


***GSTR 2004/7A3 - Addendum - Goods and services tax: in the application of items 2 and 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' or other 'recipient' of a supply 'not in Australia when the thing supplied is done'? when is 'an entity that is not an Australian resident' 'outside Australia when the thing supplied is done'?***

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## Addendum

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### Goods and Services Tax Ruling

Goods and services tax: in the application of items 2 and 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’ or other ‘recipient’ of a supply ‘not in Australia when the thing supplied is done’?
- when is ‘an entity that is not an Australian resident’ ‘outside Australia when the thing supplied is done’?

This Addendum is a public ruling for the purposes of the *Taxation Administration Act 1953*. It amends Goods and Services Tax Ruling GSTR 2004/7 to reflect:

- changes to section 38-190 of the *A New Tax System (Goods and Services Tax) Act 1999* as a result of the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016*, and
- the replacement of Goods and Services Tax Ruling GSTR 2000/3 *Goods and services tax: supplies connected with Australia* (which was withdrawn on 4 September 2019) by Goods and Services Tax Ruling GSTR 2019/1 *Goods and services tax: supply of anything other than goods or real property connected with the indirect tax zone (Australia)*.

This Addendum applies both before and after its date of issue, subject to the commencement and application provisions of each amending Act or Regulation to which it refers.

GSTR 2004/7 is amended as follows:

#### 1. Paragraph 1

After the word ‘Australia’, insert new footnote A1:

<sup>A1</sup> From 1 July 2015, the term ‘Australia’ was replaced with the term ‘indirect tax zone’ by the *Treasury Legislation Amendment (Repeal Day) Act 2015*. Where the term ‘Australia’ is used in this Ruling, it is referring to the ‘indirect tax zone’ as defined in section 195-1.

**2. Paragraph 7**

In the first sentence, omit the words '[to tax periods commencing]'.

**3. Paragraph 8**

(a) After the paragraph, insert new paragraph 8A:

8A. Changes made to this Ruling by addenda that issued on 31 October 2012, 3 April 2013 and 15 December 2021 have been incorporated into this version of the Ruling.<sup>1A</sup>

(b) At the end of new paragraph 8A, insert footnote 1A:

<sup>1A</sup> Refer to each Addendum to see how that Addendum amended this Ruling.

**4. Paragraph 9 (including the heading and footnote 2)**

Omit the paragraph.

**5. Paragraph 12**

(a) Omit the word 'and' at the end of the third dot point.

(b) Omit the last dot point; substitute:

- section 38-190 – supplies of things, other than goods or real property, for consumption outside Australia; and
- section 38-191 – supplies relating to the repair, renovation, modification or treatment of goods under warranty.

**6. Paragraph 14**

In the second sentence, after the words 'subsections 38-190(2)', insert ', (2A)'.

**7. Paragraph 15**

(a) In footnote 4, omit 'GSTR 2003/8'; substitute 'Goods and Services Tax Ruling GSTR 2003/8'.

(b) After the paragraph, insert new paragraph 15A:

15A. Subsection 38-190(2A) provides that a supply covered by any of items 2 to 4 in the table in subsection 38-190(1) is not GST-free if the acquisition of the supply relates (whether directly or indirectly, or wholly or partly) to the making of a supply of real property situated in Australia that would be wholly or partly input taxed under Subdivisions 40-B or 40-C. Subdivision 40-B deals with the supply of premises (including a berth at a marina) by way of lease, hire or licence. Subdivision 40-C deals with the sale of residential premises and the supply of residential premises by way of long-term lease.

**8. Paragraph 16**

- (a) Omit the paragraph; substitute:

Subsection 38-190(3) provides that, without limiting subsections 38-190(2) or (2A), a supply covered by table 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; and
  - (c) for a supply other than an input taxed supply, none of the following applies
    - (i) the other entity would be an Australian-based business recipient of the supply<sup>4A</sup>, if the supply had been made to it;
    - (ii) the other entity is an individual who is provided with the supply as an employee or officer of an entity that would be an Australian-based business recipient of the supply, if the supply had been made to it; or
    - (iii) the other entity is an individual who is provided with the supply as an employee or officer of the recipient and the recipient's acquisition of the thing is solely for a creditable purpose and is not a non-deductible expense.<sup>4B</sup>
- (b) After the word 'supply' in subparagraph 16(c)(i), insert new footnote 4A:

<sup>4A</sup> Under subsection 9-26(2), an entity is an Australian-based business recipient of a supply made to it if the entity is registered for GST, carries on an enterprise in Australia and the acquisition of the thing supplied is not solely of a private or domestic nature.

