Draft Goods and Services Tax Ruling

Goods and services tax: the scope of subsection 38-190(3) and its application to supplies of things (other than goods or real property) made to non-residents that are GST-free under item 2 of the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*

Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered, views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners, as it is not a ruling or advice in terms of section 37 of the ***Taxation Administration Act 1953****. When officially released it will be a public ruling for the purposes of section 37 and may be relied upon by any entity to which it applies.*

What this Ruling is about

1. This Ruling is about the operation of subsection 38-190(3) of the *A New Tax System (Goods and Services Tax) Act 1999* (the 'GST Act'). That subsection operates to negate, in certain circumstances, the GST-free status that would otherwise apply to a supply of a thing covered by item 2 of the table in subsection 38-190(1). Under item 2 certain supplies of things (other than goods or real property) made to non-residents are GST-free.

2. In examining the operation of subsection 38-190(3), the Ruling addresses the meaning and scope of each of the following paragraphs of that subsection:

(a) a supply under an agreement entered into, whether directly or indirectly, with a non-resident; and

(b) the supply is provided, or the agreement requires it to be provided, to another entity in Australia.

3. In particular, the Ruling explores the meaning of 'provided' and 'another entity' and looks at when a supply is provided to another entity in Australia. The Ruling does not otherwise address the operation of the provisions of section 38-190.

4. Unless otherwise stated, all legislative references in this Ruling are to the GST Act and all references to an item number are to an item in the table in subsection 38-190(1).

Date of effect

5. This draft Ruling represents the preliminary, though considered, view of the Australian Taxation Office. This draft may not be relied on by taxpayers or practitioners. When the final Ruling is officially released, it will explain our view of the law as it applies from 1 July 2000.

6. The final Ruling will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* (TAA 1953) and may be relied upon, after it is issued, by any entity to which it applies. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

7. If the final public ruling conflicts with a previous private ruling that you have obtained, the public ruling prevails. However, if you have relied on a private ruling, you are protected in respect of what you have done up to the date of issue of the final public ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Legislative context

8. Under section 9-5 of the GST Act a supply is not a taxable supply to the extent that it is GST-free or input taxed.

9. A supply is GST-free if it is GST-free under Division 38 of the GST Act or under a provision of another Act.[1]

10. Subdivision 38-E sets out when exports of goods and other supplies for consumption outside Australia are GST-free. The Subdivision comprises:

- section 38-185 – exports of goods;[2]

[1] Paragraph 9-30(1)(a).

[2] The operation of this section is addressed in GSTR 2002/6 Goods and services tax: Exports of goods, items 1 to 4 of the table in subsection 38-185(1) of the *A New Tax System (Goods and Services Tax) Act 1999*; GSTR 2003/2 Goods and services tax: supplies of goods and services in the repair, renovation, modification or treatment of goods from outside Australia whose destination is outside Australia;

- section 38-187 – lease or hire of goods for use outside Australia;
- section 38-188 – tooling used by non-residents to manufacture goods for export; and
- section 38-190 – supplies of things, other than goods or real property, for consumption outside Australia.

11. Subsection 38-190(1) comprises five items which set out supplies of things other than goods or real property that are GST-free. If the requirements of one of those items are met, the supply is GST-free, provided subsections 38-190(2) or (3) do not operate to negate that GST-free status.

12. Under subsection 38-190(2) a supply covered by any of items 1 to 5 in the table in subsection 38-190(1) is not GST-free if it is the supply of a right or option to acquire something the supply of which would be connected with Australia and would not be GST-free.[3]

13. Without limiting subsection 38-190(2), subsection 38-190(3) provides that a supply covered by item 2[4] in that table is not GST-free if it is a supply under an agreement entered into, whether directly or indirectly, with a non-resident and the supply is provided, or the agreement requires it to be provided, to another entity in Australia.

14. Subsection 38-190(2) applies to negate the GST-free status afforded by any of items 1 to 5. By contrast, subsection 38-190(3) only applies to negate the GST-free status afforded by item 2.

Ruling

15. A supply of a thing (other than goods or real property) made to a non-resident is GST-free under item 2 if the non-resident is not in Australia when the thing supplied is done and the other requirements of that item are met.

GSTR 2003/4 Goods and services tax: stores and spare parts for international flights and voyages.

[3] Refer GSTR 2003/8 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

[4] Refer Draft Ruling GSTR 2003/D9 Goods and services tax: in the application of items 2, 3 and paragraph (b) of item 4 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*, when is a non-resident 'not in Australia when the thing supplied is done' for the purposes of item 2 of the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*? Also GSTR 2003/7 Goods and services tax: what do the expressions 'directly connected with goods or real property' and 'a supply of work physically performed on goods' mean for the purposes of subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*?

16. However, if the supply that is GST-free under item 2 ('the item 2 supply') is made under an agreement entered into, directly or indirectly, with a non-resident and that supply is provided to another entity in Australia or the agreement requires that it be so provided, subsection 38-190(3) operates to negate the GST-free status of that supply.

The preconditions for the operation of subsection 38-190(3)

There is a supply to which item 2 applies

17. Where a supply satisfies the requirements of item 2 and is, therefore, GST-free, that supply is a supply to which item 2 applies.

That supply is made under an agreement entered into, directly or indirectly, with a non-resident

18. That supply refers to the item 2 supply. The item 2 supply must be made under an agreement entered into, directly or indirectly, with a non-resident.

19. The agreement is entered into directly with a non-resident where the parties to the agreement are the non-resident and the supplier.

20. In the context of subsection 38-190(3), we consider that entering into an agreement indirectly with a non-resident occurs where an entity such as a nominee, agent, trustee or the like enters into the agreement on behalf of the supplier or the non-resident. For example, a supplier may enter into an agreement with an agent, or representative, or associate of the non-resident acting on behalf of the non-resident. (Other examples are provided at paragraph 73 of the Explanation section of this Ruling).

That supply is provided to another entity in Australia or the agreement requires that it be so provided

21. That supply again refers to the item 2 supply. The issue is whether the item 2 supply is provided (or is required to be provided) to another entity in Australia.

22. The term 'provided' is used in subsection 38-190(3) to differentiate from the term 'made' in item 2. The word provided focuses on the doing of the thing to be supplied and the flow of the actual services or thing required to be supplied under the contractual arrangements. In contrast, the word made identifies the contractual flow of the thing supplied – from the supplier to the non-resident.

23. If, when the supplier does the thing to be supplied, the flow of the actual services or thing required to be supplied under the agreement with a non-resident is to another entity located in Australia, in contrast to the contractual flow which is to the non-resident located outside Australia, subsection 38-190(3) applies to the item 2 supply.

24. The rationale that underpins subsection 38-190(3) is that the location of a non-resident entity that has contracted for the item 2 supply is not always the most appropriate basis for determining the place of consumption of the supply. If the actual services or thing that is required to be supplied under a contract with a non-resident (who is not in Australia when the thing supplied is done) is, in fact, provided to another entity that is in Australia, the place of consumption is more appropriately treated as Australia.

25. 'Another entity' is an entity as defined in subsection 184-1(1) other than the non-resident entity to which the supply is made. The term entity includes individuals, companies, partnerships and trusts.

26. Employees are individuals and, therefore, entities within the meaning of entity. A supply may be made to a non-resident employer and provided to an employee, another entity, in Australia (see paragraphs 44 to 47 below).

27. Agents are typically individuals or companies and, therefore, entities. While an agent, like an employee, is another entity, if all the agent does is arrange on behalf of the non-resident for the supply to be made and provided to the non-resident, that supply is not provided to the agent.

Application of subsection 38-190(3)

Characterising the item 2 supply

28. Where there is a supply of a thing made to a non-resident that supply may be GST-free under item 2. If that supply satisfies the requirements of item 2, it is necessary to consider the application of subsection 38-190(3).

29. In considering the application of subsection 38-190(3), it is first necessary to clearly establish the character of the thing that the supplier is to supply to the non-resident. Proper characterisation of the thing supplied as a service, right or some other thing is most important because only then is it possible to determine whether that thing is provided, or required to be provided, to another entity.

30. If the item 2 supply is different to that which is provided to another entity in Australia, subsection 38-190(3) has no application to the item 2 supply. The United Kingdom VAT cases of *Customs and Excise Commissioners v. Redrow Group plc* [1999] 2 All ER 1; [1999] STC 161; [1999] 1 WLR 408 and *British Airways plc* [2000] BVC 2207 have at times been cited in support of the view that the item 2 supply in cases like, for example, the supply of training services to a non-resident employer (see the example at paragraphs 106 to 110 of the Explanations section) is a different supply to that which is provided to the employees of the non-resident. The item 2 supply is said to be a supply of a right to have training services performed and the supply provided to the employees in Australia is said to be a different supply being the actual training services. On this view there are two different supplies and subsection 38-190(3) does not apply. We do not accept that either of these cases can be used to support this view of how section 38-190 applies nor this outcome. Neither of these cases is about the proper characterisation of a supply. Rather, each case is simply about identifying anything that was supplied, whether a right or otherwise, so that an input tax credit deduction could be allowed. These cases are discussed further at paragraphs 250 to 267 of the Overseas legislation and case law section of this Ruling.

Determining if the item 2 supply is provided to another entity

31. Once the item 2 supply is properly characterised as a service, right or some other thing, it is then a question of fact as to whether the supply is provided (or is required to be provided) to another entity in Australia.

32. In this regard, it is necessary to look at the whole arrangement for the supply (including the contractual arrangements), the nature of the supply and the way in which the supply is carried out. If, in the doing of the service or thing to be supplied, that service or thing is in fact provided to another entity in Australia, subsection 38-190(3) applies.

33. In looking at the way in which the supply is carried out typically, the supply is done by the supplier and it is the actions of the supplier that are to be considered in determining whether the supply is provided, in fact, to another entity. However, sometimes the supplier may subcontract provision of the supply to another entity in which case the actions of the other supplier are relevant in assessing whether the supply by the primary supplier to a non-resident is provided to another entity (see Example 2 at paragraph 94 of the Explanations section of this Ruling).

34. Where a supply is a service the performance of which must be rendered to or received by an entity at the same time the services are performed, it is clear that the actual services are provided to that entity. Examples of services of this kind include a supply of training services (see Example 6 at paragraph 106 to 110 of the Explanation section of the Ruling) and the supply of speaking services at a conference (see Example 29 at paragraph 207 of the Further examples section of this Ruling).

35. In other cases it is necessary to establish exactly what it is that the supplier is supplying to the non-resident so that the actual flow of services can be properly identified. For instance, in the case of a supply of audit services to a non-resident company involving the audit of an Australian subsidiary, without knowing the exact nature of the audit services it is not possible to determine whether the actual flow of the audit services is to the Australian subsidiary or the non-resident. An example illustrating this is provided at paragraph 114 of the Explanation section of the Ruling.

36. Where it is an express or implied term of the agreement that the supply is required to be provided to another entity in Australia, subsection 38-190(3) applies. For example, this is often the case in situations where a non-resident is obliged to supply a thing to an entity in Australia and contracts with another supplier to provide that thing to the Australian entity (see Example 30 at paragraphs 209 to 210 of the Further examples section).

37. A supply made to a non-resident entity may be provided, or be required to be provided, in whole or in part, to an entity that is not the non-resident. If that other entity is in Australia, subsection 38-190(3) applies.

38. If the item 2 supply is provided in whole to both the non-resident and another entity in Australia, subsection 38-190(3) applies to the whole of the item 2 supply. This can occur, for example, where the supply is provided to a non-resident and under the agreement between the supplier and the non-resident, the supply is also required to be provided to another entity in Australia (see Example 9 at paragraph 128 of the Explanations section of this Ruling).

39. If the item 2 supply is only provided in part to another entity in Australia, the supply is partly GST-free. An example is where a supply is required to be provided in part to one entity, and in part to another entity in Australia (see Example 8 at paragraph 123 of the Explanations section of this Ruling).

40. If, after the provision of the supply to an entity in Australia, that supply is later used outside Australia, that later use does not alter the fact that the supply was provided to an entity in Australia. For instance, where training services are provided to employees in Australia of a non-resident company, the later use outside of Australia of the skills and knowledge gained by the employees from those training services does not alter the fact that the actual services were provided to the employees in Australia.

41. Similarly, if after the provision of the supply to a non-resident entity, that supply is later used in Australia, that later use does not alter the fact that the supply was provided to the non-resident entity (so long as this is not part of an artificial or contrived scheme to reduce or eliminate a GST liability).

