# *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*

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From 1 July 2015, the term 'Australia' is replaced in nearly all instances within the GST, Luxury Car Tax, and Wine Equalisation Tax legislation with the term 'indirect tax zone' by the *Treasury Legislation Amendment (Repeal Day) Act 2015*. The scope of the new term, however, remains the same as the now repealed definition of 'Australia' used in those Acts. This change was made for consistency of terminology across the tax legislation, with no change in policy or legal effect. For readability and other reasons, where the term 'Australia' is used in this document, it is referring to the 'indirect tax zone' as defined in subsection 195-1 of the GST Act.

This Ruling is affected by the amendments made by *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016.* The changes impact how GST applies to cross-border supplies. Schedule 2 (generally about business to business supplies) applies from 1 October 2016. For more information see www.ato.gov.au/AusGST.

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# 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 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*

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***Preamble***

*This document was published prior to 1 July 2010 and was a public ruling for the purposes of former section 37 of the* ***Taxation Administration Act 1953*** *and former section 105-60 of Schedule 1 to the* ***Taxation Administration Act 1953.***

*From 1 July 2010, this document is taken to be a public ruling under Division 358 of Schedule 1 to the* ***Taxation Administration Act 1953.***

*A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.*

*If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.*

*[**Note:** This is a consolidated version of this document. Refer to the Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]*

# 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 negates, in certain circumstances, the GST-free status that would otherwise apply to the supply of a thing covered by item 2 in the table in subsection 38-190(1). Under item 2, supplies of things (other than goods or real property) made to non-residents are GST-free if the requirements of that item are met.

2. In explaining the operation of subsection 38-190(3) in this Ruling, we address in particular:

- the meaning of 'a supply covered by item 2';
- when a supply covered by item 2 is 'under an agreement entered into, whether directly or indirectly, with a non-resident';
- how to determine whether 'the supply is provided, or the agreement requires it to be provided, to another entity in Australia'; and
- what apportionment is required if subsection 38-190(3) applies, in part, to a supply covered by item 2.

3. Partly in response to comments received on the draft ruling (refer paragraphs 12 to 18), we give many examples illustrating the application of subsection 38-190(3) to a range of supplies covered by item 2. The examples are not in themselves statements of principles to be applied generally. The examples show how, by examining the facts and circumstances of the supply in question, you can determine whether the supply is provided to another entity. If a supply is provided to another entity, we then consider the principles discussed in this Ruling to determine whether that supply is provided to that other entity in Australia.

4. We also discuss and illustrate in this Ruling the application of subsection 38-190(3) to certain subcontract and global supply arrangements.

5. Finally, we discuss legislative provisions found in the New Zealand and Canadian GST legislation that are similar to subsection 38-190(3). We also discuss some United Kingdom Value Added Tax (UK VAT) cases which have, from time to time, been relied upon by some commentators as supporting a contrary view to that expressed in this Ruling. That contrary view is that a tripartite arrangement (an arrangement involving three parties) is not covered by subsection 38-190(3) because this kind of arrangement always involves two or more different supplies.

6. While this Ruling does not otherwise address the operation of the provisions of section 38-190, we recognise that the wording in subsection 38-190(3) is similar to that used in subsection 38-190(4) (the latter subsection relates to item 3 and applies in circumstances where the resident recipient of the supply is in Australia but the supply is provided to another entity outside Australia). Thus, a significant part of this Ruling is relevant to the application of subsection 38-190(4).

7. 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

8. This Ruling applies [to tax periods commencing] both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

8A. [Omitted.]

9. [Omitted.]

# Related Rulings

10. There are a number of other GST public rulings which explain the operation of section 38-190. These rulings are:

| Public Ruling No. | Public Ruling Title |
|---|---|
| **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*? |
| **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) |
| **GSTR 2004/7** | 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'? |
| **GSTR 2005/2**<br>**(replacing 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 |
| **GSTD 2006/2** | Goods and services tax: does an Australian entity make a taxable supply when it supplies repair services under a warranty given by a non-resident manufacturer? |
| **GSTR 2007/2** | Goods and services tax: in the application of paragraph (b) of item 3 in the table in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999 to a supply, when does 'effective use or enjoyment' of the supply 'take place outside Australia'? |

| | |
|---|---|
| **GSTD 2007/3** | Goods and services tax: if a non-resident entity owns residential rental premises in Australia and an Australian accountant makes a supply to that entity consisting of advice about the premises and tax return preparation services, is that supply wholly or partly GST-free if made on or after 1 April 2005? |

11. GSTR 2004/7, which discusses the application of item 2, is of particular importance in relation to this Ruling as subsection 38-190(3) only applies to a supply that is covered by item 2.

# Previous draft ruling

12. A draft ruling about the operation of subsection 38-190(3) issued on 19 December 2003 for industry and professional comment (see GSTR 2003/D7). That Ruling represented the preliminary, though considered, views of the Australian Taxation Office (ATO).

13. While the ATO views expressed in GSTR 2003/D7 are confirmed by this Ruling, we give a more complete analysis of the interpretation and application of subsection 38-190(3) taking into account a range of very useful industry and professional comment received on the draft ruling.

14. In particular, we give detailed consideration to determining whether a supply, which is provided to another entity, is provided to that entity in Australia. This aspect was not elaborated upon in GSTR 2003/D7.

15. We also address for the first time apportionment issues including apportionment when a supply is provided on a periodic or progressive basis.

16. In response to feedback on GSTR 2003/D7 we also include more examples including those involving global supplies.

17. While this more comprehensive analysis gives rise to a longer ruling than the draft ruling, to assist we have:

(a) included a Ruling section (paragraphs 36 to 181, 23 pages in total) which is a concise statement of the ATO views on the application of subsection 38-190(3);

(b) included five flow charts which summarise the operation of item 2 and subsection 38-190(3) (pages 31 to 35);

(c) divided the Explanation section of the Ruling into nine parts so that it is easier to find particular areas of interest; and

(d) summarised the 15 examples in Part VI (Further examples) in a table to provide a snapshot of the

application of subsection 38-190(3) in a variety of circumstances.

18. In GSTR 2003/D7 we included two examples involving warranties (see Examples 20 and 21 of that draft ruling). These examples are not included in this Ruling as the treatment of warranties, as dealt with in those examples, is the subject of separate ATO publications.[1B]

# How to read this Ruling

19. In the 'Ruling' section we set out in summary form what you need to consider in the application of subsection 38-190(3) to a supply covered by item 2 (paragraphs 36 to 181, pages 8 to 30).

20. This is followed by five flow charts which summarise the operation of item 2 and subsection 38-190(3) as explained in the Ruling section (pages 31 to 35).

21. If you require a more detailed analysis and explanation of the issues covered in the Ruling section, you should refer to the Explanation section. That section commences with a discussion of the policy considerations underlying subsection 38-190(3) (paragraphs 182 to 188) followed by a detailed explanation of the operation of subsection 38-190(3). So that you can access more easily your specific areas of interest, we have divided the detailed explanation into nine separate parts as follows:

| PART | TOPIC |
|---|---|
| **I** | Understanding **the preconditions for the application of subsection 38-190(3)** to a supply covered by item 2 (paragraphs 190 to 257).<br>This Part provides a general overview of the various elements of subsection 38-190(3) that must be satisfied if that subsection is to apply. |
| **II** | Determining whether **a supply is provided (or is required to be provided) to another entity** (paragraphs 258 to 322).<br>This Part explains in detail how to determine when a supply is provided to another entity. |
| **III** | Determining whether the supply **is provided** (or is required to be provided) **to that other entity in Australia** (paragraphs 323 to 435).<br>This Part explains in detail how to determine whether a supply is provided to another entity in Australia. |

[1B] Refer to GSTD 2006/1 Goods and Services Tax: is a payment from a non-resident car manufacturer to an Australian distributor under an offshore warranty chargeback arrangement subject to GST? Also refer to GSTD 2006/2 Goods and services tax: does an Australian entity make a taxable supply when it supplies repair services under a warranty given by a non-resident manufacturer?

| PART | TOPIC |
|---|---|
| IV | Determining whether a supply covered by item 2 **is provided to an employee, agent or partner in Australia** (paragraphs 436 to 498).<br>This Part illustrates the application of subsection 38-190(3) to employees, agents and partners. |
| V | **Other aspects** of the operation of subsection 38-190(3) (paragraphs 499 to 518).<br>This Part considers later use of a supply outside Australia that is provided to another entity in Australia. In this part we also consider a supply that involves benefits flowing to another entity in Australia but which is not provided to another entity in Australia. |
| VI | **Further examples** (paragraphs 519 to 630).<br>This Part provides further examples of how subsection 38-190(3) applies to various types of supplies covered by item 2, in particular, certain speaking services, legal services, accounting services, advertising services, telephone services, computer services, testing services and assembly services. |
| VII | **Apportionment** (paragraphs 631 to 709).<br>This Part explains when apportionment may be necessary and the method of apportionment. |
| VIII | **The application of subsection 38-190(3) to subcontract arrangements and global supplies** (paragraphs 710 to 859).<br>This Part explains the application of subsection 38-190(3) to certain complex arrangements involving subcontracted and global supplies. We illustrate certain global audit, taxation, accounting and IT services. |
| IX | **Overseas legislation and case law** (paragraphs 860 to 907).<br>This Part discusses provisions in the New Zealand and Canadian GST legislation that are similar to subsection 38-190(3). We also discuss four UK VAT cases which concern tripartite arrangements. |

# Legislative context

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

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

24. 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 2005/2 (formerly 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; GSTR 2003/4 Goods and services tax: stores and spare parts for international flights and voyages.

- 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.

25. The relevant section for the purposes of this Ruling is section 38-190.

26. Subsection 38-190(1) comprises five items which set out supplies of things, other than goods or real property, that are GST-free. A supply that is not GST-free under one item in subsection 38-190(1) may be GST-free under one of the other items. If the requirements of one of those items are met, the supply is GST-free, provided subsection 38-190(2), (2A), (3) or (5)[2A] does not negate that GST-free status.

27. Subsection 38-190(2) provides that 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]

28. 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 Subdivision 40-B or 40-C.[3A]

29. Subsection 38-190(3) is expressed to not limit subsection 38-190(2) or (2A) and provides that 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.