- (c) At the end of subparagraph 16(c)(iii), insert new footnote 4B:

<sup>4B</sup> Non-deductible expenses are defined in subsections 69-5(3) and (3A). The expenses include meal entertainment expenses that could be paid to the employees of a non-resident as part of their remuneration package.

**9. Paragraph 21**

In footnote 7, after the words 'subsections 38-190(2)', insert ', (2A)'.

**10. Paragraph 22**

- (a) Omit the second sentence; substitute:

A non-resident is an 'entity that is not an Australian resident'.<sup>7A</sup>

- (b) At the end of the paragraph, insert new footnote 7A:

<sup>7A</sup> Section 195-1.

**11. Paragraph 23**

At the end of the second dot point, insert new footnote 8A:

<sup>8A</sup> Refer to paragraph 122 where the definition is discussed.

**12. Paragraph 27**

In the second sentence, omit the words 'of the GST Act'.

**13. Paragraph 57**

Omit the paragraph; substitute:

Subsection 38-190(4), by means of the expression 'provided, or the agreement requires it to be provided, to another entity', seeks to identify the entity to which the item 3 supply actually flows.

**14. Paragraph 67**

In footnote 13, omit 'paragraphs 122 to 124'; substitute 'paragraphs 121 to 124'.

**15. Paragraph 81**

(a) Omit the wording of footnote 17; substitute:

Refer to paragraphs 29 to 60 of Goods and Services Tax Ruling GSTR 2019/1 *Goods and services tax: supply of anything other than goods or real property connected with the indirect tax zone (Australia)*.

(b) In the second sentence, after the words 'the thing', insert 'being supplied'.

(c) At the end of the paragraph, insert new footnote 17A:

<sup>17A</sup> From 1 October 2016, some supplies of intangibles made by non-residents done in Australia may not be connected with Australia under section 9-26.

**16. Paragraph 85**

In footnote 18, omit the words 'Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2)'.

**17. Paragraph 88**

Omit the dot points; substitute:

- a supply (other than a supply of goods or real property) that is made to an individual (refer to flowcharts 1 and 2 on pages 19 and 20 respectively);
- a supply (other than a supply of goods or real property) that is made to a company (refer to flowcharts 3 and 4 on page 21 and 22 respectively);
- a supply (other than a supply of goods or real property) that is made to a partnership other than a corporate limited partnership (refer to flowcharts 5 and 6 on pages 23 and 24 respectively); and
- a supply (other than a supply of goods or real property) that is made to a trust (refer to flowcharts 7 and 8 on pages 25 and 26 respectively).

**18. Paragraph 89 – flowcharts**

- (a) At the end of Flowchart 1, in the left yellow bubble after the word 'subsections 38-190(2)', insert ', (2A)'.
- (b) At the end of Flowchart 2, in the left yellow bubble, omit the third dot point; substitute:
- subsections 38-190(2) and (2A) do not apply.
- (c) In Flowchart 3, under the heading 'Identifying the taxable part and the GST-free part', omit the word 'Example'; substitute 'example'.
- (d) At the end of Flowchart 3, in the left yellow bubble after the word 'subsections 38-190(2)', insert ', (2A)'.
- (e) At the end of Flowchart 4, in the left yellow bubble, omit the third dot point; substitute:
- subsections 38-190(2) and (2A) do not apply.
- (f) At the end of Flowchart 5, in the left yellow bubble after the word 'subsections 38-190(2)', insert ', (2A)'.
- (g) At the end of Flowchart 6, in the left yellow bubble, omit the third dot point; substitute:
- subsections 38-190(2) and (2A) do not apply.
- (h) At the end of Flowchart 7, in the left yellow bubble after the word 'subsections 38-190(2)', insert ', (2A)'.
- (i) At the end of Flowchart 8, in the left yellow bubble, omit the third dot point; substitute:
- subsections 38-190(2) and (2A) do not apply.

**19. Paragraph 94**

In footnote 20, omit 'GSTR 2003/7'; substitute 'Goods and Services Tax Ruling GSTR 2003/7'.

**20. Paragraph 96**

- (a) In the heading after '*Subsections 38-190(2)*', insert ', (2A)'.
- (b) In the first sentence after '*Subsections 38-190(2)*<sup>21</sup>', insert ', (2A)'.
- (c) In footnote 21, omit the words 'Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2)'.

**21. Paragraph 102**

- (a) Omit the heading; substitute '*Subsections 38-190(2) and (2A)*'.
- (b) In the first sentence, omit '*Subsection 38-190(2)*<sup>24</sup> negates'; substitute '*Subsections 38-190(2)*<sup>24</sup> and (2A) negate'.