42. Also, if as a result of the provision of a supply to a non-resident, another entity in Australia benefits from the provision of that thing to the non-resident, the obtaining of a benefit does not alter the fact that the provision of the supply is to a non-resident. This can occur with, for example, the supply of advertising services. If the advertising services are provided to a non-resident, subsection 38-190(3) does not apply to that supply even if another entity in Australia derives a substantial benefit from that supply (see Example 10 at paragraphs 135 of the Explanation section of this Ruling.)

43. If the thing to be supplied to the non-resident is a different thing to that which is provided to another entity in Australia, subsection 38-190(3) does not apply to the item 2 supply. The UK VAT case of *Customs and Excise Commissioners v. Plantiflor Ltd* [1999] BVC 37 has been referred to as supporting a view that in a tripartite arrangement (an arrangement involving three parties), the item 2 supply is the supply of a different thing from that which is provided to another entity. However, the United Kingdom legislative provisions considered in *Plantiflor* are entirely different. The UK VAT provisions do not have a counterpart to subsection 38-190(3). In particular, the Court did not have to address the question of whether a supplier, contracted by an entity to supply delivery services, provided those services to another entity. The Court only needed to identify what was supplied to various parties – who got what under the arrangements, and whether consideration attached to that which was supplied. This case is discussed further at paragraphs 268 to 272 of the Overseas legislation and case law section of this Ruling.

Supplies made to a non-resident and provided to employees in Australia

44. Sometimes the contracting entity is a non-resident employer. Where the contracting employer is a non-resident company, the presence of employees in Australia in relation to the supply needs to be examined from two different perspectives. First, it must be determined whether the non-resident employer satisfies the requirement in item 2 that the non-resident company is not in Australia when the thing supplied is done (the meaning of 'not in Australia' is discussed in GSTR 2003/D9[5]). If the non-resident company is not in Australia when the thing supplied is done (and the other requirements of item 2 are satisfied), it is then necessary to consider whether the item 2 supply is provided (or required to be provided) to the employees in Australia of the non-resident company.

45. An employee is an individual and is an entity within the meaning of the definition of entity in subsection 184-1(1). We consider that the item 2 supply is provided to an employee of a non-resident company if, for instance, the supply is of a kind that must be rendered to or received by an employee such as training services (see Example 6 at paragraphs 106 to 110 of the Explanations section) or the supply is personal to the employee (see Example 11 at paragraphs 142 to 145 of the Explanations section).

46. Where the contracting employer is a sole trader, the presence of employees in Australia in relation to the supply only needs to be examined from a subsection 38-190(3) perspective. This is because a supply made to a non-resident sole trader satisfies the 'not in Australia' requirement of item 2 as long as the sole trader is not physically present in Australia in relation to the supply. The presence of employees has no bearing on determining whether a sole trader is in Australia for the purposes of item 2 (the meaning of 'not in Australia' for individuals, as distinct from companies, is discussed in GSTR 2003/D9[6]).

47. If the non-resident sole trader is not in Australia when the thing supplied is done (and the other requirements of item 2 are met), it is then necessary to consider whether the item 2 supply is provided (or is required to be provided) to the employees in Australia of the non-resident sole trader. We consider that the item 2 supply is provided to an employee of a sole trader if, for instance, the supply is of a kind that must be rendered to or received by an employee such as

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[5] Draft Goods and Services Tax Ruling Goods and services tax: in the application of items 2, 3 and paragraph (b) of item 4 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*, when is a non-resident 'not in Australia when the thing supplied is done' for the purposes of item 2 of the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*.

[6] As above, note 5.

training services (see Example 12 at paragraphs 149 to 150 of the Explanations section) or is personal to the employee (see Example 11 at paragraphs 142 to 145 and of the Explanations section).

Supplies made to a non-resident through an agent acting on behalf of the non-resident in Australia

48. Sometimes a supply is made to a non-resident company or sole trader (who is not in Australia when the thing supplied is done) through an agent. That is, the agent is authorised to undertake a transaction on behalf of the non-resident principal, thereby binding the non-resident to the legal effects of the transaction, and the transaction is made by the non-resident through the agent.

49. Agents are typically individuals or companies and, therefore, an entity within the meaning of subsection 184-1(1). If a supply is made to the non-resident through an agent in Australia acting on behalf of the non-resident, the mere presence of that agent in Australia does not mean that the supply is provided to another entity in Australia. It is a question of determining to which entity the supply is provided. Typically, however, if all the agent does is arrange on behalf of the non-resident for the supply to be made and provided to the non-resident, the supply is not provided to the agent.

Global supplies

50. Sometimes the non-resident parent company of a world-wide group of companies contracts for the supply of services or other things that are to be provided to its subsidiaries. If one of those subsidiaries is located in Australia, subsection 38-190(3) may apply to one or more of the global supplies.

51. The application of subsection 38-190(3) to global supplies of this kind is discussed and illustrated at paragraphs 219 to 240 of the Further examples section of the Ruling.

Subsection 38-190(3) may not be conclusive of the GST treatment of an item 2 supply

52. If subsection 38-190(3) applies, the supply is not GST-free under item 2 of the table in subsection 38-190(1). However, the supply can still be GST-free under one of the other items of the table in subsection 38-190(1).

53. If the item 2 supply is not GST-free under another item in the table in subsection 38-190(1), or by another provision of the GST Act or another Act, the supply is a taxable supply where all the other conditions of section 9-5 are met.

Commonality with subsection 38-190(2)

54. Subsections 38-190(2) and (3) both state that certain supplies that would otherwise be GST-free under subsection 38-190(1) are not GST-free. Subsection 38-190(3) is expressed to not limit subsection 38-190(2).

55. However, subsection 38-190(3) is expressed to relate specifically to item 2 in that it states that 'a supply covered by item 2 is *not* GST-free…'. This is to be contrasted with subsection 38-190(2) which states that a supply covered by any of the items in the table in subsection 38-190(1) is not GST-free if the conditions in that subsection are met.

56. Subsection 38-190(2)[7] only applies where there are two supplies, one being a supply of a right or option, and the other being a supply that is connected with Australia and that would not be GST-free. However, subsection 38-190(3) only applies where there is one supply, being a supply that is made to a non-resident, but provided or required to be provided to another entity in Australia.

Explanation

The policy intention behind subsection 38-190(3)

57. Section 38-190 applies to supplies of things, other than goods or real property, for consumption outside Australia. Subsection 38-190(1) sets out supplies of things for consumption outside Australia that are GST-free.

58. Item 2 in the table in subsection 38-190(1) applies to supplies to non-residents outside Australia. Under that item, a supply made to a non-resident who is not in Australia when the thing supplied is done is GST-free provided that:

(a) the supply is neither a supply of work physically performed on goods situated in Australia when the work is done nor a supply directly connected with real property situated in Australia; or

(b) the non-resident acquires the thing in carrying on the non-resident's enterprise, but is not registered or required to be registered.

[7] Refer Goods and Services Tax Ruling GSTR 2003/8 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

59. A supply is GST-free under item 2 only if the non-resident is not in Australia when the thing supplied is done. The presumption is that if the non-resident is not in Australia at that time, the supply is for consumption outside Australia and should, therefore, be GST-free (provided the other requirements of the item are met).

60. However, where a non-resident contracts for the supply of a thing such as a service, the non-resident is not always the entity to which the contracted supply is actually provided. If the thing to be supplied is actually provided to another entity that is located in Australia, the presumption that the supply is for consumption outside Australia because the non-resident recipient is outside Australia is not sound.

61. Subsection 38-190(3) addresses this by imposing a further location test. Where the supply is provided (or required to be provided) to another entity, and that entity is in Australia, subsection 38-190(3) operates to negate the GST-free status that would otherwise apply under item 2. Although the non-resident recipient of the supply is located outside Australia, the place of consumption of the supply is considered to be Australia because there is an entity located in Australia to which the supply is actually provided. Therefore, the supply is not GST-free.

62. The following example is provided in the Supplementary Explanatory Memorandum for the Bill[8] which inserted subsection 38-190(3).

> A school in Australia provides tuition to overseas students in Australia. However, it bills the overseas parents of the students directly. As the supply is being made to students in Australia the supply will not be GST-free under item 2 in the table in subsection 38-190(1).[9]

63. The example illustrates the situation where non-resident parents contract for the supply of tuition services but other entities, the children, are actually provided with the services. The children are in Australia. The parents have paid for tuition services to be provided to their children in Australia.[10] (The example refers to the actual 'supply.. being made' to students. Consistently with the wording used in subsection 38-190(3) the word 'provided' should have been used instead of 'made').

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[8] A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999.

[9] However, such a supply may be GST-free under Subdivision 38-C.

[10] The thing supplied, education services, may in fact be a GST-free supply pursuant to Subdivision 38-C and not a supply covered by item 2. However the example clearly illustrates the policy intent underlying the operation of subsection 38-190(3).

The preconditions for the operation of subsection 38-190(3)

64. Subsection 38-190(3) provides that, 'without limiting subsection 38-190(2), a supply covered by item 2 … is *not* GST-free if:

(a) it is a supply under an agreement entered into, whether directly or indirectly, with a non-resident; and

(b) the supply is provided, or the agreement requires it to be provided, to another entity in Australia.'

65. The first important point to note about subsection 38-190(3) is that the subsection only applies to 'a supply covered by item 2'.

66. Secondly, the supply referred to in paragraphs 38-190(3)(a) and (b) is the item 2 supply. Paragraph 38-190(3)(a) requires that 'it', the supply covered by item 2, be under an agreement with a non-resident. Paragraph 38-190(3)(b) requires 'the supply', that is the supply covered by item 2, be provided to another entity in Australia.

67. It follows that the preconditions for applying subsection 38-190(3) are:

- there is a supply to which item 2 applies;
- that supply (the item 2 supply) is made under an agreement entered into, directly or indirectly, with a non-resident; and
- that supply (the item 2 supply) is provided to another entity in Australia or the agreement requires that it be so provided.

There is a supply to which item 2 applies

68. Subsection 38-190(3) only applies to 'a supply covered by item 2'. Where a supply satisfies the requirements of item 2 and is, therefore, GST-free, that supply is a supply to which item 2 applies.

The item 2 supply is made under an agreement entered into, directly or indirectly, with a non-resident

69. The item 2 supply must be a supply under an agreement entered into, whether directly or indirectly, with a non-resident.

70. The agreement may be either a written agreement or a verbal agreement.

71. The agreement is entered into directly with a non-resident where the parties to the agreement are the non-resident and the supplier.

72. In the context of subsection 38-190(3) we consider that entering into an agreement indirectly with a non-resident means another entity such as a nominee, agent, trustee or the like enters into the agreement on behalf of the supplier or the non-resident.

73. Examples of agreements entered into indirectly with a non-resident include:

- the supplier enters into an agreement with an agent, or representative, or associate of the non-resident acting on behalf of the non-resident;
- an agent, or representative, or associate of the supplier enters into an agreement on behalf of the supplier with a non-resident; or
- an agent, or representative, or associate of the supplier and an agent, or representative, or associate of the non-resident enters into an agreement on behalf of the supplier and the non-resident respectively.

74. If a supplier entered into an agreement with an Australian resident agent of a non-resident company, the agreement is entered into indirectly with a non-resident for the purposes of paragraph 38-190(3)(a). However, in these circumstances, it would be necessary to determine whether, given the presence of that agent in Australia, the non-resident satisfies the not in Australia requirement for that supply to be GST-free under item 2[11].

The item 2 supply is provided to another entity in Australia or the agreement requires that it be so provided

75. For subsection 38-190(3) to apply, the item 2 supply must be provided to another entity in Australia or the agreement requires that supply is to be provided to another entity in Australia.

76. We consider that an agreement requires that a supply is to be provided to another entity in Australia, where it is an express or implied term of the agreement that the supply is to be provided to another entity.

77. For subsection 38-190(3) to apply to the item 2 supply, the supply provided to another entity in Australia must be the item 2 supply. If the item 2 supply is a different supply to that which is provided to another entity in Australia, subsection 38-190(3) has no application to the item 2 supply.

[11] Refer Draft Goods and Services Tax Ruling GSTR 2003/D9.

The meaning of 'provided'

78. The word 'provided' is not defined in the GST Act. Its ordinary meaning is to supply or furnish.[12] Judicial consideration of the term in other areas of law shows that the term 'provide' is capable of taking a wide range of meanings depending on the context in which it is used. For example, it has been found to cover, in context, preparation,[13] making available,[14] and acquisition.[15]

79. 'Provided' is used in subsection 38-190(3) in contrast to the term 'made' in item 2. As indicated by the example in the Supplementary Explanatory Memorandum,[16] the intention of subsection 38-190(3) is to negate the GST-free status that would otherwise apply to supplies 'made' to non-residents if the flow of the actual services is to another entity in Australia. In that example, the flow of the actual education services is to the children in Australia. Only the contractual flow of services is to the non-resident parents.