30. Subsections 38-190(2) and 38-190(2A) may negate the GST-free status of a supply covered by any of items 1 to 5 and items 2 to 4 respectively. However, subsection 38-190(3) only negates the GST-free status of a supply covered by item 2.

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[2A] Subsection 38-190(5) applies from 1 July 2010. The provision specifies that subsection 38-190(4) does not apply to specific types of supplies.

[3] Refer to 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).

[3A] See also Goods and Services Tax Determination GSTD 2007/3 Goods and services tax: if a non-resident entity owns residential rental premises in Australia and an Australian accountant makes a supply to that entity consisting of advice about the premises and tax return preparation services, is that supply wholly or partly GST-free if made on or after 1 April 2005?

31. Subsection 38-190(2) considers two distinct supplies – a supply of a right or option and the supply of something else, the subject of the right or option.

32. Subsection 38-190(3) only ever applies if there is a supply of something, being a supply that is made to a non-resident and covered by item 2, and that same supply is provided, or is required to be provided, to another entity in Australia.

33. This Ruling is about the interpretation and application of subsection 38-190(3) to a supply covered by item 2 (and as mentioned at paragraph 6 is of assistance in interpreting and applying subsection 38-190(4)).

34. If the GST-free status of a supply covered by item 2 is negated by the application of subsection 38-190(3), that supply may still be GST-free if the requirements of another item in the table are satisfied and subsections 38-190(2) and (2A) do not apply.

35. If the item 2 supply is not GST-free under another item in the table in subsection 38-190(1), and is not GST-free or input taxed under another provision of the GST Act or another Act, the supply is a taxable supply where all the other conditions for making a taxable supply are met.[4]

# Ruling

### Item 2 and subsection 38-190(3)

36. 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[5] and:

(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;[6] 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.

37. However, if the supply covered by item 2 is under an agreement entered into, whether directly or indirectly, with a

[4] Section 9-5

[5] Refer to GSTR 2004/7 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'?

[6] Refer to 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*?

non-resident entity and that supply is provided to another entity in Australia, or the agreement requires that it be so provided, subsection 38-190(3) negates the GST-free status of that supply (otherwise afforded under item 2).

38. Subsection 38-190(3), in contrast to item 2, focuses on the entity to which the supply is provided, not the entity (the non-resident) to which the supply is made. If the supply is provided (or is required to be provided) to another entity in Australia, subsection 38-190(3) negates the GST-free status that would otherwise apply to the supply covered by item 2. Although the non-resident recipient of the supply is not in Australia, consumption of the supply is considered to be in Australia because the supply is provided to an entity in Australia.

39. Subsection 38-190(3) provides that, without limiting subsection 38-190(2) or (2A), 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.

### The application of subsection 38-190(3)

#### *When a supply is covered by item 2*

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

#### *Paragraph 38-190(3)(a)*

41. This paragraph states that:

> it is a supply under an agreement entered into, whether directly or indirectly, with a non-resident

42. 'It' refers to the supply covered by item 2. The supply covered by item 2 must be under an agreement entered into, either directly or indirectly, with a non-resident.

43. The agreement may be either a written, oral or an implied agreement.

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

45. In the context of subsection 38-190(3), we consider that entering into an agreement indirectly with a non-resident includes the case where another entity such as a nominee or agent 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 of indirectly

entering into an agreement with a non-resident are provided at paragraph 203, Part I of the Explanation section of this Ruling).

### *The meaning of non-resident*

46. The term 'non-resident' is defined in section 195-1 to mean 'an entity that is not an Australian resident'.

47. 'Australian resident' is defined in section 195-1 to mean 'a person who is a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* (ITAA 1936).

48. A non-resident therefore includes:

- an individual who is not a resident of Australia as defined in subsection 6(1) of the ITAA 1936; (refer to paragraphs 207 to 209, Part I of the Explanation section of this Ruling);
- a company that is not a resident of Australia as defined in subsection 6(1) of the ITAA 1936; (refer to paragraphs 210 to 213, Part I of the Explanation section of this Ruling);
- a partnership the central management and control of which is not located in Australia; (refer to paragraphs 214 to 215, Part I of the Explanation section of this Ruling);
- a corporate limited partnership that is not a resident of Australia as defined in section 94T of the ITAA 1936; (refer to paragraphs 216 to 217, Part I of the Explanation section of this Ruling); and
- a trust of which no trustee is a resident of Australia as defined in subsection 6(1) of the ITAA 1936 and the central management and control of which is not located in Australia (refer to paragraph 218, Part I of the Explanation section of this Ruling).

### *Paragraph 38-190(3)(b)*

49. This paragraph states that:

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

50. 'The supply' refers to the supply covered by item 2.

51. To work out whether a supply covered by item 2 is provided (or is required to be provided) to another entity in Australia, (that is, whether the requirements of paragraph 38-190(3)(b) are satisfied), we follow a two step approach.

52. We first work out whether a supply covered by item 2 is provided to another entity. We examine this at paragraphs 66 to 82.

53. Secondly, if the supply covered by item 2 is provided to another entity, we determine whether, when the thing supplied is done, that supply is provided to that other entity in Australia. We examine this at paragraphs 83 to 121.

### *The meaning of 'another entity'*

54. 'Another entity' is an entity other than the non-resident entity to which the supply is made. The term 'entity' is defined in subsection 184-1(1) and includes an individual, company, partnership, corporate limited partnership or trust.

55. An employee is an individual and therefore an entity as defined. If a supply is made to a non-resident employer and that supply is provided, or required to be provided, to an employee, that supply is provided to another entity.

56. An agent that is, for example, an individual or company is also an entity as defined. However, the mere fact that the supply is made to an agent acting for a non-resident does not mean that the supply is provided (or is required to be provided) to another entity. It is a matter of determining to which entity the supply is provided. If all the agent does is to 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.[7]

57. A partner that is, for example, an individual or company is an entity as defined.[8] If a supply is made to a non-resident partnership and the supply is provided, or required to be provided, to a partner, that supply is provided to another entity.

58. For further explanation about the provision of a supply to an employee, an agent, or a partner refer paragraphs 122 to 129.

### *The meaning of 'provided to another entity'*

59. The word 'provided' is used in subsection 38-190(3) to contrast with the term 'made' in item 2. In the context of section 38-190, the contrasting words indicate that if a non-resident contracts for a supply to be provided to another entity, the place of consumption should be determined with regard to the entity to which the supply is provided, not the entity to which the supply is made.

60. The example in the Explanatory Memorandum accompanying the Bill[9] that introduced subsection 38-190(3) illustrates this. In that example, non-resident parents contract for the supply of education services to be provided to their children in Australia. The contractual

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[7] In the case of a non-resident entity, other than an individual, the presence of an agent in Australia can sometimes result in the non-resident entity failing the requirement in item 2 that the non-resident is not in Australia. To consider this aspect further, you should refer to GSTR 2004/7.
[8] Section 184-1.
[9] A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999.

flow of the services is to the parents, while the actual flow of the services is to the children. The supply is made to the parents (non-residents) and provided to another entity, each child, in Australia.

61. Thus the expression 'provided to another entity' means, in our view, that in the performance of a service (or in the doing of some thing), the actual flow of that supply is, in whole or part, to an entity that is not the non-resident entity with which the supplier made the agreement for the supply. The contractual flow is to one entity (the non-resident recipient) and the actual flow of the supply is to another entity.

62. For example, if a supply of entertainment services is made to a non-resident company and in the performance of that service the employees are the entities that are entertained, the actual flow of that service is to another entity, each employee (see above where the meaning of 'another entity' is discussed). The supply is made to the non-resident company (the employer) and provided to another entity (each employee).

63. We discuss at paragraphs 66 to 82 how to determine whether a supply is provided to another entity.

### *The meaning of 'the agreement requires it [the supply] to be provided to another entity in Australia'*

64. The agreement refers to the agreement entered into with a non-resident, whether directly or indirectly (refer to paragraph 39).

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

### *How to determine whether the supply is provided to another entity*

*Characterisation of the supply*

66. Before it can be determined whether a supply is provided (or is required to be provided) to another entity, it is essential that the supply be properly characterised as the supply of a service, right or some other thing. It is only when the supply is properly characterised that it is possible to determine whether that supply is provided to another entity.

67. In characterising a supply it is necessary to consider all the circumstances of the transaction to ascertain its essential character.

68. Further explanation and examples about characterising a supply are provided at paragraphs 261 to 275, Part II of the Explanation section of this Ruling.

*The nature of the supply*

69. It is also necessary to establish the exact nature of the supply to determine to which entity that service or thing is provided. That is, it is necessary to establish what is really being supplied.

70. A clear understanding of the exact nature of the supply is essential to determining whether that supply is provided to another entity. It is only by having regard to what is in substance and reality being supplied that it is possible to identify to which entity that supply is provided.

71. The exact nature of a supply in any given situation depends on the facts and circumstances of the supply and the agreement made between the parties. In this regard, it is necessary to look at the whole arrangement for the supply (including the contractual arrangements) and the way in which the supply is carried out.

72. If there is no written contract, other documents such as correspondence between the parties may be useful in establishing the nature of the supply.

73. Thus, the focal point in working out whether a supply is provided to another entity is the facts and circumstances of the doing of the thing supplied. By the supplier examining what it is required to do and in what circumstances, the supplier is able to objectively determine to whom the supply is provided.

74. In some instances, it is inherent in the nature of the supply that the supply is provided to a particular entity. For example travel, training or entertainment services are, by their very nature, provided to the individual that travels, or is trained or entertained, respectively.

75. In the case of delivery or freight services where goods from one entity are addressed for delivery to another entity, we accept that the delivery or freight services are provided to that addressee entity.[10] In Part III of the Explanation section of this Ruling we provide examples which illustrate this approach. See Examples 10 and 11 (paragraphs 380 to 391 and 392 to 400 respectively) for delivery or freight services provided to an individual. See Example 13 (paragraphs 419 to 430) for delivery or freight services provided to an entity other than an individual. Example 14 (paragraphs 431 to 435) illustrates the outcome if goods are for delivery to, for example, 'The Householder', or the public at large.

76. In the case of other supplies, for example, supplies that involve the supply of legal, accounting, auditing or advertising services, the question of whether the supply is provided to another entity depends on the facts and circumstances in any given case.