**22. Paragraph 105**

In footnote 25, omit the words 'Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2)'.

**23. Paragraph 106**

- (a) Omit the heading; substitute '*Subsections 38-190(2) and (2A)*'.
- (b) In the first sentence, omit 'Subsection 38-190(2)<sup>26</sup> negates'; substitute 'Subsections 38-190(2)<sup>26</sup> and (2A) negate'.

**24. Paragraph 108**

At the end of the flowchart in the left yellow bubble, omit the sentence; substitute:

The supply is GST-free where the other requirements of the relevant item are met and subsections 38-190(2) and (2A) do not apply.

**25. Paragraph 115**

- (a) In subparagraph 115(a)(i), omit the word 'his'; substitute 'the person's'.
- (b) Omit subparagraph 115(a)(ii); substitute:  
who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that the person's usual place of abode is outside Australia and that the person does not intend to take up residence in Australia; or

**26. Paragraph 116**

- (a) Omit footnote 27.
- (b) In the second sentence, after 'TR 98/17', insert '*Income tax: residency status of individuals entering Australia*'.

**27. Paragraph 122**

After 'central management and control in Australia', insert new footnote 27A:

<sup>27A</sup> Taxation Ruling TR 2018/5 *Income tax: central management and control test of residency*.

**28. Paragraph 130**

At the end of the paragraph, insert new footnote 30A:

<sup>30A</sup> However, a corporate limited partnership is included in the definition of company (and therefore in the definition of person) by operation of section 94J of the ITAA 1936.

**29. Paragraph 137 including heading**

- (a) Omit the heading and paragraph (excluding footnote); substitute:

Division 57

137. Division 57 generally provides that a resident agent that makes a taxable supply or taxable importation<sup>32A</sup> on behalf of a non-resident is liable for the GST payable on those supplies or importations. Further, a resident agent is entitled to the input tax credits on creditable acquisitions and creditable importations made through them by a non-resident. As explained in the Explanatory Memorandum<sup>33</sup>, the reason for this is that if a non-resident is acting through an agent, there is someone in the Australian jurisdiction on whom liability can be placed. Placing the liability on someone who is in Australia decreases the compliance risk.

137A. A resident agent is not liable to pay GST on behalf of a non-resident if the non-resident makes taxable supplies or taxable importations through an enterprise that the non-resident carries on in Australia.<sup>33A</sup>

137B. A non-resident agent is also not liable to pay GST on behalf of a non-resident if the supply is only a taxable supply because of the application of the reverse charge rules under section 84-5.

137C. The non-resident and the resident agent can agree in writing under section 57-7 to 'opt in' to the agency rules to make the resident agent the liable entity rather than the recipient (the reverse charge rules in Division 84 do not apply) in the following circumstances:

- the non-resident makes a supply that is not connected to Australia because of subsection 9-26(1);
- the agreement must apply to all supplies made by the non-resident through the resident agent; and
- if the recipient of the supply is an Australian-based business recipient, the recipient is given notice in the approved form.<sup>33B</sup>

- (b) In the first sentence after the words 'taxable importation', insert new footnote 32A:

<sup>32A</sup> Refer to paragraphs 39 to 40 and 65 to 70 of Goods and Services Tax Ruling GSTR 2003/15 *Goods and services tax: importation of goods into Australia*.

- (c) At the end of new paragraph 137A, insert new footnote 33A:

<sup>33A</sup> Refer to paragraph 98A of Goods and Services Tax Ruling GSTR 2000/37 *Goods and services tax: agency relationships and the application of the law*.

- (d) At the end of new paragraph 137C, insert new footnote 33B:

<sup>33B</sup> Refer to paragraph 98B of GSTR 2000/37.

**30. Paragraph 138**

After the words 'discussed above', insert '(see paragraphs 129 to 136)'.

**31. Paragraph 139**

In the first sentence, after the words 'domestic partnerships would', insert 'potentially'.



**32. Paragraph 141**

Omit the heading; substitute 'Division 83'.

**33. Paragraph 144**

Omit the heading; substitute 'Should the residence of a partnership be determined by the residence of the partners?'.

**34. Paragraph 146**

Omit the heading; substitute 'Our approach – for determining the residence of a partnership'.

**35. Paragraph 155**

At the end of the second sentence, insert new footnote 42A:

<sup>42A</sup> *Waterloo Pastoral Company Limited v. The Federal Commissioner of Taxation* (1946) 72 CLR 262, at 266.