80. We consider, therefore, that 'provided' in the context of subsection 38-190(3) is used to distinguish between the recipient of the supply in a contractual sense, that is, the non-resident entity with which the contract is made, and the entity that is provided with the supply in an actual sense, that is, the entity to which the thing to be supplied is actually provided.

81. This view is also supported by the construction of subsection 38-190(3). Paragraph 38-190(3)(a) requires the item 2 supply to be under an agreement entered into with a non-resident. That paragraph establishes the contractual arrangements which give rise to the supply – an agreement with a non-resident. Paragraph 38-190(3)(b) looks to the actual flow of that supply – the provision of the supply and whether it is provided to another entity. These paragraphs contrast the recipient of the supply under the agreement – a non-resident, and the entity that is provided with the supply – another entity.

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[12] *Macquarie Dictionary*, Revised Third edition.

[13] *Fieldhouse v. FCT* (1989) 25 FCR 187, at 209 – 210.

[14] *Finch v Telegraph Construction and Maintenance Co Ltd* [1949] 1 All ER 452, per Devlin J at 452; *Ginty v. Belmont Building Supplies Ltd* [1959] 1 All ER 414, per Pearson J at 422. Pearson J was also of the view that, 'I do not think that there is any hard and fast meaning of the word 'provided'; it must depend on the circumstances of the case as to what is 'provided' and how what is 'provided' is going to be used.'; *Norris v. Syndi Manufacturing Co. Ltd* [1952] 1 All ER 935, per Romer J at 941; *Stocks & Parkes Investments Pty Ltd v. Minister* [1971] 1 NSWLR 932, per Jacobs, Manning and Moffitt JJ at 940; *Spillers & Bakers v. Great Western Railway* [1911] 1 KB 386, per Buckley LJ at 405, per Farwell LJ at 402.

[15] *Milburn v. Shire of Glenelg* [1940] VLR 1, per Martin J at 4 and 5.

[16] A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999.

The meaning of 'another entity'

82. The term entity is defined in subsection 184-1(1) of the GST Act to mean any of the following:

(a) an *individual;

(b) a body corporate;

(c) a corporation sole;

(d) a body politic;

(e) a *partnership;

(f) any other unincorporated association or body of persons

(g) a trust; and

(h) a *superannuation fund.

The asterisk terms (*) are defined in section 195-1.

83. 'Another' entity is an entity as defined above other than the non-resident entity to which the supply is made. A supply made to a non-resident entity may be provided, or be required to be provided, in whole or in part, to an entity that is not the non-resident. That entity is another entity for the purposes of subsection 38-190(3). In the example included in the Supplementary Explanatory Memorandum to the Bill[17] that inserted subsection 38-190(3) (reproduced at paragraph 62 above), the child of the non-resident parent is another entity.

An employee is another entity

84. Employees are individuals and therefore are entities within the meaning of entity as defined in subsection 184-1(1). Where a supply is made to a non-resident employer, and the thing supplied is provided, or required to be provided, to an employee, that supply is provided to 'another entity'. What constitutes 'provision' of a supply to an employee is discussed at paragraphs 140 to 152 below.

An agent is another entity

85. A non-resident principal may make an acquisition of a service or thing through an agent. The agent is authorised to undertake the acquisition on behalf of the principal, thereby binding the principal to the legal effects of the transaction.

[17] *A New Tax System (Indirect Tax and Consequential Amendments) Act (No. 2) 1999*

86. In these circumstances, the supply of the service is made to the non-resident. If that supply satisfies the other requirements of item 2 the supply is GST-free. (In the case of a non-resident company, the presence of an agent in Australia can sometimes result in the non-resident company failing the item 2 requirement that the non-resident company is not in Australia – refer GSTR 2003/D9[18]).

87. Agents are typically individuals or companies and, therefore, an entity within the meaning of subsection 184-1(1). Subsection 38-190(3) applies if the supply is provided, or required to be provided to another entity in Australia. However, the mere fact that the supply is made to an agent acting for a non-resident in Australia does not mean that the supply is provided to another entity in Australia. It is a question of determining to which entity the supply is provided. Typically, however, if all the agent does is arrange on behalf of the non-resident for the supply to be made and provided to the non-resident, the supply is not provided to the agent.

Example 1 – Australian barrister engaged by an Australian solicitor who is acting as agent of a non-resident

88. *An Australian solicitor acting as agent for a non-resident individual engages an Australian barrister to supply legal services to the non-resident. The individual is not in Australia when the legal services are performed and the supply is not directly connected with real property situated in Australia. In this circumstance, the supply meets the requirements of item 2. The supply of legal services by the barrister is made to the non-resident principal through the solicitor, as agent for the non-resident. The presence in Australia of the solicitor does not mean that the non-resident individual is in Australia for the purposes of item 2.*[19] *The supply is provided to the non-resident, through an agent. The supply is neither made nor provided to the agent. Subsection 38-190(3) does not apply.*

89. *It is also noted that in these circumstances that the agent supplies agency services to the non-resident which meet the requirements of item 2. The supply of the agency services is a distinct and separate supply from the supply of the legal services made through the agent. The agency services are made and provided to the non-resident. Subsection 38-190(3) does not apply.*

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[18] Draft Goods and Services Tax Ruling Goods and services tax: in the application of items 2, 3 and paragraph (b) of item 4 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*, when is a non-resident 'not in Australia when the thing supplied is done' for the purposes of item 2 of the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999?*

[19] Refer Draft Goods and Services Tax Ruling GSTR 2003/D9.

The application of subsection 38-190(3)

90. Before it can be determined whether a supply made to a non-resident is provided (or is required to be provided) to another entity located in Australia, it is first necessary to establish the character of the thing that the supplier is to supply to the non-resident.

91. This is very important because it is only when the item 2 supply is properly characterised as a supply of a service, right or some other thing that it is possible to determine whether the thing to be supplied is provided to another entity.

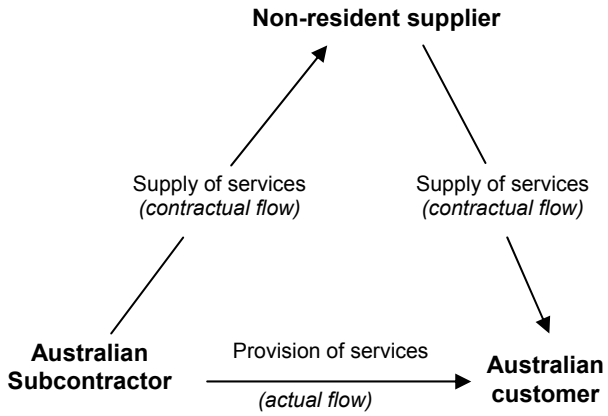
92. For instance, consider the example given in the Supplementary Explanatory Memorandum[20] and reproduced at paragraph 62 of the Ruling section above. Under the agreement between the supplier and the non-resident parents, the parents are, no doubt, supplied with certain rights. However, the essential character of the supply is a supply of services comprising the teaching, tutoring, etc of the children. The rights are integral, ancillary or incidental to the dominant part of the supply, the supply of services. The thing supplied is services. The teaching, tutoring and other education services are contracted for by the non-resident parent but the services of teaching, tutoring, etc are provided to the children in Australia.

93. In more complicated arrangements, careful consideration must be given to the proper characterisation of the item 2 supply. Consider the following example.

Example 2 – services provided to an Australian entity under a subcontract arrangement

94. *A non-resident supplier enters into a contract with an entity in Australia (the customer) under which it is obliged to provide certain services to that customer. The non-resident has no presence in Australia. The non-resident enters into another contract with an unrelated Australian entity (the subcontractor) for the provision of those services to the customer.*

[20] A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999



95. *The subcontractor makes a supply of a thing to the non-resident who is not in Australia when the thing supplied is done. Item 2 applies to the supply.*

96. *In this instance, various rights are created under the contract between the subcontractor and the non-resident. If those rights merely contribute to the supply of the service to the non-resident as a whole and cannot be identified as a dominant part of the supply, the supply to the non-resident is properly characterised as a supply of a service. As that service is required to be provided to another entity in Australia, the otherwise GST-free status under item 2 is negated by the operation of subsection 38-190(3).*

97. Once the item 2 supply is properly characterised it is necessary to look at the whole arrangement for the supply (including the contractual arrangements), the nature of the supply and the way in which the supply is carried out to determine whether the item 2 supply is provided to another entity in Australia.

98. Consider the following example.

Example 3 – supply of legal services made to a non-resident and provided to another entity in Australia

99. *A US company, with a wholly owned subsidiary in Australia, enters into a contract with an Australian law firm for the supply of legal services. The US company does not carry on business in Australia either through a place of business of its own or through an agent acting on behalf of the company. The legal services are the provision of advice on employment law. The law firm meets with the chief executive of the Australian subsidiary and provides the subsidiary with a letter of advice. The law firm has no other contact with the US company other than entering into the contract and rendering the bill for their professional services to the US Company.*

The supply contract is between the Australian law firm and a non-resident US company. The supply to the non-resident US company is GST-free under item 2. The contractual flow of services is to the non-resident. However, the actual flow of services is to the Australian subsidiary. The supply of legal services is provided to another entity in Australia. Subsection 38-190(3) applies and the GST-free status of the item 2 supply is negated.

100. This example can be contrasted with the following example.

Example 4 – supply of legal advice made and provided to a non-resident

101. *Aus Firm, an Australian law firm, contracts with a US non-resident company, US Co, to supply legal services. US Co has no presence in Australia. Aus Firm has agreed to provide US Co with advice on employment law issues associated with the dismissal of the chief executive officer of its Australian subsidiary. Aus Firm deals only with personnel of US Co located outside Australia and has no interaction of any kind with any entity in Australia in relation to the matter. The advice is prepared and the final advice is sent to the non-resident. In these circumstances, the legal services are provided to the non-resident. The supply is not provided to another entity in Australia. Subsection 38-190(3) does not apply.*

102. While paragraph 38-190(3)(b) does not specify that the supplier must be the entity that provides the supply, we consider that ordinarily the supply is carried out by the supplier and it is the actions of the supplier that are to be considered in determining whether the supply is provided to another entity.

103. Sometimes, the supplier may subcontract the supply made to a non-resident to another entity in which case the actions of that other entity are relevant in assessing whether the supply made by the primary supplier to a non-resident is provided to another entity.

Example 5 – supply of accounting services to a non-resident subcontracted to another supplier

104. *A non-resident company contracts with an Australian accounting firm for the supply of accounting services to its Australian subsidiary. The non-resident company does not carry on business in Australia either through a place of business of its own or through an agent acting on behalf of the company. The Australian accounting firm subcontracts with another supplier to provide the accounting services to the Australian subsidiary. The provision of the accounting services to the Australian subsidiary is by the other supplier. The supply of accounting services made by the Australian firm to the*

non-resident company is GST-free under item 2. However, subsection 38-190(3) applies to the supply contract made between the Australian accounting firm and the non-resident company. It is irrelevant that the supply made by the Australian accounting firm is done by another supplier. The supply by the Australian accounting firm is made to the non-resident but provided to another entity in Australia.

105. Where the supply is a service the performance of which must be rendered to or received by an entity (or entities) at the same time the services are performed, the flow of the actual services (as opposed to the contractual flow) to a particular entity is easily identified. A supply of training services is a supply of this kind.

Example 6 – supply of flight training services made to a non-resident company and provided to another entity in Australia

106. *An Australian based flight training school enters into an agreement with a non-resident airline company to train employee pilots at its flight training school in Australia.*

107. *The contractual supply is between the non-resident and the supplier. The supply is made – in a contractual sense – with a non-resident. The employees, based in China, attend the training course in Australia.*

108. *The thing that is supplied under that contract is flight training services comprising the teaching and tutoring of the employees of the non-resident. In doing that thing, the flow of the actual services of teaching and tutoring is to the employee pilots. The teaching and tutoring are rendered to, or received by, the employee pilots at the same time as the service of teaching and tutoring is performed. In the doing of the training services the employees are given the training. The training is provided to the employees.*

109. *The employees are other entities. Entity by definition in section 195-1 includes individuals.*

110. *The supply of training services made to the non-resident airline satisfies the requirements of item 2. However subsection 38-190(3) operates to negate the GST-free status otherwise applicable to the item 2 supply of training services because the actual training services are provided to the employees in Australia.*

111. Although performance and receipt of the service may take place at the same time, this does not necessarily mean that performance and receipt occur in the same place. For example, video links and telephones make it possible for things to be supplied from one place and received at the same time in another place. The entity that receives the services at the same time as they are performed is the entity to which the services are provided.