[10] This does not, however, include the delivery of goods that are generically addressed, for example, to 'The Householder' or are for delivery to the public at large; see Example 14 at paragraphs 431 to 435. It also does not include the situation where an entity's own goods are simply freighted or moved from one location to another location. In that case the circumstances of the particular supply in question must be considered to determine whether the supply is provided to another entity.

77. If a supply is the provision of advice or information which involves work to create, develop or produce that advice or information, for example, a legal opinion or an audit report, the supply is the performance of services.[11] Thus, in determining whether a supply is provided to another entity regard is to be had to the performance of the services in creating, developing or producing the opinion or audit report and whether those services are provided to another entity.

78. For example, consider the supply of auditing services to a United States (US) non-resident parent company that has an Australian subsidiary. If services effecting compliance by the Australian subsidiary with its legal or reporting obligations are being supplied, the supply is provided to the Australian subsidiary. On the other hand, if services effecting compliance by the US parent company with its legal or reporting requirements in the US are being supplied, the supply is provided to the non-resident parent company. (Refer Examples 2 and 3 at paragraphs 288 to 303, Part II of the Explanation section of this Ruling.)

79. In situations where the contractual flow of a supply is to an entity (other than an individual), and it is necessary to determine whether the actual flow of the supply is to another entity (other than an individual), we consider that a strong indicator that the supply is provided to another entity is that the contracting entity has no further interaction with, or participation in, the provision of the supply beyond contracting and paying for the supply. However, the application of subsection 38-190(3) is still dependent upon on all the facts and circumstances of the supply. (Refer to Examples 5 (paragraphs 314 to 322) and 33 (paragraphs 580 to 587), Parts II and VI respectively of the Explanation section of this Ruling.

80. It is only in limited circumstances that any one fact, or a particular combination of facts, means or indicates that a supply is provided to another entity. Accordingly, we give numerous examples in the Ruling illustrating the application of subsection 38-190(3) in a wide variety of circumstances.

81. The examples are not in themselves statements of principles to be applied generally. The examples illustrate the scope of subsection 38-190(3) in a given fact situation. In particular, the examples show how, by examining the facts and circumstances of the supply in question, you can determine whether that supply is provided to another entity.

82. Further explanation (and examples) about how to determine whether a supply is provided to another entity are provided at paragraphs 258 to 322, Part II of the Explanation section of this Ruling.

[11] As explained in GSTR 2000/31 if a supply is the provision of advice or information and the supply involves work to create, develop or produce that information or advice for the recipient, the supply is one of performance of services.

### *How to determine whether the supply is provided to the other entity in Australia*

83. It is only necessary to consider this second step if it is first determined that the supply is provided to another entity.

84. If the supply is 'provided to another entity' this is not in itself sufficient for subsection 38-190(3) to negate the GST-free status of a supply covered by item 2. The supply must be provided to that other entity in Australia.

85. It is therefore relevant to determine when provision of the supply occurs and whether that provision is to that other entity in Australia (see paragraphs 89 to 112 for individuals; and paragraphs 113 to 121 for entities other than individuals).

#### *Provision of the supply occurs as and when the thing supplied is done*

86. A supply is provided as and when the thing supplied is done. This is the relevant time for determining whether a supply is provided to an entity in Australia.

87. Consistent with the views expressed in GSTR 2004/7[12] and GSTR 2000/31[13] as to when the thing supplied is done we consider that:

- *if the thing provided is a service* – the provision of that service occurs during the period of time when the service is performed;
- *if the thing provided is advice or information and the supply involves work to create, develop or produce that information or advice for the other entity* – the thing provided is the performance of services. The provision of that thing occurs when the service is performed and includes the period of time during which the advice is prepared, produced or created, as the case may be;
- *if the thing provided is an instantaneous provision of advice or information* – the provision of that thing occurs at the time at which the advice or information is instantaneously provided;
- *if the thing provided is the creation, grant, transfer, assignment or surrender of a right* – the provision of that thing occurs at the time that the right is created, granted, transferred, assigned or surrendered; and
- *if the thing provided is the entry into, or release from, an obligation to do anything, or refrain from an act, or to tolerate an act or situation* – the provision of that thing occurs at the time at which the obligation is entered into or the release is effected.

[12] As above, note 5.
[13] GSTR 2000/31 Goods and services tax: supplies connected with Australia.

88. In the case of a service performed over time, for example provision of advice or information created, developed or produced over time, the relevant period for determining whether any part of the supply is provided to another entity in Australia is the period during which the advice or information is created, developed or produced.

*When provision of the supply is to an individual (another entity) in Australia*

89. Consistent with the approach in GSTR 2004/7, we determine whether an individual is in Australia by reference to his or her physical location.

90. However, while 'in Australia' has the same meaning in item 2 (and paragraph (a) of item 3 and paragraph (b) of item 4) and subsection 38-190(3), the reference to 'in Australia' in subsection 38-190(3) is not simply a presence test.

91. In item 2 (and paragraph (a) of item 3 and paragraph (b) of item 4) it is necessary to determine whether the entity to which the supply is made is not in Australia when the thing supplied is done. This is a presence test at a particular time. We resolve this issue by answering the question whether a recipient is in Australia in relation to the supply at the relevant time.[14]

92. However, in subsection 38-190(3), the question at issue is whether there is provision of a supply to another entity in Australia. We resolve this issue not by determining whether that other entity is in Australia in relation to the supply, but by determining whether provision is *to that other entity in Australia*.

93. To determine whether there is provision *to an individual in Australia*, we distinguish between non-resident and resident individuals, according to whether they are physically in or outside Australia when the thing supplied is done.

*Non-resident individual not physically in Australia when the thing supplied is done*

94. If a supply is provided (or is required to be provided) to a non-resident individual who is not physically in Australia when the thing supplied is done, the supply is not provided to that individual in Australia. Paragraph 38-190(3)(b) is not satisfied and therefore subsection 38-190(3) does not negate the GST-free status of the supply.

95. While the services that effect provision of a supply to a non-resident individual might take place in Australia, the supply is not provided *to that non-resident individual in Australia* if the individual is physically outside Australia when the services are performed. There must be provision *to the non-resident individual in Australia for*

[14] Refer to GSTR 2004/7 at paragraphs 31 to 33.

*subsection 38-190(3) to apply.* (Refer paragraphs 329 to 331, Part III of the Explanation section of this Ruling.)

*Non-resident individual physically in Australia when the thing supplied is done*

96. If a supply is provided (or is required to be provided) to a non-resident individual who is physically in Australia when the thing supplied is done and that individual's presence in Australia is integral to, as distinct from being merely coincidental with, the provision of the supply, we consider that the supply is provided to that individual in Australia. The requirement in paragraph 38-190(3)(b) is satisfied and subsection 38-190(3) (assuming the other requirements of the provision are satisfied) negates the GST-free status of the supply.

97. Conversely, if a non-resident individual's presence in Australia is not integral to the provision of the supply, we consider that the supply is not provided to that individual in Australia. Paragraph 38-190(3)(b) is not satisfied and therefore subsection 38-190(3) does not negate the GST-free status of the supply.

98. Apportionment is required if, for part of the time when the thing supplied is done, a non-resident individual is physically in Australia and that individual's presence is integral to the provision of the supply. That part of the supply is taxable[15] as subsection 38-190(3) negates the GST-free status of the supply. Apportionment is discussed further at paragraphs 138 to 148.

99. At paragraphs 105 to 112 we explain when a non-resident individual's presence in Australia is integral to the provision of the supply.

*Resident individual physically in Australia when the thing supplied is done*

100. If a supply is provided (or is required to be provided) to a resident individual who is physically in Australia when the thing supplied is done, the supply is provided to that individual in Australia. The requirement in paragraph 38-190(3)(b) is satisfied and subsection 38-190(3) negates the GST-free status of the supply (assuming the other requirements of that provision are satisfied).

*Resident individual not physically in Australia when the thing supplied is done*

101. If a supply is provided (or is required to be provided) to a resident individual who is not physically in Australia when the thing supplied is done and that individual's presence outside Australia is integral to, as distinct from being merely coincidental with, the provision of the supply, we consider that the supply is provided to that

[15] Assuming that the requirements of section 9-5 are otherwise satisfied.

individual outside Australia, not in Australia. Paragraph 38-190(3)(b) is not satisfied and therefore subsection 38-190(3) does not negate the GST-free status of the supply.

102. Conversely, if a resident individual's presence outside Australia is not integral to the provision of the supply, we consider that the supply is provided to that individual in Australia. The requirement in paragraph 38-190(3)(b) is satisfied and subsection 38-190(3) negates the GST-free status of the supply (assuming the other requirements of that provision are satisfied).

103. Apportionment is required if, for part of the time when the thing supplied is done, a resident individual is physically outside Australia and that presence is integral to the provision of the supply. That part of the supply is GST-free as subsection 38-190(3) does not negate the GST-free status of the supply. Apportionment is discussed further at paragraphs 138 to 148.

104. We explain at paragraphs 105 to 112 when a resident individual's presence outside Australia is integral to the provision of the supply.

*How to determine whether an individual's presence at a particular location (that is, in Australia if a non-resident, or outside Australia if a resident) is integral to the provision of a supply*

105. It is necessary to consider this section if a supply is provided to:

- a non-resident individual who is in Australia when the thing supplied is done (see paragraphs 96 to 99); or
- a resident individual who is outside Australia when the thing supplied is done (see paragraphs 101 to 104).

106. A supply is provided to an individual at a particular location (that is, in Australia if a non-resident or outside Australia if a resident), if the individual's presence at that location is integral to the provision of the supply as distinct from being merely coincidental with the provision of the supply.

107. Determining whether an individual's presence at a particular location is integral to the provision of the supply requires an examination of the facts and circumstances of the supply. However, some indicators that an individual's presence at a particular location is integral to the provision of the supply, and is not merely coincidental, include:

- the need for the supply arises from the individual's presence at that location; or
- the presence of the individual at that location is integral to the performance, receipt or delivery of the supply.

108. Some examples of supplies where the need for the supply arises from an individual's presence at a particular location are as follows:

- a supply of immigration advice to a non-resident individual who wants to extend his or her stay in Australia;
- a supply of customs broker services to a non-resident individual who is in Australia and requires the services of a customs broker to enter goods for home consumption in Australia;
- a supply of legal services in relation to an offence committed by that individual while at that location; and
- a supply of repair services which are provided to an individual at that location to repair a piece of equipment (for example a laptop) at that location.

