

[1297] *Interchase* - The meaning of "supply" in GST

by David W Marks, Barrister (Queensland)

The definition of "supply" in s 9-10 *A New Tax System (Goods and Services Tax) Act 1999* includes the surrender of a right and the release from an obligation. This definition does not expressly include the discharge or satisfaction of an obligation.

FCT v Orica Limited (1998) 194 CLR 500; 39 ATR 66 was fought, in part, on the basis of the Commissioner's contention that the performance of obligations amounted to the "discharge" or "satisfaction" of an asset (rights under an agreement). That contention was upheld.

Section 160M(3)(b) ITAA 1936 did not just refer to the "discharge" or "satisfaction" of a right. It also referred, amongst other things, to the "release" or "surrender" of a right.

Definition of "supply"

I am not the first to comment on the omission of reference to "discharge" and "satisfaction" in the GST definition of "supply": refer David Cominos "Goods and Services Tax -- The conceptual framework" (1999) 3(2) *The Tax Specialist* 61 at 63.

Does this omission mean anything?

The Commissioner's view is, apparently, that it is not significant. GST Ruling GSTR 2000/11 (GST: grants of financial assistance), para 29, says:

"In the case of a transaction which is in substance the supply of a right or obligation, the thing consumed may be the right or obligation itself, by its exercise or discharge."

The *Interchase* case

The plaintiff in *Interchase Corporation Limited v ACN 010 087 573 Pty Ltd*

(White J, 23 June 2000), reported at para [1296] of this *Bulletin*, sought to vary an order previously made by the court by adding a declaration. The declaration would have gone to the impact of GST on the judgment. The proposed declaration would have said that, if the Commissioner sought GST from the plaintiff in relation to benefits awarded to the plaintiff, the plaintiff would be entitled to be indemnified for GST and for its costs in defending a claim for payment of GST.

White J refused to make the declaration. According to her Honour, the impact of GST had not been pleaded. The potential impact of GST would have been apparent even at the commencement of the trial. There were questions as to whether the plaintiff in fact fell within the GST net, whether a GST component of damages was too remote, and whether the impact of GST was foreseeable.

In *Carborundum Realty v RAI Archicentre Pty Ltd* (1993) 25 ATR 192, Harper J of the Victorian Supreme Court refused an application after judgment to amend a statement of claim to include a new head of damages covering CGT, and also refused a declaration going to the same point. Harper J's decision was based, in part (at 205):

"upon the lateness of the application. The defendant would, I think, be unfairly prejudiced were it required, post judgment, to meet for the first time a claim giving rise to difficult issues of law, some of the most difficult of which (given the fact that the Commissioner was not joined as a party) are hypothetical."

White J cites that decision with approval. However, as with Harper J in *Carborundum*, White J in *Interchase* goes on to consider the substantive taxation point. Her Honour says at para [54]:

"The receipt of payment by a judgment creditor does not obviously involve the creation, grant, transfer, assignment or surrender of any right or the entry or release from an obligation (s 9-10(2)(e)(f)). When the judgment is satisfied the debt created by the judgment is thereby extinguished and does not depend on the surrender of any rights or the release of the judgment debtor."

Her Honour goes on to comment that Div 78 of the GST Act, and s 22 of the GST Transition Act, may have the effect that GST is not payable in relation to this particular judgment. Those provisions related to the settlement of insurance claims.

Finally, her Honour indicated that it was unlikely that the payment of interest on the judgment in accordance with the *Supreme Court Act 1995 (Qd)* could constitute consideration. (Section 48 provides for interest to run after judgment.

Her Honour is apparently not referring to interest to the date of judgment under s 47.)

However, perhaps the most significant facet of this judgment relates to her Honour's views about the mere discharge or satisfaction of an obligation. This is significant both in litigation, and in analysing day-to-day transactions.

If the Commissioner is correct in GST Ruling GSTR 2000/11, it is difficult to know when to stop dividing and subdividing a transaction, to find all the potential supplies which might occur. The majority of the High Court in *Orica* did not balk at an example (thrown up in argument) of a potential capital gain occurring by mere performance of an executory contract (at CLR 505, in argument, and at 540).

There are aspects of White J's judgment in *Interchase* that will be scrutinised critically over the coming months. However, her Honour's comments, going to "release" or "surrender", may introduce sensible limits on the meaning of "supply".