112. If the entity that receives the performance of the service is another entity, and that entity is located in Australia, subsection 38-190(3) applies.

113. Often establishing the exact nature of the supply is critical to identifying the real flow of the actual services.

114. For example, a supplier contracts with a non-resident company to audit its subsidiary in Australia. To determine whether that supply is provided to the Australian subsidiary, it is necessary to understand the exact nature of the audit service performed. If the audit is to comply with the requirements of the *Corporations Act*, the audit service being to enable the Australian subsidiary to meet its obligations under the *Corporations Act*, the supply of audit services flows to the subsidiary. The supply is provided to the Australian subsidiary. If, on the other hand, the audit services are to verify a particular matter for the non-resident only, that supply is provided to the non-resident.

115. The importance of establishing the exact nature of the supply is also illustrated in the following example involving a supply of legal services.

Example 7 – supply of legal services for application for registration of a trade mark made and provided to a non-resident

116. *An Australian law firm is asked by a United Kingdom non-resident company to apply on behalf of the UK company for registration of a trademark in an international class in the name of an Australian subsidiary. The non-resident company does not carry on business in Australia either through a place of business of its own or through an agent acting on behalf of the company.*

117. *The supply is a supply of legal services to the UK company to act on behalf of the non-resident in the registration of a trademark in the name of the Australian subsidiary. In performing the legal services there is no interaction between the Australian law firm and the Australian subsidiary.*

118. *The exact nature of the legal services is the provision of the services of applying for registration of the trademark in the name of the Australian subsidiary. The applicant for registration is the non-resident. The entity in whose name the trademark is to be registered is the Australian subsidiary. However, the application services are provided to the non-resident applicant.*

119. *As a result of the registration of the trade mark in accordance with the Trade Marks Act 1995, the Australian subsidiary becomes the registered owner and obtains the exclusive rights to use the trade mark and to authorise other persons to use the trademark in relation to the goods and/or services in respect of which the trademark is registered. However, while the Australian subsidiary obtains a significant benefit from the services rendered to the non-resident, this does not in our view alter the actual flow of the application services to the non-resident. (It is noted that the registration of a trade mark may be opposed on the ground that the applicant is not the owner of the trademark – section 58 of the Trade Marks Act 1995).*

120. *If, on the other hand, the facts in this case are that the applicant is the Australian subsidiary, we consider that the services are provided to the Australian subsidiary.*

The supply is provided in part to another entity in Australia

121. Section 9-5 provides that a supply is a taxable supply except to the extent that it is GST-free or input taxed. This creates a general apportionment rule for the GST Act. A supply can be partly one status and partly another to the extent that the provisions establishing that status apply to the supply. If the provisions establishing a particular status for supplies apply to one part of the supply but not to another, that status applies to the supply to that extent.[21]

122. If a supply made to a non-resident meets the terms of item 2 of subsection 38-190(1) and part of the thing supplied is provided to another entity in Australia, subsection 38-190(3) negates the GST-free status accorded to that part. The supply remains GST-free under item 2 to the extent that it is not provided to the other entity in Australia (unless another provision of the Act operates to negate that GST-free status).

Example 8 – supply of consultancy services made to a non-resident and provided in part to one entity and in part to another entity in Australia

123. *A non-resident parent company has a subsidiary company in Australia and a subsidiary company in New Zealand. The non-resident company does not carry on business in Australia either through a place of business of its own or through an agent acting on behalf of the company.*

[21] See GSTR 2001/8: apportioning the consideration for a supply that includes taxable and non-taxable parts at paragraphs 82 to 91 for a discussion of the general rule of apportionment.

124. *The non-resident engages an Australian management consultant to assist each subsidiary company in restructuring its operations. The supply by the management consultant is made to the non-resident and meets the terms of item 2.*

125. *However, the thing supplied, being the consultancy work undertaken by the consultant, is undertaken with each of the subsidiaries. The management consultant works with the subsidiaries to restructure their operations. The consultant interacts with each of the subsidiaries. The actual services flow, in part, to each of the subsidiaries. The supply is, therefore, provided to each of the subsidiaries, not the non-resident parent company.*

126. *The supply is provided to another entity, or rather, other entities. One of those entities, the Australian subsidiary, is in Australia. The other, the New Zealand subsidiary, is not. The supply is partly provided to another entity in Australia. Subsection 38-190(3) applies to that part of the supply that is provided to the Australian subsidiary.*

The supply is provided to both the non-resident and another entity

127. Sometimes a supply of services may be provided to both the non-resident and another entity in Australia. In that case the supply made to the non-resident is not GST-free.

Example 9 – supply of pathology services made and provided to a non-resident and required to be provided to another entity in Australia

128. *A non-resident pharmaceutical company with no presence in Australia runs a global clinical trial for a new drug. Australian medical practitioners engaged by the pharmaceutical company are responsible for recruiting and monitoring the Australian patients included in the trial.*

129. *The non-resident pharmaceutical company contracts with an Australian pathology company for it to test samples from the Australian patients. The results of the tests for each patient are sent to the pharmaceutical company to enable the company to assess the effectiveness of the drug. The pharmaceutical company also requires that the test results for each patient are provided to the medical practitioner to enable that doctor to monitor the health of the trial patient. The pathology services as a whole are carried out for both the non-resident pharmaceutical company and the Australian medical practitioners.*

130. *Item 2 applies to the supply of information. In this case the dominant part of the supply is the analysis of data to enable a professional opinion to be provided. The supply is not characterised as a supply of work physically performed on goods.*

131. *However, the supply is provided, in whole, to both the non-resident contractual recipient and the medical practitioners. The medical practitioners are entities other than the pharmaceutical company. As the supply of the pathology services is required to be provided to the medical practitioners, and that supply is the same supply that is provided to the non-resident, subsection 38-190(3) applies to the supply of pathology services from the pathology company to the pharmaceutical company.*

132. Further examples illustrating the application of subsection 38-190(3) are given at paragraphs 159 to 240 in the Further examples section of the ruling.

Later use of the supply by the non-resident recipient outside Australia

133. If the thing supplied is provided to another entity in Australia, it is not relevant to the application of subsection 38-190(3) that the thing supplied is for later use outside Australia. For example, while the airline in Example 6 makes use outside of Australia of the skills that the employee pilots have gained from the training, this is not relevant in assessing the application of subsection 38-190(3). The essence of the supply is the supply of training services. The flight school is obliged to supply training services to the non-resident airline consisting of the teaching and tutoring of the individual employees. What use the airline makes of the trained pilots is not relevant in establishing what is being supplied and to whom. The supplier has undertaken to supply flight training to the non-resident airline and those training services are provided to the employees in Australia.[22]

Benefits that flow to another entity as a result of the provision of the supply to a non-resident

134. If a non-resident entity is provided with the thing supplied, it is irrelevant that some benefit(s) flow from that supply to some other entity in Australia. If the non-resident is the only entity that is provided with the thing supplied, subsection 38-190(3) does not apply,

[22] See the UK VAT case of *Customs and Excise Commissioners v. G & B Practical Management Development Ltd* [1979] STC 280 as an example of the application of the distinction between the supply of training services to employees in the UK and the later use outside the UK of the skills and knowledge gained by the employees from those training services.

even if another entity in Australia obtains some benefit from the supply made and provided to the non-resident.

Example 10 – advertising services supplied to a non-resident in respect of goods sold in Australia

135. *A US resident distributor of soft drinks contracts for the supply of advertising air time on a national television network in Australia. The soft drinks are available from supermarket chains throughout Australia*.

136. *The supply of air time by the Australian television network is made to a non-resident. If the non-resident is not in Australia when the thing supplied is done, item 2 applies to the supply.*

137. *While Australian retailers potentially benefit from the supply of advertising services through increased sales, this does not preclude the supply from being GST-free. The performance of those advertising services is not provided to another entity in Australia.*

138. The advertising example illustrates that for the purposes of applying subsection 38-190(3), the focus is on the doing of the thing supplied and the flow of the actual service. It is not relevant to determine which entity (or entities) may benefit from the supply of that thing.

139. Subsection 38-190(3) is not about determining how the results of a supply are to be subsequently used or enjoyed or which entity benefits from the supply. Once the nature of the item 2 supply is established, the issue is whether in the doing of the thing supplied, the thing to be supplied is provided to another entity in Australia.

Provision of a supply to an employee

140. Sometimes when a non-resident employer contracts for the supply of a thing, a question arises as to whether that supply is provided, in whole or in part, to an employee in Australia of the employer. As with other situations, the answer depends on the arrangements for the supply, the nature of supply and the way the supply is carried out.

141. If the supply contracted for by a non-resident employer is personal to the employee, we consider that supply is provided to the employee. Consider the following example.

Example 11 – preparation of foreign tax returns for employees in Australia of a non-resident

142. *An Australian resident accounting firm enters into an arrangement with a non-resident sole trader entity to complete foreign tax returns for the non-resident's employees working in Australia. The Australian resident accounting firm meets with the employees. The supply is made over some time as the returns are prepared.*

143. *Each employee is another entity. The returns are required by the employees for them to meet their own foreign tax obligations. The thing supplied, tax return preparation services, is personal to the employees and is, therefore, provided to the employees.*

144. *If the non-resident sole trader is not in Australia when the tax return services are done, the supply made to the non-resident is GST-free under item 2. However, the preparation of the foreign tax returns is a supply that is provided to the employees and not the non-resident employer. As the employees are in Australia subsection 38-190(3) applies to negate the GST-free status.*

145. *If the returns are sent to the non-resident entity and then the non-resident sends them to its employees, this does not alter the fact that the supply is still personal to the employees and, therefore, is still provided to the employees not the non-resident. Subsection 38-190(3) still applies*.

146. A supply is also provided to an employee where the service is of a kind that can only be rendered to or received by an employee at the same time the service is performed - see Example 6 regarding flight training. In that example, the training services are provided to the employees in Australia rather than to their employer. This is so even though the employees receive the training in their capacity as employees and not in a personal capacity. It is in the nature of the training services that it is the individuals that are trained rather than their employer and who are thereby provided with the training.

147. If the employer is a non-resident sole trader that has employees in Australia, the sole trader is not 'in Australia' through the presence of the employees, as illustrated in Example 11. A supply made to a non-resident sole trader only fails the 'not in Australia' requirement of item 2 if the sole trader is in Australia in relation to the supply when the thing supplied is done.[23]

148. Therefore, provided that the sole trader is not in Australia, item 2 can apply. In such a case it is then necessary to consider whether subsection 38-190(3) applies. That subsection applies if the supply is provided or required to be provided, to an employee of the sole trader and the employee is in Australia when the supply is provided.

[23] Refer Draft Goods and Services Tax Ruling GSTR 2003/D9.

Example 12 – supply of training services made to a non-resident sole trader and provided to the Australian employees

149. *Andrew is a New Zealand resident individual who carries on business as a management consultant. Andrew employs Barbara, who is based in Sydney, to provide consultancy services to Andrew's Australian customers. Andrew decides that Barbara would benefit from some additional computer training and so engages an Australian computer training company to train Barbara. Andrew remains in New Zealand at all times and Barbara remains in Australia at all times.*

150. *The supply of computer training services is made to Andrew, rather than Barbara, because Andrew is a party to the contract. The supply is GST-free under item 2. However, the training services are required to be provided to Barbara (by analogy with the discussion of flight training services in example 6) so subsection 38-190(3) applies to deny the GST-free status.*

151. If the employer is a non-resident company that has employees in Australia, it is first necessary to consider what impact those employees have on the 'not in Australia' requirement. If the not in Australia requirement is satisfied, the application of subsection 38-190(3) is then considered.

152. The following two examples illustrate situations where the employee of a non-resident company is in Australia and the employee is not provided with the thing supplied to the non-resident employer.

Example 13 – supply of stevedoring services made and provided to a non-resident

153. *A non-resident company ship owner contracts with a supplier of stevedoring services to supply ship loading services at Australian ports. The non-resident company does not carry on business in Australia either through a place of business of its own or through an agent acting on behalf of the company.*

154. *To do what is contractually required the stevedore must load the ship of the non-resident at Australian ports. The ship loading is done in Australia. The supply is made to a non-resident who is not in Australia when the thing supplied is done and is GST-free under item 2. The supply of loading services is not a supply of work physically performed on goods.*

155. *The loading of the ship is not provided to another entity. It is the ship of the non-resident ship owner that is loaded. The supply is not provided to any employee of the ship owner even though some of its employees are present when the ship is loaded and may help to*

facilitate the loading process. The stevedoring services are not in any sense personal to any employee nor are they essentially for any employee. They are for the non-resident company. Subsection 38-190(3) does not apply.