109. Some examples of supplies where the presence of the individual at that location is integral to the performance, receipt or delivery of the supply, are as follows:

- supply of training or entertainment – the services are to be received by the individual at that location (see Examples 15 and 16 (training), paragraphs 442 to 450 and 451 to 456 respectively, Part IV; and Example 7 (entertainment), paragraphs 358 to 363, Part III of the Explanation section of this Ruling);
- supply of travel – the travel is to be undertaken by the individual at that location;
- supply of hairdressing or other similar services applied to the person – the services are to be performed on the individual at that location.

110. In the following circumstance the individual's presence at a particular location is not integral to the provision of the supply:

- a service is provided to an individual who is a non-resident and, during the period when those services are performed, the individual comes to Australia on holiday. While on holiday in Australia the non-resident individual takes the opportunity to visit a supplier to check on the progress of the supply of services. The need for the supply does not arise from the individual's presence in Australia and the individual's presence in Australia is not integral to the performance, receipt or delivery of the supply (see Example 8, paragraphs 365 to 370, Part III of the Explanation section of this Ruling);
- a service is provided to an individual who is a resident of Australia and, during the period when those services are performed, the individual goes overseas on holiday. While on holiday outside Australia the resident individual checks on the progress of the supply of services. The need for the supply does not arise from

the individual's presence outside Australia and the individual's presence outside Australia is not integral to the performance, receipt or delivery of the supply (see Example 9, paragraphs 371 to 376, Part III of the Explanation section of this Ruling).

111. In the case of delivery or freight services which are provided to an individual in the circumstances described at paragraph 75, we accept those services are provided to that individual in Australia, if the goods are addressed to that individual in Australia. Alternatively, if the goods are addressed to the individual outside Australia, we accept that those services are provided to that individual outside Australia. This outcome is not dependent upon the residency status of the individual to whom the goods are addressed.[16] Refer to Examples 10 (paragraphs 380 to 391) and 11 (paragraphs 382 to 400), Part III of the Explanation section of this Ruling, which illustrate and further explain this approach.

112. Further explanation and examples about an individual's presence at a particular location being integral to the provision of a supply are provided at paragraphs 346 to 400 of Part III of the Explanation section of this Ruling.

*When provision of the supply is to a company, partnership, corporate limited partnership or trust (another entity) in Australia*

113. Unlike individuals, a company, partnership, corporate limited partnership or trust can be both in and outside Australia at the same time. If a company, partnership, corporate limited partnership or trust does not have a presence in Australia the supply is not provided to that entity in Australia.

114. A *company, corporate limited partnership or trust* is in Australia (irrespective of its residency status) if the entity carries on business (or in the case of an entity that does not carry on business, carries on activities) in Australia at or through a fixed and definite place of its own, or through an agent at a fixed and definite place, for a sufficiently substantial period of time.[17]

115. Additionally a *company or corporate limited partnership* is in Australia if it is incorporated or formed in Australia respectively.[18]

116. A *partnership* is in Australia if the entity carries on business (or in the case of a partnership that is in receipt of ordinary income or

[16] This does not, however, include the delivery of goods that are generically addressed to 'The Householder' or are for delivery to the public at large. See Example 14 (paragraphs 431 to 435) Part III of the Explanation section of this Ruling. It also does not include the situation where an individual's goods are simply freighted or moved from one location to another location. In that case the circumstances of the particular supply in question must be considered to determine whether the supply is provided to another entity in Australia.

[17] Refer to GSTR 2004/7 at paragraphs 230 to 379 (company); paragraphs 412 to 416 (corporate limited partnership); paragraphs 422 to 429 (trust).

[18] Refer to GSTR 2004/7 at paragraphs 333 to 339 (companies) and paragraphs 414 to 416 (corporate limited partnerships).

statutory income jointly, other activities which generate that income) in Australia at or through a fixed and definite place of its own, or through an agent at a fixed and definite place, for a sufficiently substantial period of time.[19]

117. If a company, partnership, corporate limited partnership or trust has a presence in Australia, we consider that a supply is provided to that entity in Australia if the supply is for the purposes of its Australian presence (for example, an Australian branch, representative office or agent if it is a non-resident company or the Australian head office if it is an Australian incorporated company). If the supply is for the purposes of the entity's presence outside Australia (for example, an offshore branch) the supply is not provided to the entity in Australia.

118. This also means that if a company, partnership, corporate limited partnership or trust is present only in Australia the supply is necessarily provided to that entity in Australia.

119. In the case of delivery or freight services which are provided to an entity other than an individual in the circumstances described at paragraph 75, we accept those services are provided to that entity in Australia, if the goods are addressed to that entity in Australia. Alternatively, if the goods are addressed to that entity outside Australia, we accept those services are provided to that entity outside Australia. This outcome is not dependent upon the residency status of the entity to which the goods are addressed.[20] Refer to Example 13 (paragraphs 419 to 430), Part III of the Explanation section of the Ruling).

120. Apportionment is required if the supply is partly for the purposes of an entity's Australian presence. Apportionment is discussed further at paragraphs 138 to 143.

121. Further explanation and examples of when a supply is provided to an entity other than an individual are provided at paragraphs 401 to 430 of Part III of the Explanation section of this Ruling.

### *Determining whether a supply made to a non-resident employer is provided to an employee in Australia*

122. To determine whether a supply is provided to an employee, it is essential to examine the nature of the supply closely. By examining what is really being supplied and how that supply is carried out, it is possible to establish to whom the service or other thing is provided, that is, the employer or another entity, the employee. If the supply is

[19] Refer to GSTR 2004/7 at paragraphs 380 to 397.

[20] This does not, however, include the delivery of goods that are generically addressed to 'The Householder' or are for delivery to the public at large. See Example 14 (paragraphs 431 to 435) Part III of the Explanation section of this Ruling. It also does not include the situation where an entity's own goods are simply freighted or moved from one location to another location. In that case the circumstances of the particular supply in question must be considered to determine whether the supply is provided to another entity in Australia.

provided to the employee it is then necessary to consider if the employee's presence at a particular location is integral to the provision of that supply.

123. For example, a non-resident sole trader engages an Australian accounting firm to prepare Australian tax returns for non-resident employees working in Australia. The service involves the accounting firm meeting with the employees in Australia and preparing their individual tax returns. The tax return services are about the tax obligations of each individual. The tax return preparation services in these circumstances are provided to the individual employee. The employee is in Australia when the service is performed and that employee's presence in Australia is integral to, as distinct from being merely coincidental with, the provision of the supply. The supply otherwise covered by item 2 is not GST-free.

124. Where an employee is involved with the provision of a supply, the weight to be given to that fact differs according to the circumstances of the supply in question. In the above example, the fact that the employee has contact with the supplier strongly indicates, in the circumstances of the supply, that the supply is provided to that employee. On the other hand, contact by an employee with a supplier is of little relevance in circumstances where the employee's involvement with the provision of the supply is simply to facilitate the provision of the supply to the non-resident employer. This is the case where, for example, an employee of a non-resident employer interacts with a law firm in circumstances where the firm is providing legal advice concerning a business venture of the non-resident employer.

125. For further explanation and examples concerning employees refer to paragraphs 437 to 470, Part IV of the Explanation section of this Ruling.

### *Determining whether a supply is provided to an agent in Australia*

126. Sometimes a non-resident entity makes an acquisition through a resident agent in Australia. If all the agent does is to 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 resident agent in Australia.[21]

127. For further explanation and examples concerning agents refer to paragraphs 471 to 481, Part IV of the Explanation section of this Ruling.

[21] In the case of a non-resident entity, other than an individual, the presence of an agent in Australia can sometimes result in the non-resident entity failing the requirement in item 2 that the non-resident is not in Australia. To consider this aspect further, you should refer to GSTR 2004/7.

### *Determining whether a supply is provided to a partner in Australia*

128. As with other situations, the application of subsection 38-190(3) to a supply involving a partner, who is in Australia and a partner of a non-resident partnership, depends on the nature of the supply to determine whether a supply, which is made to the non-resident partnership, is provided to the partner. If it is determined that the supply is provided to the partner it is then necessary to determine whether that partner's presence in Australia is integral to the provision of that supply (if the partner is an individual); or the supply is for the purposes of the partner's presence in Australia (if the partner is an entity other than an individual).

129. For further explanation and examples concerning partners refer to paragraphs 482 to 498, Part IV of the Explanation section of this Ruling.

## Other aspects of the operation of paragraph 38-190(3)(b)

### *Later use of a supply, outside Australia, that is provided to another entity in Australia*

130. If the nature of a supply covered by item 2 is such that the supply is provided to another entity in Australia, the fact that the results or outcomes of the supply are later used outside Australia does not alter the nature of the supply and the application of subsection 38-190(3) to that supply.

131. For instance, if training services are provided to employees of a non-resident company who are in Australia attending the training course, the later use outside Australia of the skills and knowledge gained by the employees from those training services does not alter the fact that the training services are provided to the employees in Australia.[22]

132. Similarly, if a supply is provided to another entity outside Australia, and that supply is later used in Australia, that later use does not alter the fact that the supply is not provided to that entity in Australia.

133. The enquiry for the purposes of subsection 38-190(3) is one of determining the exact nature of the supply having regard to all the facts and circumstances and then whether that supply, as properly described, is provided to another entity in Australia.

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[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.

### *Another entity in Australia benefits from the supply, but the supply is not provided to another entity in Australia*

134. If the nature of the supply is such that the supply is only provided to an entity outside Australia, subsection 38-190(3) does not apply. This outcome is not altered even if another entity in Australia benefits from a supply provided to another entity outside Australia.

135. This can occur with, for example, the supply of advertising services. If the advertising services are made and provided to a non-resident, subsection 38-190(3) does not apply to that supply even if another entity in Australia derives a benefit from that supply (see Example 23 at paragraphs 504 to 508, Part V of the Explanation section of this Ruling).

136. As stated at paragraph 133, the enquiry for the purposes of subsection 38-190(3) is one of determining the nature of the supply having regard to all the facts and circumstances of the supply, and then whether that supply, as properly described, is provided to another entity in Australia.