**36. Paragraph 176**

In the first sentence, omit the words 'of the GST Act'.

**37. Paragraph 178**

(a) In the third dot point, after 'a partnership', insert new footnote 47A:

<sup>47A</sup> See definition of 'partnership' in section 995-1 of the ITAA 1997.

(b) In the fourth dot point, after the words 'corporate limited partnership', insert new footnote 47B:

<sup>47B</sup> See section 94D of the ITAA 1936.

(c) At the end of the fifth dot point, omit the full stop.

**38. Paragraph 198**

(a) At the end of the first sentence, insert new footnote 51A:

<sup>51A</sup> Refer to paragraphs 29 to 35 of Goods and Services Tax Ruling GSTR 2019/1 *Goods and services tax: supplies of anything other than goods or real property connected with Australia*.

(b) In the second sentence, after the words 'the thing', insert 'being supplied'.

(c) Omit the wording of footnote 52; substitute:

From 1 October 2016, intangible supplies made by non-residents that are done in Australia may not be connected with Australia under subsection 9-26(1).

**39. Paragraph 199**

- (a) Omit 'GSTR 2000/31'; substitute 'GSTR 2019/1'.
- (b) Omit the wording of footnote 53; substitute:

Refer to paragraphs 37 to 60 of GSTR 2019/1 for guidance in identifying the 'thing' being supplied and where that 'thing' being supplied is 'done'.

**40. Paragraph 239**

In footnote 58, omit '[85-1880]'; substitute '[85-1905]'.

**41. Paragraph 241**

In footnote 61, omit the third and fourth sentences; substitute:

A foreign unincorporated association is treated as a 'foreign company' for the purposes of service of process. (Refer to Halsbury's Laws of Australia, 'Conflict of Laws', Chapter 85, paragraph [18-1875]).

**42. Paragraph 243**

- (a) Omit the third sentence; substitute:

That subsection may negate the GST-free status that would otherwise apply to an item 2 supply.

- (b) After the third sentence, insert new footnote 62A:

<sup>62A</sup> For information on subsection 38-190(3), refer to Goods and Services Tax Ruling GSTR 2005/6 *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 in the table in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999.*

**43. Paragraph 253**

In the first sentence, omit the words 'it servants'; substitute 'its servants'.

**44. Paragraph 255**

- (a) Omit the second sentence; substitute:

In *Payne's* case, the Tribunal had to decide whether a company that leased a flat in London to a tenant had a 'business establishment or some other fixed establishment' in the United Kingdom (UK) within the meaning of section 9 of the *Value Added Tax Act 1994* or had 'established his business or has a fixed establishment' in the UK to which the services of the appellants were supplied within the meaning of article 9(2) of the Sixth VAT Directive of the European Council.<sup>65A</sup>

- (b) At the end of the second sentence, insert new footnote 65A:

<sup>65A</sup> *EC Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes – Common system of value added tax: uniform basis of assessment.*

**45. Paragraph 275**

In footnote 68, after the words 'at 348', insert 'to 349'.

**46. Paragraph 281**

Omit the wording of footnote 71; substitute:

See *Saccharin Corporation, Limited v. Chemische Fabrik Von Heyden Aktiengesellschaft* [1911] 2 KB 516.

**47. Paragraph 285**

(a) In the first sentence, omit the word 'company'; substitute 'Company'.

(b) Omit the second sentence; substitute:

Also, on behalf of and in the name of the Austrian Lloyd Company, the agents insured luggage or goods and advertised in England the sailing of the Austrian Lloyd Company's steamers.

**48. Paragraph 290**

Omit the words '*Saccharin Corporation Ltd. v. Chemische Fabrick Von Heyden Aktiengesellschaft*'; substitute:

*Saccharin Corporation, Limited v. Chemische Fabrik Von Heyden Aktiengesellschaft*

**49. Paragraph 292**

(a) Omit the wording of footnote 74; substitute:

*Saccharin Corporation, Limited v. Chemische Fabrik Von Heyden Aktiengesellschaft* [1911] 2 KB 516, at 525.

(b) Omit the wording of footnote 75; substitute:

*Saccharin Corporation, Limited v. Chemische Fabrik Von Heyden Aktiengesellschaft* [1911] 2 KB 516, at 524 to 525.

**50. Paragraph 294**

Omit the words 'Slade J' in the first sentence; substitute 'Slade LJ'.