Example 14 – supply of legal services made and provided to a non-resident company with an executive in Australia when the service is done

156. *A United States company, US Finance, is a non-resident company with no branch, office or agent in Australia. An executive of US Finance comes to Australia to investigate the possibility of acquiring shares in an Australian company. While in Australia, the executive meets with an Australian legal firm and issues instructions on behalf of US Finance. The Australian legal firm provides a letter of advice to the executive before his departure from Australia.*

157. *US Finance is 'not in Australia'. The presence of the executive, whether he has the authority to issue instructions on behalf of the non-resident company or not, does not mean that US Finance fails the not in Australia requirement. This is because US Finance does not carry on business within Australia through a place of its own or through an agent acting on behalf of US Finance. The supply of advice is made to a non-resident that is not in Australia when the legal services are done. Item 2 applies to the supply.*

158. *The executive is an individual, and is therefore 'another entity'. However, the employee is not provided with the legal services. The legal services are not personal to the employee and are not otherwise for the employee. Subsection 38-190(3) does not apply.*

Further examples

The application of subsection 38-190(3)

159. As discussed in the Explanations section, before considering the application of subsection 38-190(3) it is necessary to ensure that the supply is properly characterised. Once that is done, to determine whether a supply is provided to another entity it is necessary to examine the arrangements for the supply, the nature of the supply and the way in which the supply is carried out. In the first part of this section of the Ruling we provide some examples that illustrate this approach generally. In the second part we provide some examples that illustrate specific aspects of this approach. In the third part we conclude with further examples of the application of subsection 38-190(3) to global supplies.

Part I

Some general examples

160. The examples included in this part are:

Example No	***Description of the supply***
15	*Supply of legal services made and provided to a non-resident in relation to a share acquisition by an Australian subsidiary.*
16	*The supply of testing and analytical services made and provided to a non-resident.*
17	*Supply of assembly services made to a non-resident and provided to an entity in Australia*
18	*Supply of assembly services made and provided to a non-resident.*
19	*Supply of assembly services made and provided to a non-resident.*
20	*Supply of repairs under a warranty made to a non-resident and provided to another entity in Australia.*
21	*Supply of warranty repair services made to a non-resident and provided to another entity.*
22	*International freight exports – domestic leg of transport – supply of transport services made to a non-resident and provided to another entity outside Australia.*

Example No	***Description of the supply***
23	*Import by Australian subsidiary – domestic leg of transport – supplier required to deliver goods to a customer in Australia – supply of transport services made and provided to a non-resident and provided to an entity in Australia.*
24	*Supply of delivery services made to a non-resident and provided to another entity in Australia.*
25	*Supply of delivery services made to a non-resident and provided to another entity in Australia.*
26	*Supply of delivery services made and provided to a non-resident.*

Example 15 – supply of legal services made and provided to a non-resident in relation to a share acquisition by an Australian subsidiary

161. *A non-resident company, NR Co, with no business presence in Australia is buying shares in an Australian company, Oz Co. An Australian law firm, Aus Firm, gives advice to the Head Office of NR Co on various issues associated with the acquisition. Two weeks prior to settlement, NR Co decides that it will create and use a new Australian subsidiary, Aus Sub, to acquire the shares. Aus Sub is established one day before settlement of the acquisition of the shares. Aus Firm has no dealings with any party in Australia or with any directors or employees of Aus Sub. Aus Firm provides no professional services to Aus Sub. Indeed, Aus Sub does not exist for most of the time during which Aus Firm supplies professional services to NR Co.*

162. *The supply is made to a non-resident who is not in Australia when the legal services are performed. The supply is GST-free under item 2. Subsection 38-190(3) does not apply to the supply from Aus Firm to NR Co as that supply is not provided to another entity in Australia.*

Example 16 – the supply of testing and analytical services made and provided to a non-resident

163. *A US resident company, US Co provides a service of testing, analysing and reporting on the quality of certain ores.*

164. *US Co has no presence in Australia. US Co enters into a contract with an Australian resident customer, Oz Miner, to analyse and report on various mineral samples.*

165. *US Co enters into an agreement with an Australian analytical company, Oz Co. Under that agreement Oz Co does the analysis of the mineral samples provided by Oz Miner. Oz Miner arranges delivery of the samples directly to Oz Co. Other than delivery of the samples to Oz Co, Oz Co has no further interaction with Oz Miner. Oz Co undertakes the analysis and sends the results to US Co. US Co interprets the results and compiles a comprehensive report for its Australian customer.*

166. *In these circumstances the supply by OZ Co of a report of the results of the analysis (which is not a supply of work physically performed on goods.*[24]*) is made and provided to US Co. Item 2*

[24] See paragraphs 69 to 77 of GSTR 2003/7 Goods and Services Tax: what do the expressions 'directly connected with goods or real property' and 'supply of work physically performed on goods' mean for the purposes of subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999* ?

applies and that supply is GST-free. Subsection 38-190(3) does not apply.

167. *If Oz Co, with the permission of US Co, provides Oz Miner with a copy of its findings as presented to US Co, as the service supplied by OZ Co is not provided to Oz Miner, this does not alter the fact that the supply is only provided to US Co.*

Example 17 – supply of assembly services made to a non-resident and provided to an entity in Australia

168. *Aus Co Engineering assembles machinery kits which are imported into Australia by a non-resident company with no presence in Australia, NR Co. NR Co arranges for the importation of the kits and delivery of the kits to the premises of Aus Co. Aus Co assembles the kits so that they are ready to be accepted by the Australian customers of NR Co. When ordering goods from NR Co customers must specify whether they would like to receive kits in unassembled form or whether they would like NR Co to arrange for assembly before the customer receives the goods.*

169. *Aus Co makes a supply of assembly services to NR Co in that Aus Co is discharging the contractual obligation it owes to NR Co. As the supply of assembly services is a supply of work physically performed on goods, the supply does not satisfy the requirements of paragraph (a) of item 2. If the non-resident is not registered, or required to be registered (NR Co is making supplies connected with Australia under paragraph 9-25(3)(a) and may meet the registration turnover threshold) the supply meets the requirements of paragraph (b) of item 2 and the supply is GST-free.*

170. *However, Aus Co provides the supply to the Australian customer of NR Co, since it is the customer who is availing itself of the service of assembly. The goods are assembled for the customer. NR Co is merely discharging the contractual obligation that it has to ensure that the goods are assembled before the customer receives them. Subsection 38-190(3) applies to the supply made by Aus Co to NR Co but provided to the Australian customers of NR Co.*

Example 18 – supply of assembly services made and provided to a non-resident

171. *Following on from Example 17, the result would be different if the customer merely ordered goods that, in light of the circumstances and the contract between NR Co and the customer, are necessarily to be received in completed form. Suppose that the customer orders a car from NR Co, and NR Co has the car assembled in Australia by Aus Co. The assembly of the car is not a separate or optional*

component of the supply of the car by NR Co to the customer; it is implicit in the concept of supplying a car that it will be supplied in an assembled form. Therefore, the supply of the assembly services by Aus Co is provided to NR Co and not to the customer. Subsection 38-190(3) does not apply. (To be GST-free the supply would have to satisfy the requirements under item 2 as explained in Example 17.)

Example 19 – supply of assembly services made and provided to a non-resident

172. *The result in Example 17 would also be different if NR Co imported the machinery kits into Australia and had Aus Co assemble them without any particular customer in mind but anticipating that customers will be found later. In this case the assembly services are provided to NR Co as there is no particular customer to whom they are provided. It is not known whether any customer will ultimately be found or whether any future customer that is found will be in Australia. Subsection 38-190(3) does not apply. (To be GST-free the supply would have to satisfy the requirements under item 2 as explained in Example 17.)*

Example 20 – supply of repairs under a warranty made to a non-resident and provided to another entity in Australia

173. *A non-resident manufacturer, NR Co, with no presence in Australia, manufactures and sells machinery. NR Co sells machinery directly to customers in Australia. The Australian customer imports the goods into Australia. NR Co does not make supplies connected with Australia. NR Co supplies a warranty with the machinery to the customers in Australia under which NR Co is obligated to repair the customer's machinery if the machinery proves to be defective. Warranty repairs are carried out by Oz Co on behalf of NR Co under an agreement with NR Co.*

174. *Oz Co makes a supply of warranty repair services to NR Co. This supply of warranty repair services is made to a non-resident who acquires the supply in carrying out its enterprise. NR Co is not registered or required to be registered. While the supply of warranty repair services is a supply of work physically performed on goods, the supply meets the requirements of paragraph (b) of item 2.*

175. *However, there is another entity in Australia, the Australian customer. The supply of the warranty repairs is provided to the Australian customer – the flow of the actual repairs is to the Australian customer under the warranty arrangements. The supply is made to NR Co and provided to the Australian customer. Subsection 38-190(3) applies.*

176. *An alternative view is that there are warranty repair services supplied to the Australian customer by Oz Co and a supply by Oz Co of an obligation to NR Co to undertake warranty repair services for Australian customers. We do not consider this to be the correct nature of the supplies involved.*

Example 21 – supply of warranty repair services made to a non-resident and provided to another entity

177. *NZ Co, a non-resident manufacturer of motor vehicles, sells motor vehicles to an Australian distributor ADis Co. NZ Co does not carry on business in Australia either through a place of business of its own or through an agent acting on behalf of the company. The motor vehicles acquired by ADis Co are sold to an Australian dealer Adealer Co. Adealer Co sells the motor vehicles to Australian customers. NZ Co provides a warranty to Adis Co which requires NZ Co to repair defective motor vehicles. Adis Co provides a warranty to Australian customers which requires Adis Co to repair defective motor vehicles.*

178. *As NZ Co has no presence in Australia it is unable to undertake the repairs of faulty motor vehicles it is required to undertake under the warranty it provides to Adis Co. NZ Co makes an agreement with Adis Co to repair faulty vehicles on its behalf. NZ Co will pay Adis Co for the repair services it supplies. This supply is made to a non-resident who is not in Australia, is not registered or required to be registered and who acquires the supply in carrying on its enterprise.*

179. *Adis Co does not have the facilities to repair faulty vehicles which it is required to do under its warranty to Australian customers. Adis Co enters into an agreement with Adealer Co to repair faulty motor vehicles on its behalf. Adis Co pays Adealer Co for the repair services it supplies.*

180. *When a faulty motor vehicle requires repair within the terms of the warranty that Adis Co has given to the Australian customer, the Australian customer takes the motor vehicle to Adealer Co for repair. Such a warranty repair also falls within the terms of the warranty supplied by NZ Co to Adis Co. When Adealer Co performs the repair it is meeting Adis Co's obligation under the warranty it supplied to the Australian customer. Adis Co, through Adealer Co, is also meeting its obligation to perform the repair services under the agreement that it has made with NZ Co. This latter performance also means that NZ Co meets its obligations under the warranty it supplied to Adis Co. The one action of repair meets contractual obligations to two different entities under two different warranty contracts.*

181. *There is a supply of warranty repair services to the Australian customer by the Australian distributor under the warranty supplied to the customer. There is also a supply of warranty repair services to NZ Co under the agreement between NZ Co and Adis Co that Adis Co would perform repairs on behalf of NZ Co. This latter supply meets the requirements of item 2 (paragraph (b)).*

182. *However, subsection 38-190(3) applies to the supply of repair services by Adis Co to NZ Co because those repair services are provided to Adis Co. Under the warranty arrangements NZ Co has an obligation to repair cars sold to Adis Co (regardless of whether Adis Co subsequently sells the cars to someone else or otherwise deals with them). NZ Co fulfils this obligation by engaging Adis Co to supply to it repair services. Adis Co, as a supplier of repair services, provides repair services to itself, in its other capacity as the buyer of cars from NZ Co. The provision of repairs to the customers of Adealer Co arises under the subsequent and separate warranty between Adis Co and the customers.*

Example 22 – international freight exports – domestic leg of transport – supply of transport services made to a non-resident and provided to another entity outside Australia

183. *An Australian exporter sells goods to a US customer on delivered duty paid terms. The exporter is obligated, therefore, to deliver the goods to the buyer at the named place of destination, Los Angeles. The buyer takes delivery of the goods at this point. The Australian exporter contracts with an overseas airline, US Air, to transport the goods from Adelaide to Los Angeles. US Air has no presence in Australia. US Air contracts with an Australian transport supplier, Aus Transport, to undertake the domestic leg of the transport of the goods from Adelaide to Sydney.*

184. *Aus Air supplies US Air with domestic transport services. Aus Transport moves the goods from Adelaide to Sydney on behalf of US Air. The supply by Aus Transport is not covered by item 5 of section 38-355 as Aus Transport is not the supplier of the international transport of the goods from Australia.*

185. *The supply of transport services made by Aus Transport to US Air is a supply made to a non-resident who is not in Australia when the transport services are performed, and satisfies the requirements of item 2 for that supply to be GST-free.*

186. *Under the export sale terms, the Australian exporter is required to provide the US customer with the services of delivering the goods to the customer at the named place of destination. The Australian exporter effects that delivery through US Air. US Air in turn subcontracts part of that delivery service to Aus Transport. As*

the item 2 supply is provided to the US customer, subsection 38-190(3) does not apply. The supply is not provided to another entity in Australia.