## Further examples

137. In Part VI of the Explanation section of this Ruling at paragraphs 519 to 630, we illustrate the application of subsection 38-190(3) to a wide range of supplies. We demonstrate how the supply of a service of the same general kind such as legal or accounting services can give rise to different outcomes under subsection 38-190(3) depending on the exact nature of the supply.

## Apportionment

138. A supply may only be partly GST-free as a result of the application of subsection 38-190(3) to a supply covered by item 2. The part of the supply that is not provided to another entity in Australia is GST-free. The part of the supply that is provided to another entity in Australia is not GST-free under item 2. That part is taxable.[23] In this circumstance, the consideration for the supply must be apportioned between the GST-free and taxable parts of the supply.[24]

139. The need to apportion in the context of subsection 38-190(3) can arise because the supply is only provided in part to another entity. For example, a supply may be provided:

- in part to the non-resident entity to which the supply is made (for example, a non-resident company) and in part to another entity in Australia (for example, a subsidiary in Australia); or

[23] Assuming that the requirements of section 9-5 are otherwise satisfied.
[24] Refer to GSTR 2001/8 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts.

- in part to another entity in Australia and in part to another entity that is not in Australia (refer Example 40 at paragraphs 636 to 644, Part VII of the Explanation section of this Ruling).

140. Apportionment of a supply as a result of the operation of subsection 38-190(3) may also be required if, for example, a supply is provided to another entity over a period of time and the supply is only provided to that other entity in Australia for part of the time (refer Examples 41 and 42 at paragraphs 647 to 652 and 653 to 661 respectively, Part VII of the Explanation section of this Ruling).

141. To work out the value of the taxable part of the supply, the consideration is apportioned to each of the parts to find the consideration for the taxable part. The supplier can use any reasonable method that is supportable in the particular circumstances to apportion the consideration.[25]

142. The supplier should keep records that explain the method used.[26]

143. Sometimes the same supply of services is provided to a non-resident entity outside Australia *and* another entity in Australia and it is not possible to identify separate parts of the supply flowing to each entity. If the supply is covered by item 2, subsection 38-190(3) negates the GST-free status of the supply to the extent that the supply is provided to the other entity in Australia. As explained at paragraph 141 of this Ruling it is necessary to apportion the consideration for the supply between the GST-free and taxable parts of the supply on some fair and reasonable basis taking into account the particular circumstances of the supply. See Example 43, paragraphs 663 to 671 of Part VII of the Explanation section of this Ruling.

### *Apportionment when a supply is provided on a periodic or progressive basis*

144. Under Division 156, if a taxable supply is made for a period or on a progressive basis and the consideration is provided on a periodic or progressive basis, the GST payable is attributed as if each progressive or periodic component of the supply were a separate supply.[27]

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[25] Refer to paragraphs 92 to 113 of GSTR 2001/8.
[26] Refer to paragraphs 25 to 30 of GSTR 2001/8 and paragraph 382-5(1)(a) in Schedule 1 to the *Taxation Administration Act 1953*.
[27] Section 156-25 provides that Division 156 does not apply to a supplier who accounts on a cash basis.

145. If a supply is provided for a period with consideration given on a periodic basis and, for part of the time when the thing supplied is done, the supply is provided to another entity in Australia, it may not be possible for the supplier to identify the taxable part of the supply at the beginning of the period over which the thing is provided. This is because there is no way for the supplier to determine in advance whether, and to what extent, the supply is provided to an entity in Australia during the period over which the supply is provided. However, it is possible for the supplier to identify this in relation to the periodic components of the supply. Accordingly, we accept that this is the basis on which GST payable on the supply (and input tax credits on the creditable acquisition) is attributable to tax periods.

*Supplier accounts on a cash basis*

146. If a supplier, who accounts on a cash basis, makes a supply for a period or on a progressive basis and the consideration is given on a periodic or progressive basis, similar issues may arise to those referred to at paragraph 145. Example 45 at paragraphs 693 to 707, Part VII of the Explanation section of this Ruling illustrates how to attribute GST payable in these circumstances.

***Apportionment where the supply is performed over more than one tax period but consideration is paid in earlier tax period***

147. If a supply is performed over more than one tax period and the GST (if any) on the supply is attributable to a tax period before the completion of the supply (for example, consideration is fully paid in one tax period but the supply is spread across two or more later tax periods), the supplier must use a reasonable basis for determining the extent to which the supply is taxable. That is, the supplier must use a reasonable basis to determine the extent to which the supply is provided to another entity in Australia.

148. If there is a change in circumstance such that the supply is taxable to a greater or lesser extent than determined in an earlier tax period the supplier has an adjustment event. The adjustment may be either an increasing or a decreasing adjustment depending upon whether the corrected GST amount is greater than, or less than, the previously attributed GST amount.[28]

[28] Refer to paragraphs 12 to 15 and 72 to 87 in GSTR 2000/19 Goods and services tax: making adjustments under Division 19 for adjustment events.

### Application of subsection 38-190(3) to certain complex arrangements

#### *Subcontract arrangements*

149. Sometimes a non-resident supplier subcontracts the provision of services to one of its customers in Australia to another supplier located in Australia. There may be various reasons for subcontracting the service. The non-resident supplier may have no physical presence in Australia to undertake the performance of the service or the non-resident supplier may not have the necessary capabilities to perform the service itself.

150. If the non-resident supplier subcontracts the provision of a particular service to a supplier in Australia, the subcontract arrangement does not alter either the character or nature of the supply made by the non-resident supplier to the Australian customer. In particular, the character of the supply is not transformed from the supply of a service to the supply of a right nor is the nature of the supply altered from the supply of an actual service to that of an arranging service.

151. We consider that a supply that is an arranging service typically involves the non-resident supplier arranging for the Australian supplier to enter into a contract of supply with the Australian customer for the supply of the required thing. (This is discussed further at paragraphs 720 to 721, Part VIII of the Explanation section of this Ruling.)

152. The consequence of the view expressed in paragraph 150 is that the supply by the non-resident is connected with Australia and is a taxable supply if the other requirements for making a taxable supply are met.[29]

*Alternative views*

153. An alternative view (not supported by the Commissioner) is that the service supplied by the non-resident supplier is not done in Australia because the non-resident supplier does not itself physically perform the service in Australia. This view does not recognise that the enquiry for the purposes of paragraph 9-25(5)(a) is only what is done in Australia and not by whom it is done in Australia. The service supplied by the non-resident supplier is performed in Australia, albeit by a subcontractor, and is therefore done in Australia for the purposes of paragraph 9-25(5)(a).

154. The subcontract arrangement also does not alter the character or nature of the supply of a service made by the Australian supplier to the non-resident. The supply made by the Australian supplier to the non-resident is, and remains, the supply of a service which is provided to the Australian customer of the non-resident. If that supply satisfies the requirements of item 2, the supply is not GST-free because subsection 38-190(3) negates the GST-free status of that supply.

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[29] Section 9-5.

155. Another view (not supported by the Commissioner) is that the supply by the Australian subcontractor to the non-resident is the supply of a right to have certain services provided to the customer of the non-resident in Australia. If the arrangement is one under which a subcontractor contracts to supply a particular service, the essential character of the supply is a supply of the particular service, not a supply of rights.

156. In Part VIII of the Explanation section of this Ruling at paragraphs 732 to 755, we contrast by way of example the supply of a particular service to a non-resident which is subcontracted to a second Australian supplier and the supply of an arranging service to a non-resident under which the Australian supplier arranges for a second Australian supplier to supply the particular service to the non-resident.

### *Global supplies*

157. In many multi-national groups, a range of services is made available to group members through an internal service provider; typically the parent company or a separate dedicated entity. Such services include accounting, auditing, legal, information technology, research and development and financial services. Group members for which these services are performed are sometimes directly charged a fee by the group entity that provides the service or in other cases a cost is allocated. The fee or cost allocation may be separately identified or part of a bundled charge or cost allocation, sometimes incorporated into a management fee.

158. Sometimes the internal service provider contracts with an external service provider to perform the services for the group. In that case, there is typically a head agreement between the internal service provider and the external provider (the head supplier) and a range of subcontracting agreements to enable the head supplier to fulfil its obligations to provide services to members of the global group.

159. There are a number of GST issues that arise in relation to these global arrangements, in particular from consideration of subsection 9-25(5) (supplies connected with Australia), subsection 38-190(1) (supplies of things other than goods or real property for consumption outside Australia), subsection 38-190(3) (supplies covered by item 2 and provided to another entity in Australia) and Division 84 (offshore supplies other than goods or real property).

160. We discuss particular GST issues arising from global supply arrangements in detail in Part VIII of the Explanation section of this Ruling. In that Part we examine four global supply examples – global supplies of audit services (Example 48, paragraphs 762 to 787), taxation services (Example 49, paragraphs 789 to 810), general accounting services (Example 50, paragraphs 812 to 831) and data processing and IT services (Example 51, paragraphs 833 to 859).

161. However, we summarise below some important points made in Part VIII of the Explanation section of this Ruling.

162. If a parent entity or other internal service provider of a multi-national group has agreed (either by written agreement or otherwise) to provide services to one or more members of the group to meet an identified need, the supply of an intra-group service ordinarily exists as between the internal service provider and the relevant group member(s). Services that may be supplied, depending on the business of the multi-national group and its organisational structure, include financial, accounting, legal, auditing, factoring, and computer services.

*Character and nature of the supply made by the internal service provider*

163. The internal service provider may itself perform the service required by the group member. However, sometimes the performance of that service is subcontracted to another group member or an external provider. If the provision of the service is subcontracted to another supplier, the character of the supply, that is, a service by the internal service provider to the group member does not alter. The supply by the internal service provider is and remains a supply of a service and the nature of that service does not change.

*Supplies connected with Australia*

164. If the internal service provider (or another non-resident supplier contracted to supply services to the internal service provider), that is, the overseas supplier, subcontracts the supply to a supplier in Australia (the 'Australian supplier'), for example, because the overseas supplier does not carry on business in Australia, the supply by the overseas supplier may be connected with Australia.

165. The supply by the overseas supplier is connected with Australia if the services are performed in Australia by the Australian supplier (paragraph 9-25(5)(a)). This is so even though the overseas supplier (that is, the internal service provider or the non-resident supplier) does not physically perform that service in Australia. The service is physically performed in Australia by the Australian supplier.

