buyer may have claimed GST in relation to the intended supply of land. This can happen if the supply of land is deemed to take place before the agreement is cancelled and the transaction is not treated as zero-rated.
37. In this situation, a GST adjustment is required under s 25.
38. Payment of a deposit will trigger the time of supply unless the recipient holds the deposit as a stakeholder.^{11 12}
39. If time of supply was triggered before the agreement was cancelled and the transaction was expected to be zero-rated¹³, the seller will not have paid GST and the buyer will not have been able to claim GST. In this situation, neither the seller nor the buyer is required to make an adjustment when the agreement is cancelled.
40. If time of supply was triggered before the agreement was cancelled and the transaction was not zero-rated, then the seller would have been required to pay GST and the buyer would have been entitled to claim GST (if they are GST registered).
41. Whether GST was paid (or claimed) on the full amount of the sale price or only on the amount of the deposit will generally depend on whether the person is registered on an invoice basis (full sale price) or payments basis (amount of the deposit).

What to do if you have already paid or claimed GST

42. If you have already paid output tax (as the seller) or claimed input tax (as the buyer) in relation to the intended supply of land and the contract is cancelled, you will need to make a GST adjustment under s 25.
43. Section 25 requires an adjustment if a return or taxable supply information contains an inaccuracy because the supply was cancelled.
44. If a land sale agreement has been cancelled and the seller retains the deposit there is no supply of land or any other supply for the deposit. Therefore, GST does not apply.

¹¹ See **IS 10/03: GST: Time of supply – payments of deposits, including to a stakeholder** *Tax Information Bulletin* Vol 22, No 6 (July 2010): 7.

¹² For information on whether entering into a land sale agreement triggers the time of supply see **IS 07/02: Is an agreement for the sale and purchase of property an “invoice” for GST purposes?** *Tax Information Bulletin* Vol 19, No 7 (August 2007): 7.

¹³ See **IS 17/08: Goods and services tax – Compulsory zero-rating of land rules (general application)** *Tax Information Bulletin* Vol 29, No 10 (November 2017): 17, including the flowchart in Appendix 1.

This means any GST the seller has paid will need to be reversed in the period in which it has become apparent that the GST paid was incorrect. This will generally be the period in which the agreement was cancelled.

45. If a buyer has claimed GST in relation to the intended supply of land, then this will need to be reversed in the period in which the seller issues supply correction information or the buyer becomes aware that the taxable supply information they have is incorrect. This will generally be the period in which the agreement is cancelled.

Example | Taurira

Example | Taurira 1 – Property developer sells land to an unregistered person who defaults

Build Co Ltd is a GST-registered property developer that accounts for GST on an invoice basis.

On 1 December 2023, Build Co Ltd agrees to sell land to Mr Smith, who is not registered for GST, for \$1,150,000 including GST (if any). The agreement is unconditional and Mr Smith pays a 10% deposit of \$115,000 to Build Co Ltd on the same day. Build Co Ltd holds the deposit for its own benefit, not as a stakeholder. Possession and settlement are on 20 February 2024.

Time of supply is triggered on 1 December 2023 when Build Co Ltd receives the deposit. Build Co Ltd treats the transaction as standard-rated (because Mr Smith is not GST registered) and pays GST output tax of \$150,000 on the full sale price.

Mr Smith decides he doesn't want to go ahead with the purchase and fails to pay the balance of the purchase price on settlement date. Build Co Ltd issues a settlement notice with a new completion date but Mr Smith does not comply. Build Co Ltd cancels the contract and retains the deposit.

GST does not apply to the deposit Build Co Ltd retains as it has made no supply of land or any other supply in return for the deposit. The deposit is compensation for Mr Smith's failure to pay the balance of the purchase price as agreed.

Build Co Ltd makes a GST adjustment under s 25 and claims a GST input tax credit of \$150,000 in the period in which the agreement was cancelled (ie, when Build Co Ltd knew Mr Smith was not going through with the purchase and that the amount of output tax it had previously paid was incorrect).

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

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

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References | Tohutoro

Legislative references | Tohutoro whakatureture

A New Tax System (Goods and Services Tax) Act 1999, Division 99

Goods and Services Tax Act 1985, ss 2 ("goods", "services"), 5 ("supply") 9, 25

Case references | Tohutoro kēhi

Case L67 (1989) 11 NZTC 1,391

Case N24 (1991) 13 NZTC 3,199

Case S65 (1996) 17 NZTC 7,408

Case W9 (2003) 21 NZTC 11,083

Case W11 (2003) 21 NZTC 11,100

Case W22 (2003) 21 NZTC 11,212

Ch'elle Properties (NZ) Ltd v CIR (2004) 21 NZTC 18,618

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

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

Coumat Ltd v Whitford Properties Ltd [2018] NZCA 15

FCT v Reliance Carpet Co Pty Ltd [2008] HCA 22

Garratt v Ikeda [2002] 1 NZLR 577 (CA)

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Other references | Tohutoro anō

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About this document | Mō tēnei tuhinga

Questions we've been asked (QWBAs) are issued by the Tax Counsel Office. QWBAs answer specific tax questions we have been asked that may be of general interest to taxpayers. While they set out the Commissioner's considered views, QWBAs are not binding on the Commissioner. However, taxpayers can generally rely on them in determining their tax affairs. See further [Status of Commissioner's advice](#) (Commissioner's statement, Inland Revenue, December 2012). It is important to note that a general similarity between a taxpayer's circumstances and an example in a QWBA will not necessarily lead to the same tax result. Each case must be considered on its own facts.