187. This example can be contrasted with the following example.

Example 23 – import by Australian subsidiary – domestic leg of transport – supplier required to deliver goods to a customer in Australia – supply of transport services made to a non-resident and provided to an entity in Australia

188. *A UK resident company, UK Co, with no presence in Australia supplies goods to an Australian resident company, Oz Co on delivered duty paid (or unpaid) terms of sale. UK Co is obligated to deliver the goods to Oz Co. UK Co requests a UK resident transport company, UK Trans Co, to undertake the international movement of goods from the UK to Australia. The goods are to be delivered to Oz Co in Adelaide.*

189. *UK Trans Co subcontracts to an Australian resident transport company, Aus Transport, the domestic transport of goods from Sydney to Adelaide. The supply by Aus Transport is not covered by item 5 of section 38-355 as Aus Transport is not the supplier of the international transport of the goods to Australia.*

190. *Aus Transport clears the goods through customs and delivers the goods to Adelaide.*

191. *Aus Transport has some interaction with Oz Co. arranging a suitable time to deliver the goods and again when it delivers the goods. The transport service occurs over the time from clearing the goods through customs in Sydney, the journey to Adelaide, until they are delivered to Oz Co.*

192. *Aus Transport makes a supply to UK Trans Co. The requirements of item 2 are satisfied. However, the supply by Aus Transport to UK Trans Co is provided to another entity in Australia, the Australian customer of UK Co. Subsection 38-190(3), therefore, applies to negate the GST-free status of the supply.*

Example 24 – supply of delivery services made to a non-resident and provided to another entity in Australia

193. *Booklovers Inc. is a non-resident company, with no presence in Australia, which sells books in response to orders placed over the Internet. Kate, who is in Australia at all times, orders a book from Booklovers. A delivery service is offered by Booklovers for a small*

extra charge.[25] *Booklovers will deliver the book to Kate's address. Booklovers meets this obligation by engaging a subcontractor, Ace Couriers Ltd, to perform the delivery. Ace Couriers is an Australian resident courier firm.*

194. *Ace Couriers makes a supply of delivery services to Booklovers. The contractual flow of services is to Booklovers. Ace Couriers has a contractual obligation to Booklovers to supply to it delivery services. That supply is GST-free under item 2. However, the exact nature of the supply is to deliver the books for the customer of Booklovers. It is the customer, Kate who is availing herself of the delivery services. Ace Couriers provides the actual delivery services to Kate. The book is delivered for Kate. Booklovers is merely discharging the contractual obligation that it has to deliver the book. The item 2 supply is, therefore, provided to Kate, another entity in Australia. Subsection 38-190(3) applies to negate the GST-free status of the item 2 supply.*[26]

Example 25 – supply of delivery services made to a non-resident and provided to another entity in Australia

195. *Taking the same facts as in Example 24 except that Booklovers merely promises Kate that it will arrange for the book to be delivered by a third party such as Ace Couriers, as opposed to promising to deliver the book itself. Booklovers arranges for Ace Couriers to deliver the book to Kate. The arranging fee paid by Kate to Booklovers includes the cost of Booklovers engaging the services of Ace Couriers. Ace Couriers contracts with Booklovers to deliver books to Booklover customers such as Kate for a set fee.*

196. *If Kate chooses to avail herself of this option and incurs the extra charge, the supply of delivery services made by Ace Couriers to Booklovers is still provided to Kate. Instead of choosing this option, Kate might have chosen to make her own arrangements for having the book delivered. For example, she might have engaged Ace Couriers to collect the book and deliver it to her. The result is the same. The book is delivered for Kate. It is Kate who is availing herself of the delivery services.*

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25 This is a supply of delivered goods – refer GSTD 2002/3 Goods and Services Tax Determination Goods and services tax: how do I account for GST when I supply taxable goods, non-taxable goods and delivery services together?

26 However the supply of delivery services is GST-free if it satisfies the requirements of section 38-355.

197. *The supply by Ace Couriers to Booklovers is made to a non-resident and satisfies the GST-free requirements of item 2. However, subsection 38-190(3) applies since the item 2 supply of delivery services is provided by Ace Couriers to Kate. The book is delivered for Kate.*[27]

198. Contrast this with the following example.

Example 26 – supply of delivery services made and provided to a non-resident

199. *Booklovers wants to distribute advertising material in Melbourne and Sydney to the public at large. Booklovers contracts with Ace Couriers to distribute the advertising material on its behalf. In this circumstance, the material is essentially delivered for Booklovers. The supply of delivery services is provided to Booklovers and subsection 38-190(3) does not apply. The supply of delivery services made by Ace Couriers to Booklovers remains GST-free under item 2.*

Part II

Some examples illustrating specific aspects of the application of subsection 38-190(3)

200. The examples included in this part are:

Example No	***Description of the supply***
27	*Supply of enquiry services made and provided to a non-resident.*
28	*Supply of computer helpline services made to a non-resident and provided to another entity in Australia.*
29	*Supply of conference speaking services made to a non-resident and provided to another entity in Australia.*
30	*Supply of software support services made to a non-resident and provided to another entity in Australia.*
31	*Supply of advertising services made and provided to a non-resident parent company.*
32	*Supply of advertising services made to a non-resident and provided to an Australian subsidiary of a non-resident parent company.*

[27] However the supply of delivery services is GST-free if it satisfies the requirements of section 38-355.

The nature of the supply

201. We emphasised earlier the importance of understanding the nature of the item 2 supply. The following examples further illustrate this point.

Example 27 – supply of enquiry services made and provided to a non-resident

202. *Trans-Europe Airlines Co is a non-resident company which operates an airline in Europe. Trans-Europe engages an Australian company, Aus Bookings Co, to operate a telephone bookings centre in Australia. Aus Bookings Co has a very good reputation in the industry and operates a successful telephone bookings centre for other foreign airlines. Customers call Aus Bookings Co to enquire about flights and to make reservations and buy tickets. Aus Bookings Co passes on the relevant information and money to Trans-Europe.*

203. *The supply is the operation of the telephone bookings/enquiry service. This supply is made and provided to Trans-Europe. The customers can get information and other benefits by calling Aus Bookings Co, but the service is operated for Trans-Europe so that it can carry on its business operations. The service is an input into the business operations of Trans-Europe. Where the supply satisfies the requirements of item 2, subsection 38-190(3) does not apply to negate that GST-free status.*

Example 28 – supply of computer helpline services made to a non-resident and provided to another entity in Australia

204. *USA Technology, a United States computer seller, wins a contract to supply a large Australian firm (Aus Customer Ltd) with a computer network. The computers are imported by Aus Customer Ltd. USA Technology does not make supplies connected with Australia and is not registered, or required to be registered. The contract requires USA Technology to ensure that Aus Customer receives after sales service for a period of some years, including by means of a help line that Aus Customer staff may call when they have trouble with their computers. USA Technology has no presence in Australia. USA Technology subcontracts with another Australian firm, Helpline Ltd, to perform this support service for Aus Customer.*

205. *The supply by Helpline Ltd is a supply of an information and support service to USA Technology. The supply is GST-free under item 2. However, that supply is provided to Aus Customer as it is only staff of Aus Customer that is provided with the actual service. USA Technology is not provided with the actual service. It merely has a legal interest in seeing that its contractual obligation to Aus Customer is met. Subsection 38-190(3) applies to the supply made by Helpline Ltd to USA technology and provided to Aus Customer. The supply is not GST-free.*

Service is received by or rendered to a particular entity at the same time the service is performed

206. As discussed at paragraph 34 where the supply is a service the performance of which is rendered to or received by an entity (or entities) at the same time the services are performed, the flow of the actual services to a particular entity is easily identified. If the entity to which the services are rendered is located in Australia, that supply is not GST-free. A supply of speaking services at a conference is another example.

Example 29 – supply of conference speaking services made to a non-resident and provided to another entity in Australia

207. *A non-resident conference organiser engages an Australian conference speaker to speak at a conference it is organising in Australia for the members of a profession. The members of the audience are entities other than the conference organiser. The nature of the speaking service is such that it is received at the time the speech is given and is received by the members of the audience to whom it is given. The supply is made to the non-resident conference organiser and as long as the non-resident is not in Australia when the speaking services are performed, the supply is GST-free under item 2. However that supply is provided to the members, other entities in Australia. Subsection 38-190(3) applies to the supply of speaking services made to a non-resident but provided to other entities in Australia. The GST-free status of the supply is negated under subsection 38-190(3).*

Provision to another entity is an express or implied term of the agreement

208. Where it is an express or implied term of the agreement made with a non-resident that the supply is provided to another entity in Australia, subsection 38-190(3) applies.

Example 30 – supply of software support services made to a non-resident and required to be provided to another entity in Australia

209. *US Co is a non-resident company that supplies software under licence to customers in Australia. The licence agreement requires US Co to supply software support services. US Co subcontracts Melbourne Co, a resident Australian company, to do the thing that it, US Co, is required to do under its licence agreement with its Australian customers. Under its agreement with US Co, Melbourne Co is obliged to supply software support services to the Australian customers of US Co, being training services, the answering of telephone enquiries and the provision of minor technical updates.*

210. *US Co has contracted with Melbourne Co for the supply of software support services. That supply is made to a non-resident and satisfies the item 2 requirements for that supply to be GST-free. However the supplies of training, answering telephone enquires are provided to the Australian customer. The minor technical updates are also provided to the Australian customer when they are loaded into the customers' system. The supply by Melbourne Co is, therefore, provided to the Australian customer, another entity in Australia, and subsection 38-190(3) applies to negate the GST-free status of the item 2 supply made to US Co.*

An entity benefits from the supply provided to another entity

211. At paragraph 139 we stated that a supply is not provided to another entity simply because that other entity may benefit from the provision of that supply to the non-resident. Some further advertising examples are provided to illustrate this point.

Example 31 – supply of advertising services made and provided to a non-resident parent company

212. *An Australian advertising agency, Ad Co, wins a contract to supply advertising services to a US company, US Co. Part of the services are to advertise the Australian brand of products sold by the Australian subsidiary of US Co, Aust Co. Aust Co does not provide any consideration to Ad Co for the services to be supplied by Ad Co to US Co. US Co has no presence in Australia at any time. The Australian subsidiary is not the agent of US Co in Australia.*

213. *Ad Co only deals with US Co in relation to the advertising of the Australian brand of products. Ad Co delivers the advertising 'copy' (that is, the product) directly to the media. The supply made by Ad Co to US Co meets the requirements of item 2 and the supply is GST-free under that item. The supply of advertising services made to*

US Co by Ad Co is not provided to another entity in Australia. In the doing of the thing supplied, the advertising services, nothing is provided to Aust Co. Subsection 38-190(3) does not apply.

214. The above example can be contrasted with the following example.

Example 32 – supply of advertising services made to a non-resident and provided to an Australian subsidiary of a non-resident parent company

215. *An Australian advertising agency, Ad Co wins a contract to supply advertising services to a US company, US Co. The agreement is for advertising the Australian brand of products sold by the Australian subsidiary of US Co.*

216. *Aust Co does not provide any consideration to Ad Co for the services supplied by Oz Co to US Co. US Co has no presence in Australia at any time. The Australian subsidiary is not the agent of US CO in Australia.*

217. *Ad Co deals with Aust Co in relation to the advertising campaign for the Australian brand of products including, for example, obtaining sign-off on the advertising copy. Ad Co does not deal with US Co in relation to the development and approval for the advertising copy.*

218. *The contract of supply is between the Australian advertising agency and US Co. The GST-free requirements of item 2 are satisfied. However, the services are provided to another entity in Australia, Aust Co, and subsection 38-190(3) applies to negate the GST-free status of the item 2 supply.*

Part III

Global supplies

219. The examples included in this part are:

Example No	***Description of the supply***
33	Global audit services.
34	Global supply of telecommunication services.