*Supplies partly connected with Australia*

166. Sometimes an overseas supplier subcontracts only part of a service to a supplier in Australia. In that case, only part of the service is performed in Australia. The supply by the overseas supplier is connected with Australia to the extent the services are performed in Australia by the Australian supplier.

*Alternative view*

167. An alternative view is that a supply of a service is connected with Australia by virtue of paragraph 9-25(5)(a) only if the entire service is performed in Australia. As explained in GSTR 2000/31[30] we do not accept this view (see paragraphs 92 and 226 to 235 of GSTR 2000/31).

*Subsection 38-190(3)*

168. Typically it is the actions of the supplier that are to be considered in determining whether a supply is provided, in fact, to another entity. If there is a head agreement between the internal service provider and the external provider (the head supplier) and a range of subcontracting agreements to enable the head supplier to fulfil its obligations to provide services to members of a global group, the actions of the subcontracted supplier are relevant in assessing whether the supply by the head supplier to the internal service provider is provided to another entity (that is, an entity other than the internal service provider) in Australia.

## Overseas legislation and case law

### *Similar legislative provisions in New Zealand and Canada*

169. In Part IX of the Explanation section of this Ruling, we discuss aspects of legislative provisions similar to subsection 38-190(3) that are found in the New Zealand and Canadian GST legislation.

### *United Kingdom (UK) VAT cases*

170. The following is our view of the significance for subsection 38-190(3) of four United Kingdom VAT cases: *Customs and Excise Commissioners v. Redrow Group plc*;[31] *British Airways plc*;[32] *WHA Ltd & Anor v. Customs & Excise Commissioners*;[33] and *Commissioners v. Plantiflor Ltd*.[34] In Part IX of the Explanation section of this Ruling we further discuss these cases.

[30] Goods and services tax: supplies connected with Australia.
[31] [1999] 2 All ER 1; [1999] STC 161; [1999] 1 WLR 408.
[32] [2000] BVC 2207.
[33] [2004] EWCA Civ 559.
[34] [1999] BVC 37.

*Customs and Excise Commissioners v. Redrow Group plc ('Redrow') and British Airways plc ('British Airways')*

171. Redrow and British Airways have at times been cited in support of the view that the supply of a service covered by item 2 like, for example, the supply of training services to a non-resident employer,[35] is a different supply to that which is provided to another entity, the employees of the non-resident employer that are trained. The supply covered by item 2 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.

172. On this view there are two different supplies. The supply of a right made to a non-resident and covered by item 2 and the supply of a service to the employees in Australia. On this view, subsection 38-190(3) does not therefore apply to the supply covered by item 2.

173. We do not accept that either of these cases can be used to support this view. Whether a tripartite arrangement involves one or more supplies depends on the facts and circumstances of the supply in question. Often a supply entails various contractual rights and entitlements that contribute to the supply as a whole and the right is not a separate or distinct supply in itself. For example, a supply of a training service made to a non-resident entails various rights and entitlements such as the right to receive the training service. However that right merely contributes to the supply as a whole and is not a separate or distinct supply in itself. The supply is a supply of training services.

174. Moreover, neither of these UK cases is about the characterisation of a transaction as a single supply of a service or a series of separate and distinct supplies. Rather, each case is simply about identifying anything that was supplied, whether a right or otherwise, so that an input tax deduction could be allowed. These cases are discussed further at paragraphs 870 to 907, Part IX of the Explanation section of this Ruling.

*WHA Ltd & Anor v. Customs & Excise Commissioners ('WHA')*

175. The more recent UK VAT case of *WHA* provides support for the proposition that *Redrow* was merely about identifying whether anything was supplied to Redrow. In particular, in *WHA* Lord Neuburger makes the comment, in respect of the passage from Lord Millett's judgement in *Redrow* that is often relied upon as supporting the view that there are two supplies, one of rights and the other of services, that Lord Millett was merely emphasising that there was a supply to Redrow and not merely an 'adventitious benefit'.[36]

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[35] Refer to Example 15 at paragraphs 442 to 448, Part IV of the Explanation section of this Ruling.

[36] *WHA Limited and Viscount Reinsurance Company limited v. Customs and Excise Commissioners* [2004] EWCA Civ 559; [2004] BVC 485 at paragraph 52.

176. In *WHA* Lord Neuburger also recognised that a supply of services can be supplied to one entity and provided to another entity. *WHA* is discussed further at paragraphs 888 to 894, Part IX of the Explanation section of this Ruling.

*Customs and Excise Commissioners v. Plantiflor Ltd ('Plantiflor')*

177. The UK VAT case of *Plantiflor* has been referred to as supporting a view that in a tripartite arrangement, the supply covered by item 2 is the supply of a different thing from that which is provided to another entity.

178. We do not accept this view as a general proposition. The UK legislative provisions considered in *Plantiflor* are 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. This case is discussed further at paragraphs 895 to 907, Part IX of the Explanation section of this Ruling.

**Application of item 2 and subsection 38-190(3)**

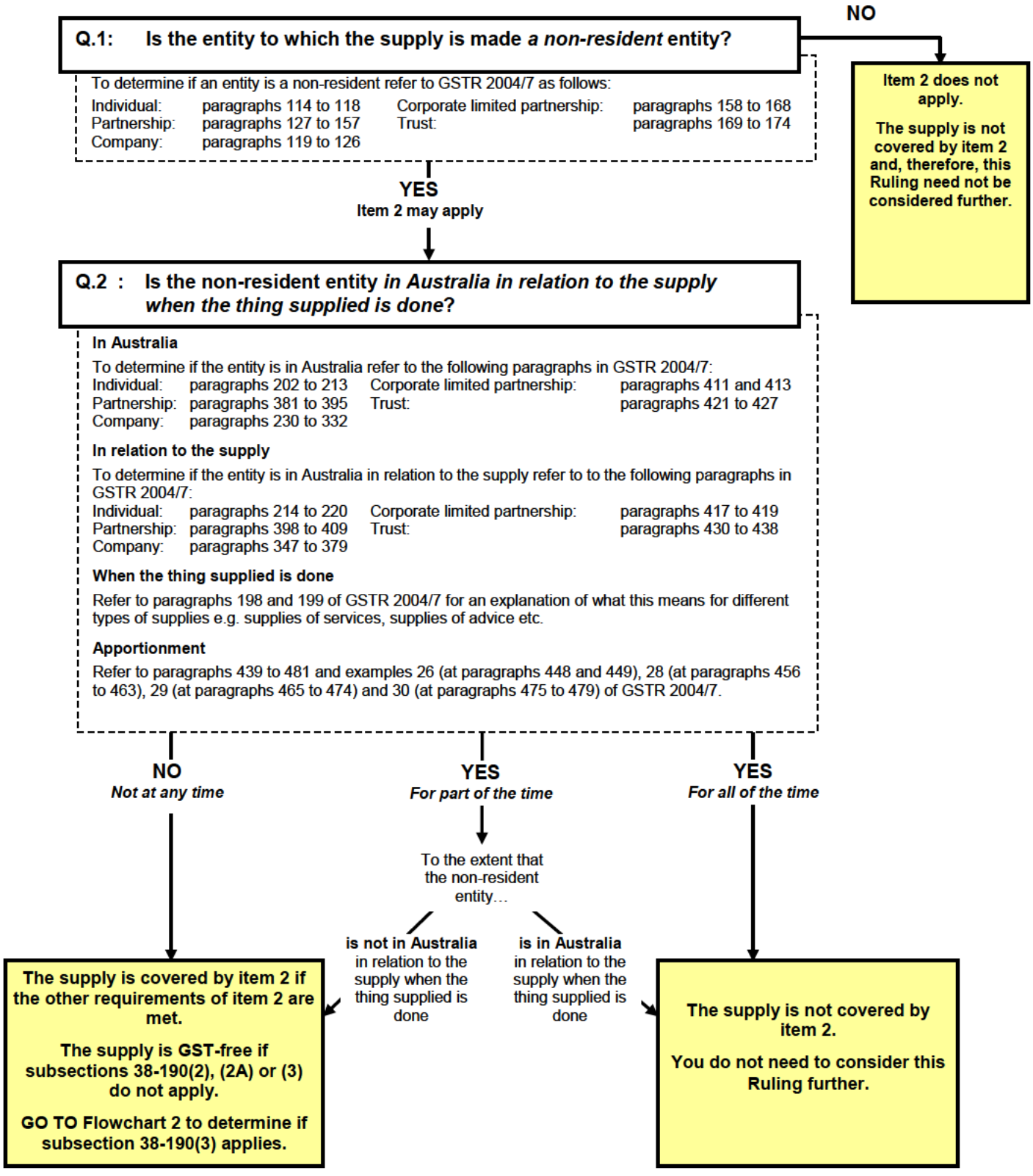
179. The following flowcharts illustrate, in broad terms, the application of item 2 and subsection 38-190(3) to a supply made to a non resident and provided to another entity in Australia.