**51. Paragraph 310**

Omit the wording of footnote 82, substitute:

As Slade LJ commented in *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929, at 1013:

If in any given case all other factors indicate that the business carried on by the representative of a corporation in a particular country was clearly the business of the corporation (rather than that of its representative), it could make no difference that the corporation required him to take its instructions before he actually concluded contracts on

its behalf; the existence of such a requirement would not by itself prevent the corporation from being present in the country concerned and thus from being amenable to the jurisdiction of its courts.

**52. Paragraph 327**

- (a) In the second sentence, after the words 'resident agent is', insert 'generally'.
- (b) At the end of the paragraph, insert new footnote 86A:

<sup>86A</sup> Refer to GSTR 2000/37 for further analysis of the application of Division 57.

**53. Paragraph 335**

Omit the wording of footnote 88; substitute:

Definition of 'resident' or 'resident of Australia' in subsection 6(1) of the ITAA 1936.

**54. Paragraph 336**

In the quotation, omit the word 'purposes'; substitute 'purpose'.

**55. Paragraph 349**

Omit the paragraph; substitute:

Clearly there is a connection between the supply and the presence in Australia that is not a minor connection if the supply to a company is solely or partly for the purposes of the Australian presence. For example, the company is in Australia in relation to the supply if the supply is for its:

- Australian branch, representative office or agent, if it is a non-resident company; or
- Australian head office, if it is an Australian incorporated company.

**56. Paragraph 366**

In footnote 91, omit the words 'Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38 190(2)'.

**57. Paragraph 415**

Omit the wording of footnote 94; substitute:

Limited partnerships are formed upon registration under state statutes (*Limited Partnerships Act 2016* (WA), section 10; *Partnership Act 1891* (SA), section 48; *Partnership Act 1892* (NSW), section 50A; *Partnership Act 1891* (QLD), section 50; *Partnership Act 1958* (Vic), section 52; *Partnership Act 1891* (Tas), section 51) and thus, like companies, are situated in the state in which they were registered and from whose sovereign power they derive their origin.

**58. Paragraph 440**

Omit the wording of footnote 95; substitute:

*See Goods and Services Tax Ruling GSTR 2001/8 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts at paragraphs 81ZJ to 91 for a discussion of the general rule of apportionment.*

**59. Paragraph 446**

Omit the wording of footnote 99; substitute:

Refer to GSTR 2001/8 at paragraphs 25 to 30B and paragraph 382-5(1)(a) in Schedule 1 to the *Taxation Administration Act 1953*.

**60. Paragraph 454**

In footnote 100, omit 'Section'; substitute 'Relevantly, section'.

**61. Paragraph 481**

In footnote 101, omit 'GSTR 2000/19'; substitute 'Goods and Services Tax Ruling GSTR 2000/19'.

**62. Paragraph 493**

(a) Omit the paragraph; substitute:

*The supply of training made to Asia Tech is provided to another entity in Australia, the employees. However, subsection 38-190(3) does not apply to make the supply taxable, as the provision of training to the employees is solely for Asia Tech's business activities and is not a non-deductible expense under section 69-5.<sup>103</sup> Therefore, the supply of computer training is GST-free under item 2.*

(b) At the end of the second sentence, insert new footnote 103:

<sup>103</sup> Subparagraph 38-190(3)(c)(iii), which was inserted with effect from 1 July 2016 and is applicable in relation to working out net amounts for tax periods starting on or after 1 October 2016. Prior to this amendment, the supply in this example would not have been GST-free under table item 2.

**63. Paragraph 509**

(a) Omit 'Withdrawal and replacement of paragraph 68 of GSTR 2000/31' 9'

(b) Omit:

*Subsections 38-190(2) and (3)* 96

substitute:

*Subsections 38-190(2), (2A) and (3)* 96

(c)	Omit	
	<i>Subsection 38-190(2)</i>	102
	substitute:	
	<i>Subsections 38-190(2) and (2A)</i>	102
(d)	Omit	
	<i>Subsection 38-190(2)</i>	106
	substitute:	
	<i>Subsections 38-190(2) and (2A)</i>	106
(e)	Omit:	
	<i>Division 57</i>	137
	<i>Division 83</i>	141
	<i>Should the residence of a partnership be determined by the residence of the partners?</i>	144
	<i>Our approach – for determining the residence of a partnership</i>	146
	substitute:	
	<u>Division 57</u>	137
	<u>Division 83</u>	141
	<u>Should the residence of a partnership be determined by the residence of the partners?</u>	144
	<u>Our approach – for determining the residence of a partnership</u>	146

This Addendum applies both before and after its date of issue.

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### Commissioner of Taxation

15 December 2021

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#### ATO references

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