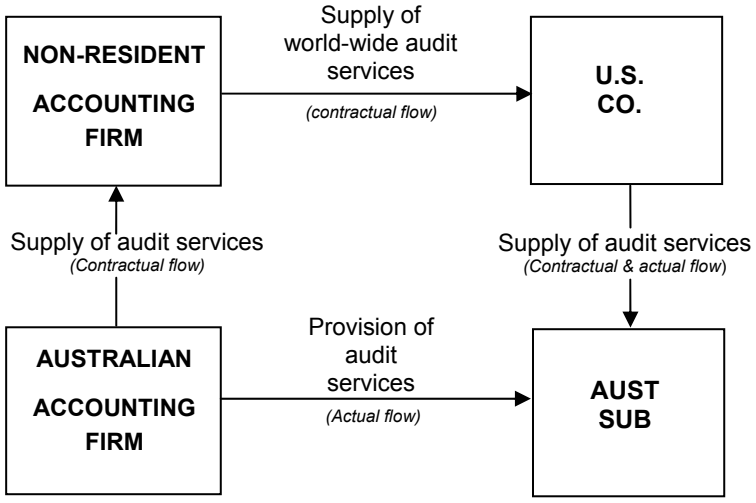
220. Sometimes supplies are made under far more broad ranging, global agreements. For example, an overseas parent company contracts with a non-resident supplier for the supply of services to the world-wide group (the head contactor). The head contractor in turn contracts with another supplier (the subcontractor) for the provision of the required service to another entity in Australia.
Subsection 38-190(3) may apply to one or more supplies made under the global arrangements.

221. Most important in considering the application of item 2 and subsection 38-190(3) is the proper characterisation of the supply. For example, whether each particular supply is properly characterised as a supply of a right or a service and the nature of each service is fundamental to the application of subsection 38-190(3). This is particularly so in relation to global supply arrangements.

222. The following examples illustrate the operation of subsection 38-190(3) where supplies are made under global arrangements.

Example 33 – global audit services

223. *A US resident parent company, US Co, engages a US accounting firm to supply audit services to the world-wide company group. An Australian subsidiary of US Co requires an audit to meet Australian statutory requirements. The US accounting firm contracts with an Australian resident accounting firm for the provision of audit services to the Australian subsidiary.*



Supply by US accounting firm to US resident parent company

224. *The US accounting firm makes a supply of audit services to US Co. The audit of the Australian subsidiary of US Co is performed under a subcontract arrangement with an Australian resident accounting firm. As the supply of audit services to US Co is partly performed in Australia, the supply of audit services to US Co is connected with Australia to the extent that the audit service is performed in Australia (subsection 9-25(5) – see also paragraph 92 of GSTR 2000/31).*

225. *If the supply by the US accounting firm to US Co satisfies the other requirements of section 9-5, the supply of audit services that are connected with Australia is a taxable supply unless and to the extent that the supply is GST-free. The supply is GST-free to the extent that it satisfies the requirements of section 38-190.*

226. *The supply of audit services to US Co satisfies the requirements of item 2. The supply is made to a non-resident who is not in Australia when the thing is done and the supply is not a supply of work physically performed on goods situated in Australia when the work is done nor a supply directly connected with real property situated in Australia.*

227. *The audit is to conform to the requirements of the Corporations Act, the audit service being to enable the Australian subsidiary to meet its obligations under the Corporations Act. Thus, the supply of audit services is provided to the Australian subsidiary of US Co. The flow of the actual services, as opposed to the contractual flow, is to the Australian subsidiary. Subsection 38-190(3) applies to the supply of audit services to US Co by the US accounting firm that would otherwise have been GST-free under item 2.*

Supply by Australian accounting firm to US accounting firm

228. *The Australian accounting firm makes a supply of audit services to the US accounting firm. The supply is connected with Australia (subsection 9-25(5)) and is a taxable supply except to the extent that the supply is GST-free.*

229. *The supply is made to a non-resident who is not in Australia when the audit services are performed. The supply satisfies the requirements of item 2.*

230. *The audit is to conform to the requirements of the Corporations Act, the audit service being to enable the Australian subsidiary to meet its obligations under the Corporations Act. The supply of actual audit services flows to the Australian subsidiary. The contractual flow is to the US accounting firm.*

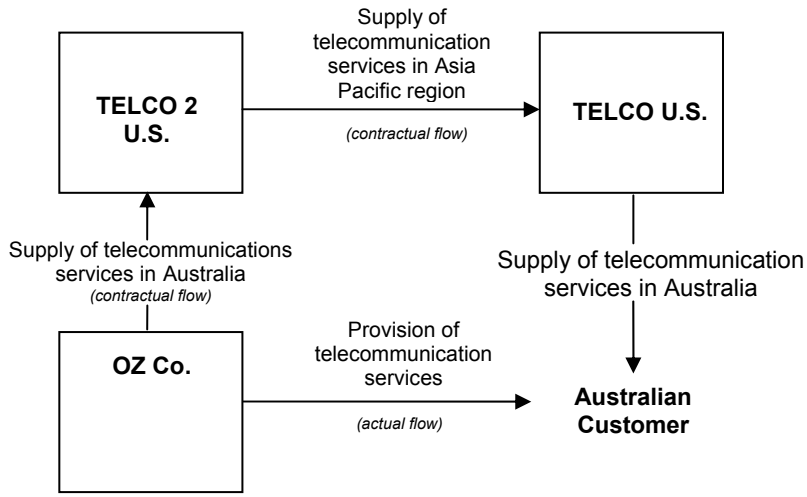
231. *The supply by the Australian accounting firm to the US accounting firm is made to the US accounting firm but provided to the Australian subsidiary. Subsection 38-190(3) applies to the supply of audit services from the Australian accounting firm to the US accounting firm.*

Supply by US resident parent company to the Australian subsidiary

232. *The US parent company charges the Australian company for the supply of audit services it makes to the subsidiary, effected through contractual arrangements with the US accounting firm. The supply of audit services made by the US parent company to its Australian subsidiary is connected with Australia (paragraph 9-25(5)(a). The supply is done in Australia.*

Example 34 – global supply of telecommunication services

233. *A telecommunications company resident in the US, Telco US, is a global supplier of telecommunications services. An Australian resident sole trader (resident business customer) contracts with Telco US for the supply of telecommunications services. Telco US subcontracts to another US resident telecommunications company, Telco2 US, for the supply of telecommunication services in the Asia-Pacific region. Telco 2 US subcontracts with an Australian telecommunications company, Oz Telco, for the supply of telecommunication services in Australia. The telecommunication services required by the Australian resident customer are, under these arrangements, actually delivered by Oz Co.*



Supply by Oz Co to Telco 2 US

234. *Oz Co makes a supply of telecommunications services to US Co 2. The supply is connected with Australia (subsection 9-25(5)). The supply is a taxable supply. However the supply is not a taxable supply to the extent that the supply is GST-free.*

235. *The supply is made to a non-resident who is not in Australia when the telecommunication services are performed. The supply satisfies the requirements of Item 2.*

236. *In the doing of the item 2 supply, the Australian customer uses the services, lines, exchanges and information assistance of Oz Co. Oz Co interacts with the Australian customer. The flow of the actual services is to the Australian customer. The contractual flow is to Telco 2 US. The supply of telecommunication services by Oz Co to Telco 2 US is, therefore, provided to the Australian customer. The Australian customer is another entity in Australia. Subsection 38-190(3) applies to negate the GST-free status of the supply by Oz Co to Telco 2 US established under item 2. The supply is a taxable supply; it is not GST-free.*

Supply by Telco 2 US to Telco US

237. *The part of the supply by Telco 2 US to Telco US that it subcontracts to Oz Co is done in Australia. That part of the supply is, therefore, connected with Australia (see paragraph 9-25(5)(a) and paragraph 92 of GST 2000/31). If the other requirements of section 9-5 are met, the supply is a taxable supply. However the supply is not a taxable supply to the extent that the supply is GST-free.*

238. *The supply made by Telco 2 US to Telco US is a supply made to a non-resident who is not in Australia when the telecommunication services are done. The requirements of item 2 are satisfied.*

239. *However, the actual flow of the part of supply that is subcontracted to Oz Co, as opposed to the contractual flow of that part of the supply, is to an Australian customer. The Australian customer is another entity. Thus the supply is provided to another entity in Australia. Therefore, subsection 38-190(3) applies to negate the GST-free status of that part of the supply. That part of the supply is a taxable supply; it is not GST-free.*

Supply by Telco US to the Australian customer

240. *The supply by Telco US to its Australian customer is a supply of telecommunications services. As that supply is done in Australia (under the subcontract arrangements), the supply is connected with Australia (paragraph 9-25(5)(a)). If the other requirements of section 9-5 are met the supply is a taxable supply.*

Overseas legislation and case law

Similar provisions in other jurisdictions

New Zealand

241. Subsection 38-190(3) is based on a similar provision in the GST Act in New Zealand.[28] In New Zealand, services supplied to non-residents are often zero-rated (equivalent to GST-free). For example, services performed for a non-resident who is outside New Zealand at the time of performance and which are not directly connected with land or improvements to land or moveable personal property (other than choses in action or temporarily imported goods) are zero-rated.[29]

242. However, zero-rating does not apply to services supplied under an agreement entered into with a non-resident if it is reasonably foreseeable at the time the agreement is entered into that the performance of the services will be received by another person in New Zealand including an employee or company director of the non-resident, or that the performance of the services will not be received by the party in New Zealand in the course of making taxable or exempt supplies.[30]

243. The exception to zero-rating was introduced in 1999 in response to the 1995 Court of Appeal decision in *Wilson & Horton v. Commissioner of Inland Revenue*.[31] That case concerned the supply of advertising services to a non-resident in relation to advertisements published in The New Zealand Herald. The Court held that the zero-rating provisions, in particular former paragraph 11(2)(e) of the New Zealand GST Act, were directed to the contractual arrangements between the supplier and the recipient. Any benefits that accrued in New Zealand arising from the advertising were disregarded because of the indirect relationship that the benefits had with the contract between *Wilson & Horton* and the non-resident. This meant that if services are contracted with a non-resident who is outside New

[28] ss 11A(2) *Goods and Services Tax Act 1985.*
[29] ss 11A(1)(k) *Goods and Services Tax Act 1985.*
[30] ss 11A(2) *Goods and Services Tax Act 1985.*
[31] (1995) 17 NZTC 12,325.

Zealand at the time of supply, paragraph 11(2)(e) may zero-rate the supply under that contract regardless of any benefits that may be enjoyed in New Zealand.

244. A government review in 1999[32] recognised that '[t]his interpretation can, in a number of situations, allow the zero-rating of services that are consumed in NZ when the contract is made with a non-resident who is outside New Zealand'. [33]

245. The amendment to the New Zealand GST law was designed to ensure that 'GST is charged on the supply of services that are physically performed in New Zealand but are contracted for with a non-resident who is outside New Zealand. The amendment aims to protect the integrity of the tax base by ensuring that domestic consumption is subject to GST, even though a non-resident may have purchased the services.'[34]

246. In the course of developing this amendment to the law, one option was to amend the law to exclude from zero-rating a supply of services that although supplied to a non-resident, also benefits a person in New Zealand. However, the government review recognised that 'any requirement to consider where the actual benefit of a service is enjoyed would raise major complications from a practical perspective. It was decided therefore that '...this option, although more clearly focused on the place of consumption, is not feasible.'

Canada

247. A similar provision is also to be found in the Canadian GST provisions.

248. In Canada, under the general zero-rating provision for exported services[35] a supply of a service *made* to a non-resident person is zero-rated with certain exceptions. One exception is a service that is *rendered* to an individual while that individual is in Canada.

249. In the Explanatory Memorandum that accompanied the introduction of this provision in 1996 the following example is given. A non-resident corporation sends its employees to Canada for training in the operation of a new computer system. The resident firm providing the training invoices the non-resident corporation for the training service. The training service supplied to the non-resident corporation is subject to GST because the service is rendered to individuals while the individuals were in Canada, unless the service is

[32] *GST: A review. A tax policy discussion document*. First published in March 1999 by the Policy Advice Division of the New Zealand Inland Revenue Department.
[33] Paragraph 9.12, page 61 of the Review.
[34] Taxation (Annual Rates & Remedial matters) Bill.
[35] Section 7 of Part V of Schedule VI to the *Excise Tax Act* (Canada).

zero-rated (GST-free) under another provision. Like Australia, Canada makes a distinction between the contractual parties to the supply and the party that actually gets the thing supplied.

Consideration of three UK VAT cases involving 'tripartite supplies'

250. 'Tripartite' arrangements, as the name suggests, are arrangements that involve three parties. Subsection 38-190(3) can be described as having application to 'tripartite' arrangements as the subsection is concerned with a supply that is contracted for by one party and actually provided to another party.