180. Flowchart 1 should be read in conjunction with the relevant paragraphs in this Ruling and GSTR 2004/7.[37]

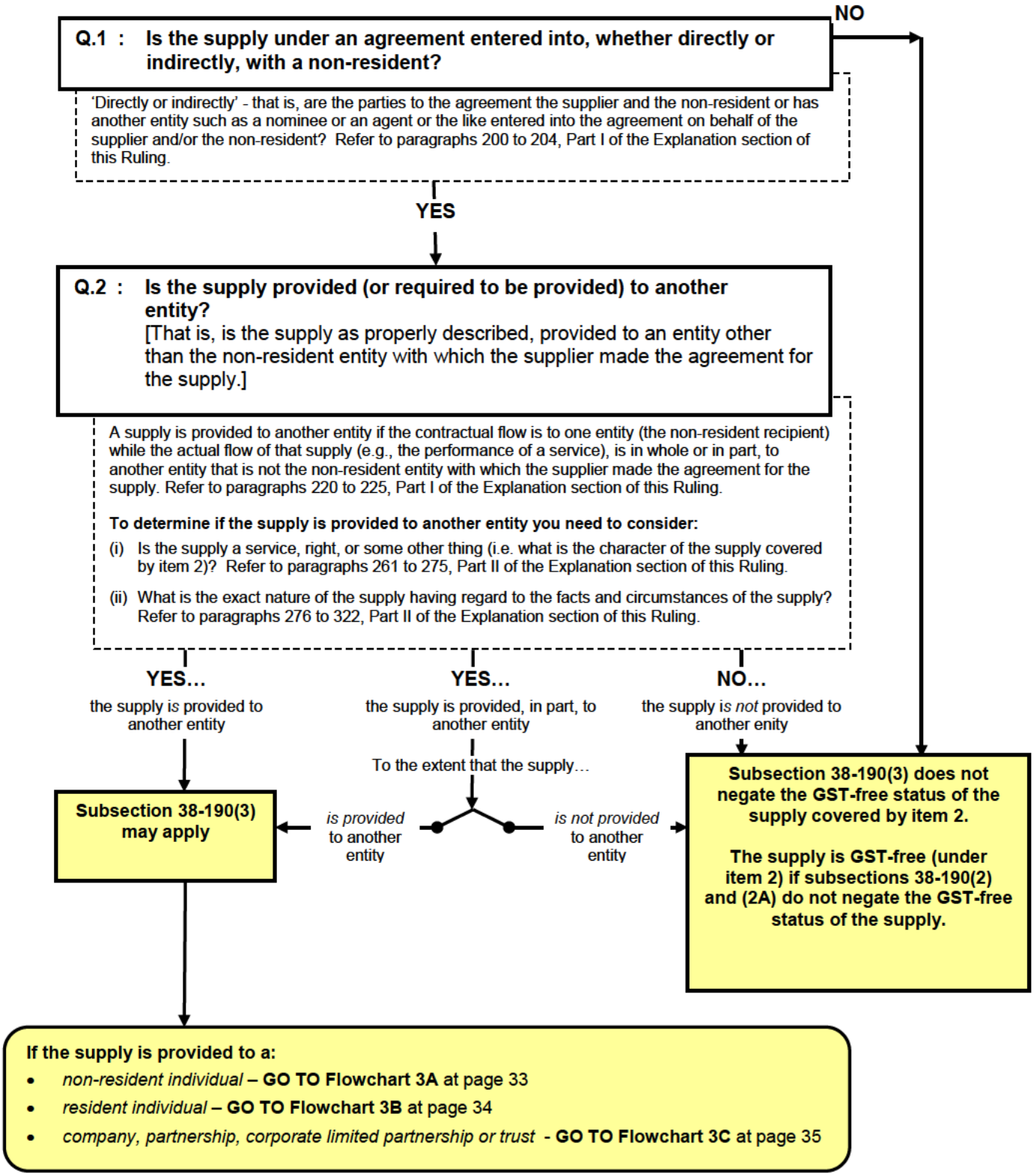
181. Flowcharts 2, 3A, 3B, and 3C should be read in conjunction with the relevant paragraphs in this Ruling.

[37] As above, note 5.

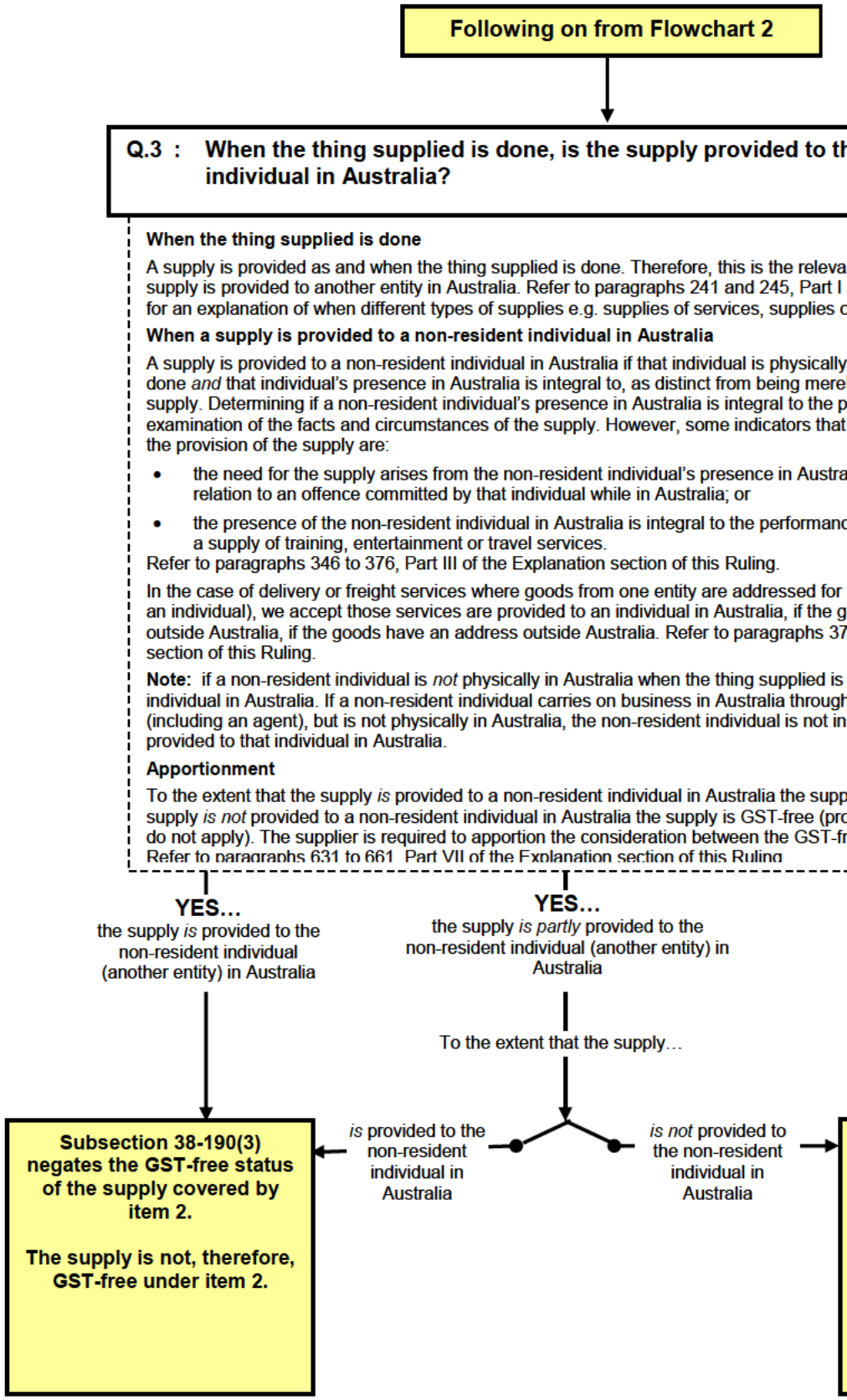
**FLOWCHART 1 – in the application of subsection 38-190(3), how to determine whether a supply made to an entity is covered by item 2**



## FLOWCHART 2 – in the application of subsection 38-190(3), how to determine whether a supply is provided to another entity



## FLOWCHART 3A – in the application of subsection 38-190(3), how to determine whether the supply is provided to that other entity, a non-resident individual, in Australia



**FLOWCHART 3B – in the application of subsection 38-190(3), how to determine whether the supply is provided to that other entity, a resident individual, in Australia**

**Following on from Flowhart 2**

**e thing supplied is done, is the supply provided to the resident individual in ?**

**pplied is done**

d as and when the thing supplied is done. Therefore, this is the relevant time for determining whether a o another entity in Australia. Refer to paragraphs 241 and 245, Part I of the Explanation section of this Ruling of when different types of supplies e.g. supplies of services, supplies of advice etc. are provided to an entity.

**provided to a resident individual in Australia**

d to a resident individual in Australia if that individual:

Australia when the thing supplied is done; or

tside Australia when the thing supplied is done but that presence outside Australia is not integral to, as ing merely coincidental with, the provision of the supply.

ident individual's presence outside Australia is integral to the provision of the supply requires an facts and circumstances of the supply. However, some indicators that the presence outside Australia is sion of the supply are:

he supply arises from the resident individual's presence outside Australia; e.g., a supply of legal services in offence committed by that individual while outside Australia; or

of the resident individual outside Australia is integral to the performance, receipt or delivery of the supply; of training, entertainment or travel services.
s 346 to 376, Part III of the Explanation section of this Ruling.

ery or freight services where goods from one entity are addressed for delivery to another entity (in this case ccept those services are provided to an individual in Australia, if the goods have an Australian address, and the goods have an address outside Australia. Refer to paragraphs 377 to 400, Part III of the Explanation g.

he supply *is* provided to a resident individual in Australia the supply is taxable. To the extent that the supply resident individual in Australia the supply is GST-free (provided subsections 38-190(2) and (2A) do not r is required to apportion the consideration between the GST-free and taxable parts of the supply. Refer to 661, Part VII of the Explanation section of this Ruling.

d to the nother lia

**YES…**
the supply is *partly* provided to the resident individual (another entity) in Australia

**NO…**
the supply *is not* provided to the resident individual (another entity) in Australia

To the extent that the supply…

**3-190(3) free status overed by**

**, therefore, r item 2.**

*is* provided to the resident individual in Australia

*is not* provided to the resident individual in Australia

**Subsection 38-190(3) does not negate the GST-free status of the supply covered item 2.**

**The supply is GST-free (under item 2) if subsections 38-190(2) and (2A) do not negate the GST-free status of the supply.**

## FLOWCHART 3C – in the application of subsection 38-190(3), how to determine whether the supply is provided to that other entity, a company, partnership, corporate limited partnership or trust, in Australia

**Following on from Flowchart 2**

**Q 3 : When the thing supplied is done, is the supply provided to the com corporate limited partnership or trust in Australia?**

**When the thing supplied is done**
A supply is provided as and when the thing supplied is done. Therefore, this is the relevant time fo provided to an entity in Australia. Refer to paragraphs 241 and 345, Part I of the Explanation secti when different types of supplies e.g. supplies of services, supplies of advice etc. are provided to a

**In Australia**
A company, corporate limited partnership or trust is in Australia (irrespective of its residency statu the entity carries on business (or in the case of an entity that does not carry on business, carries o sufficiently substantial period of time:

- at or though a fixed and definite place of its own, or
- through an agent at a fixed and definite place.

Also, a company or corporate limited partnership is in Australia if it is incorporated or formed in Au

A partnership is in Australia if the entity carries on business (or in the case of a partnership that is statutory income jointly, other activities which generate that income) in Australia at or through a fi through an agent at a fixed and definite place, for a sufficiently substantial period of time.