251. The United Kingdom VAT cases of *Customs and Excise Commissioners v. Redrow Group plc*. [1999] BVC 96 *('Redrow')*; *British Airways plc v. Customs and Excise Commissioners* [2000] BVC 2207 *('British Airways')* and *Customs and Excise Commissioners v. Plantiflor Ltd* [1999] BVC 37 are three well know UK VAT cases that involve tripartite arrangements.

252. In this part we discuss certain aspects of these cases with a view to dispelling any views that these cases have any bearing on the interpretation and application of subsection 38-190(3).

253. The cases of *Redrow* and *British Airways* each concerned a claim for input tax deductions.

254. The basic principle under the UK VAT system is that VAT on supplies of goods or serves to a taxable person for the purpose of the person's business may be deducted from the VAT due on the supplies which the person makes to the person's customers, and the balance remitted to Customs.

255. In *British Airways* the facts were that when a flight was delayed, food and drink were provided by a restaurant to passengers at the company's expense. There were three parties to the arrangement, British Airways, the restaurant and the passenger. The issue was whether British Airways was entitled to an input tax deduction for the VAT charged on the supply provided to the passenger. To be entitled to an input tax deduction for VAT charged on refreshments supplied at its request to delayed passengers, British Airways had to be able to show that something was provided by the restaurant to British Airways.

256. British Airways, having appealed to the English High Court, was found to be entitled to input tax deductions on the refreshments supplied at its request to delayed passengers because it was found to have obtained the right to have its delayed passengers fed at its expenses which was for the purpose of its business.

257. Mr de Voil (Chairman of the VAT Tribunal) referred to the decision in *Redrow* and asked did British Airways obtain anything – anything at all? 'Yes – it obtained the right to have its delayed passengers fed at its expense – and that was clearly for the purposes of its business. That is enough to enable it to succeed.' British Airways were entitled to an input tax deduction.

258. The characterisation of the supply made by the restaurants to British Airways was not the issue in dispute. It was simply about finding anything - anything at all - that could be said to be actually supplied to British Airways. It was found that a right was supplied. The Court did not have to determine the essential character of the supply made by the restaurants to British Airways.

259. In *Redrow* the facts are more complicated. Redrow Group plc (Redrow) was involved in constructing new houses for sale. Most prospective purchasers of a Redrow home had an existing home to sell and could not proceed with the purchase of a Redrow home unless and until they had a buyer for their existing home. Thus Redrow operated a sales incentive scheme to expedite sales of its homes. Redrow selected an estate agent and instructed it to value the prospective purchaser's existing home and to handle the sale. Redrow monitored progress in the marketing of the property, maintaining pressure on the agent to achieve a sale. As an incentive to the prospective purchaser, Redrow entered into an agreement with both the agent and the prospective purchaser that it pay the estate agent's fee plus VAT if the prospective purchaser completed the purchase of a home from Redrow. The instructions to the agent could not be changed without Redrow's agreement. However, the agreement provided that Redrow was not liable to pay the agent's fee if the prospective purchaser did not proceed with the purchase of a home from Redrow. The agent was advised by Redrow on being recruited into the scheme to enter into a separate agreement in the normal terms with the prospective purchaser, to provide cover in the event that Redrow was not liable to pay the fee because the prospective purchaser decided to go elsewhere to buy a new home.

260. The question at issue was whether Redrow was entitled to credit as a deduction from the output tax due from it for the amount of the VAT which the estate agent was obliged to charge on the supply of its services.

261. Lord Hope of Craighead found that:

> Clearly the estate agents were supplying services to the prospective purchasers, as they were engaged in the marketing and sale of the existing homes which belonged to the prospective purchasers and not to Redrow. But Redrow was prepared to undertake to pay for these services in order to facilitate the sale of its homes to the prospective purchasers. The estate agents received their instructions from Redrow and, so long as the prospective purchasers completed

> with Redrow, it was Redrow who paid for the services which were supplied. I do not see how the transactions between Redrow and the estate agents can be described other than as the supply of services for a consideration to Redrow. The agents were doing what Redrow instructed them to do*, for which they charged a fee which was paid by Redrow.*
>
> The matter has to be looked at from the standpoint of the person who is claiming the deduction by way of input tax. Was something being done for him for which, in the course or furtherance of a business carried on by him, he has had to pay a consideration which has attracted VAT? The fact that someone else – in this case, the prospective purchaser – also received a service as part of the same transaction does not deprive the person who instructed the service and who has had to pay for it of the benefit of the deduction.

262. Lord Hope of Craighead found that a service was supplied to Redrow for consideration. His Lordship's comments seem to suggest that the actual flow of the services is to the customer, though it is not clear. However this was not the issue for consideration.

263. Lord Millett said:

> ..anything done for consideration which is not a supply of goods constitutes a supply of services.. This makes it unnecessary to define the services in questions. ….there can be no question of deducting input tax unless the taxpayer has incurred a liability to pay it as part of the consideration payable by him for a supply of goods or services. …….Once the taxpayer has identified the payment the question to be asked is: did he obtain anything – anything at all – used or to be used for the purposes of his business in return for the payment. This will normally consist of the supply of goods or services to the taxpayer. But it may equally well consist of the right to have goods delivered or services rendered to a third party. The grant of such a right is itself a supply of services.
>
> …..
>
> The services[36] obtained by [Redrow] ..... consist of the right to have the householder's home valued and marketed in accordance with the taxpayer's instructions.

264. This is the ratio relied on in *British Airways*. The general reference by Lord Millett to the grant of a right being a supply of services does not mean that the supply by the real estate agent to Redrow would be properly characterised as a supply of a right for the purposes of section 38-190. The proper characterisation of the supply is not the issue in Redrow. The issue in that case is simply about finding something of any nature at all that was supplied to Redrow.

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[36] Under the UK VAT Act a supply of anything which is not a supply of goods but is done for consideration is a supply of services.

265. Lord Millett also said:

> In the present case the taxpayer did not merely derive a benefit from the services which the agents supplied to the householders and for which it paid. It chose the agents and instructed them. In return for the payment of their fees it obtained a contractual right to have the householder's homes valued and marketed, to monitor the agents' performance and maintain pressure for a quick sale and to override any alteration in the agents' instructions which the householders might be minded to give. Everything which the agents did was done at the taxpayer's request and in accordance with the instructions and, in the events which happened, at its expense. The doing of those acts constituted a supply of services to the taxpayer.
>
> The tribunal had the second of the two factors to which I have referred in mind when it said that it was necessary to await events and see to whom the agent makes the supply; it is only if the taxpayer becomes liable to pay the agent's fees that his services are supplied to it. The commissioners criticised this reasoning, submitting that the destination of a supply must be ascertainable when it is made; it cannot be held in suspense to await subsequent everts. But this assumes that the services rendered to the householder and those rendered to the taxpayer are the same. They are not. The services rendered to the householder are the ordinary services of an estate agent in the valuation and marketing of his house. If the householder sells his home but fails to complete the purchase of a Redrow home, he may become liable for the agent's fees. He is not, however, entitled to deduct input tax in respect of the fees because, although the services in question were supplied to him, they were not used or to be used for the purposes of any business carried on or to be carried on by him.
>
> The services obtained by the taxpayer are different. They consist of the right to have the householder's home valued and marketed in accordance with the taxpayer's instructions. Unless the householders sells his home and completes the purchase of a Redrow home, however, the taxpayer is not liable for the agents' fees and pays no input tax, so there is nothing in respect of which a claim to deduct may be made. What must await events is not the identity of the party to whom the services are rendered, for different services are rendered to each, but which of the parties is liable to pay for the services rendered to him and so bare the burden of the tax in respect of which a claim to deduction may arise.
>
> It is sufficient that the taxpayer obtained something of value in return for the payment of the agent's fees in those cases where it became liable to pay them, and that what it obtained was obtained for the purposes of the taxpayer's business. Both these conditions are satisfied in the present case.

266. Lord Millett seems to be referring here to the two separate contracts co-existing for the supply of real estate agent services. His Lordship then seems to identify two separate supplies of services pursuant to those contracts. However, these comments are not made in the context of a provision like subsection 38-190(3) and his Lordship's comments can not be construed as supporting a particular outcome under subsection 38-190(3).

267. If a non-resident contracts for the supply of real estate agent services and that supply satisfies the requirements of item 2, that supply is a taxable supply if the supply is provided or required to be provided to another entity in Australia.

268. The UK case of *Plantiflor* was an appeal by UK Customs and Excise against a decision of the Court of Appeal that a charge for postage and packing made by a supplier, Plantiflor, of bulbs to its customers did not give rise to a charge for VAT liability.

269. There were two contractual supplies - a supply of arranging services by Plantiflor to its customers and a supply by Parcelforce (the Post Office) to Plantiflor for the delivery of Plantiflor's customer's goods.

270. In giving effect to these contractual arrangements the judges agreed that each party was supplied with the following things:

- bulbs supplied by Plantiflor to the customer;
- arranging services supplied by Plantiflor to the customer;
- delivery services supplied by Parcelforce to Plantiflor (Parcelforce delivered Plantiflor's customer's goods); and
- delivery services supplied by Parcelforce to the customer (Parcelforce delivered the buyers goods to him).

271. Under the UK VAT provisions, if consideration attaches to one of those supplies, a liability to VAT may arise. While each judge identified these same supplies as having been made, the judges differed in their views as to which supply was effected for consideration and the amount of the consideration paid.

272. The identification of these different supplies in *Plantiflor* is not support for the view that in Australia subsection 38-190(3) does not work in a tripartite situation like this because there are different supplies. The legislation is not the same. The issue for the purposes of subsection 38-190(3) is whether a supply that is contracted for by one entity is provided to another. This is not the issue in *Plantiflor*. *Plantiflor* has, in our view, no impact as far as the interpretation and application of subsection 38-190(3) is concerned. At paragraph 195

above we give an example of the application of subsection 38-190(3) in circumstances similar to *Plantiflor*.

Your comments

273. We invite you to comment on this draft Goods and Services Tax Ruling. Please forward your comments to the contact officer(s) by the due date.

Due date: **28 February 2004**
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Detailed contents list

274. Below is a detailed contents list for this draft Goods and Services Tax Ruling:

Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:
GSTR 1999/1; GSTR 2000/31; GSTR 2001/8; GSTR 2002/6; GSTR 2003/D9; GSTR 2003/2; GSTR 2003/4; GSTR 2003/7

Subject references:
- exported services
- GST-free supplies
- services
- supplies of things other than goods or real property
- taxable supplies
- tripartite

Legislative references:
- Excise Tax Act (Canada) s7, Pt V of Sch VI
- GSTA 1999 9-5
- GSTA 1999 9-25(5)
- GSTA 1999 9-25(5)(3)(a)
- GSTA 1999 9-25(5)(a)
- GSTA 1999 9-30(1)(a)
- GSTA 1999 38-C
- GSTA 1999 38-E
- GSTA 1999 38-185
- GSTA 1999 38-187
- GSTA 1999 38-188
- GSTA 1999 38-190
- GSTA 1999 38-190(1)
- GSTA 1999 38-190(1)(4)(a)
- GSTA 1999 38-190(2)
- GSTA 1999 38-190(3)
- GSTA 1999 38-190(3)(a)
- GSTA 1999 38-190(3)(b)
- GSTA 1999 38-355
- GSTA 1999 85-5(2)
- GSTA 1999 85 (NZ) 11A(1)(k)
- GSTA 1999 85 (NZ) 11A(2)
- GSTA 1999 184-1(1)
- GSTA 1999 195-1
- TAA 1953 37
- Taxation (Annual Rates & Remedial matters) Bill (New Zealand)
- Corporations Act
- Trade marks Act 1995 sec 58

Case references:
- British Airways plc No. 13,395; [1996] BVC 2,383
- British Airways plc. [2000] BVC 2207
- British Airways plc v. C & E Commrs [1996] BVC 359
- Customs and Excise Commissioners v. G & B Practical Management Development Ltd [1979] STC 280
- Customs and Excise Commissioners v. Plantiflor Ltd [1999] BVC 37
- Customs and Excise Commissioners v. Redrow Group plc [1999] BVC 96.
- Fieldhouse v. FCT (1989) 25 FCR 187
- Finch v. Telegraph Construction and Maintenance Co Ltd [1949] 1 All ER 452
- Ginty v. Belmont Building Supplies Ltd [1959] 1 All ER 414
- Milburn v. Shire of Glenelg [1940] VLR 1
- Norris v. Syndi Manufacturing Co. Ltd [1952] 1 All ER 935
- Spillers & Bakers v. Great Western Railway [1911] 1 KB 386
- Stocks & Parkes Investments Pty Ltd v. Minister [1971] 1 NSWLR 932
- Wilson & Horton v. Commissioner of Inland Revenue (1995) 17 NZTC 12,325

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