Refer to paragraphs 401 to 404, Part III of the Explanation section of this Ruling.

**When a supply is provided to an entity, other than an individual, in Australia**
A supply is provided to a company, partnership, corporate limited partnership or trust in Australia i entity's Australian presence (e.g., an Australian branch, representative office or agent if it is a non head office if it is an Australian incorporated company). Refer to paragraphs 405 to 414, Part III of

In the case of delivery or freight services where goods from one entity are addressed for delivery t other than an individual), , we accept those services are provided to that other entity in Australia, address, and outside Australia, if the goods have an address outside Australia. Refer to paragraph Explanation section of this Ruling.

**Note:** if a company, partnership, corporate limited partnership or trust does not have a presence to that entity in Australia.

**Apportionment**
To the extent that the supply is provided to the presence of a company, partnership, corporate lim supply is taxable. To the extent that the supply is not provided to the presence of a company, part or trust in Australia the supply is GST-free (provided subsections 38-190(2) and (2A) do not apply the consideration between the GST-free and taxable parts of the supply. Refer to paragraphs 631 section of this Ruling.

**YES…**
as the entity *only* has a presence in Australia

or

it has a presence outside Australia but *at all times* the supply is for the purposes of its presence in Australia

**Subsection 38-190(3) negates the GST-free status of the supply covered by item 2.**

**The supply is not, therefore, GST-free under item 2.**

**YES…**because

- e.g. *for part of the time* the entity has a presence in Australia and the supply is for the purposes of its presence in Australia;

or

- e.g. for all of the time the entity has a presence in Australia but the supply is only *partly* for the purposes of its presence in Australia

To the extent that the supply…

*is* provided to that other entity in Australia

*is not* provided to that other entity in Australia

as the entity

it has a pres
*time is* the s
pre

**Subse
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supp**

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item 2)
and (
GST-fr**

# Explanation (this forms part of the Ruling)

### The policy behind subsection 38-190(3)

182. Section 38-190 applies to supplies of things, other than goods or real property, for consumption outside Australia. Subsection 38-190(1) comprises five items which set out supplies of things, other than goods or real property, for consumption outside Australia that are GST-free.

183. Item 2 in the table in subsection 38-190(1) applies to a supply of a thing, other than goods or real property, which is made to a non-resident who is not in Australia when the thing supplied is done. The supply 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;[38] 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.

184. The requirement that the non-resident is not in Australia when the thing supplied is done is based on the underlying presumption that if the non-resident recipient (that is, the non-resident entity to which the supply is made) 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).

185. However, if a non-resident enters into an agreement for the supply of a thing, the non-resident is not always the entity to which the supply is provided. If the supply is provided to another entity in Australia, the presumption that the supply is for consumption outside Australia because the non-resident recipient is not in Australia is not sound.

186. Subsection 38-190(3) addresses this circumstance. If the supply is provided (or is required to be provided) to another entity in Australia, subsection 38-190(3) negates the GST-free status that would otherwise apply under item 2. Although the non-resident recipient of the supply is not in Australia, consumption of the supply is considered to be in Australia because the supply is provided to another entity in Australia.

[38] Refer to GSTR 2003/7.

187. The following example is provided in the Supplementary Explanatory Memorandum for the Bill[39] 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).[40]
>
> (The example refers to the 'supply… being made' to students. To be consistent with the wording used in subsection 38-190(3) the word 'provided' should have been used instead of 'made.')

188. In that example, non-resident parents contract for the supply of tuition services but other entities, their children, who are in Australia, are provided with the services. The parents have paid for tuition services to be provided to their children in Australia.

### How the various requirements and application of subsection 38-190(3) are discussed in the Explanation section of this Ruling

189. We have divided the Explanation section into nine parts as follows:

| PART | TOPIC |
|---|---|
| **I** | Understanding **the preconditions for the application of subsection 38-190(3)** to a supply covered by item 2 (paragraphs 190 to 257). |
| **II** | Determining whether **a supply is provided (or is required to be provided) to another entity** (paragraphs 258 to 322). |
| **III** | Determining whether the supply is **provided** (or is required to be provided) **to that other entity in Australia** (paragraphs 323 to 435). |
| **IV** | Determining whether a supply covered by item 2 **is provided to an employee, agent or partner in Australia** (paragraphs 436 to 498). |
| **V** | **Other aspects** of the operation of subsection 38-190(3) (paragraphs 499 to 518). |
| **VI** | **Further examples** (paragraphs 519 to 630). |
| **VII** | **Apportionment** (paragraphs 631 to 709). |
| **VIII** | **The application of subsection 38-190(3) to subcontract arrangements and global supplies** (paragraphs 710 to 859). |
| **IX** | **Overseas legislation and case law** (paragraphs 860 to 907). |

[39] Paragraph 1.108 of the Supplementary Explanatory Memorandum to the A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999.
[40] The supply of 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).

# Part I – understanding the preconditions for the application of subsection 38-190(3) to a supply covered by item 2

190. Subsection 38-190(3) provides that:

> [w]ithout limiting subsections 38-190(2) or (2A), 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.

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

192. Secondly, the supply referred to in paragraphs 38-190(3)(a) and (b) is the supply covered by item 2. Paragraph 38-190(3)(a) requires that 'it', the supply covered by item 2, is under an agreement entered into 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. If the supply covered by item 2 is a different supply to that which is provided to another entity in Australia, subsection 38-190(3) has no application to the supply covered by item 2.

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

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

194. In this Part we look at the meaning of a supply covered by item 2 and discuss each of the elements of paragraphs 38-190(3)(a) and (b).

195. In relation to paragraph 38-190(3)(a) we explain the meaning of the following elements of that paragraph:

- it (at paragraph 199);
- an agreement entered into, directly or indirectly (at paragraphs 200 to 204); and

- non-resident (including non-resident individual, non-resident company, non-resident partnership, non-resident corporate limited partnership and non-resident trust (at paragraphs 205 to 218)).

196. In relation to paragraph 38-190(3)(b) we explain the meaning of the following elements of that paragraph:

- the *supply* (at paragraph 219);
- a supply is *provided to another entity* (at paragraphs 220 to 225);
- *another entity* including an employee; an agent; and a partner that is another entity (at paragraphs 226 to 240);
- a supply is *provided to another entity in Australia* (at paragraphs 241 to 253); and
- *under the agreement a supply is required* to be provided to another entity in Australia (at paragraphs 254 to 255).

### The meaning of 'a supply covered by item 2'

197. Subsection 38-190(3) only applies to 'a supply covered by item 2'.

198. If a supply satisfies the requirements of item 2 and is, therefore, GST-free, that supply is a supply covered by item 2.

### The elements of paragraph 38-190(3)(a)

#### *The meaning of 'it'*

199. 'It' refers to the supply covered by item 2. The supply covered by item 2 must be under an agreement entered into, either directly or indirectly, with a non-resident.

#### *The meaning of 'an agreement entered into, either directly or indirectly, with a non-resident'*

200. The agreement may be either a written, oral or implied agreement.

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

202. We consider that, in the context of subsection 38-190(3), entering into an agreement *indirectly* with a non-resident includes the case where another entity such as a nominee or an agent or the like enters into the agreement on behalf of the supplier or the non-resident.

203. 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 enter into an agreement on behalf of the supplier, and the non-resident, respectively.

204. If a supplier enters into an agreement with an Australian resident agent of, for example, a non-resident company, the agreement is entered into *indirectly* with a non-resident company for the purposes of paragraph 38-190(3)(a). (In the case of a non-resident entity, other than an individual, the presence of an agent in Australia can sometimes result in the non-resident entity failing the requirement in item 2 that the non-resident is not in Australia. To consider this aspect further, you should refer to GSTR 2004/7.[41])

### *The meaning of 'non-resident'*

205. The term 'non-resident' is defined in section 195-1 to mean 'an entity that is not an Australian resident'.

206. 'Australian resident' is defined in section 195-1 to mean 'a person who is a resident of Australia for the purposes of the ITAA 1936'.

### *Non-resident individual*

207. An individual is a non-resident if the individual is not a resident of Australia, as defined in subsection 6(1) of the ITAA 1936, for Australian income tax purposes.

208. An individual is a 'resident of Australia' as defined in subsection 6(1) of the ITAA 1936 if that individual is:

> (a) a person, other than a company, who resides in Australia and includes a person:
>
> (i) whose domicile is in Australia, unless the Commissioner is satisfied that his [or her] permanent place of abode is outside Australia;

[41] Refer to paragraphs 319 to 332; 374 to 379 and 437 to 438 in GSTR 2004/7.

(ii) 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 his [or her] usual place of abode is outside Australia and that he [or she] does not intend to take up residence in Australia; or

(iii) who is:

(A) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; or

(B) an eligible employee for the purposes of the *Superannuation Act 1976*; or

(C) the spouse, or a child under 16, of a person covered by sub-subparagraph (A) or (B).

209. Residency status is a question of fact and is one of the main criteria that determine an individual's liability to Australian income tax. Taxation Ruling TR 98/17[42] provides guidance on determining residency status of individuals under the income tax definition.

### *Non-resident company*

210. A company is a non-resident if the company is not a resident of Australia, as defined in subsection 6(1) of the ITAA 1936, for Australian income tax purposes.

211. A company is a resident of Australia if the company is incorporated in Australia or, if not incorporated in Australia, it carries on business in Australia and has either its central management or control in Australia, or its voting power controlled by shareholders who are residents of Australia.[43]

212. Thus if, for example, a company is incorporated in Australia under the *Corporations Act 2001,* it is a resident of Australia.

213. Bodies corporate can be incorporated under legislation other than the *Corporations Act 2001*. For example, the *Associations Incorporation Act 1981* (Qld) provides for associations that are formed for certain specified purposes to be incorporated. If bodies incorporate under this Act, or a similar Australian Act, they are residents of Australia for the purposes of this Ruling.

[42] Income tax: residency status of individuals entering Australia.
[43] See further TR 2004/15 Income tax: residence of companies not incorporated in Australia – carrying on business in Australia and central management and control.

### *Non-resident partnership (other than a corporate limited partnership[44])*

214. We consider that a partnership is a non-resident if its central management and control is not located in Australia. Conversely, if the central management and control of a partnership is in Australia, the partnership is a resident of Australia (whether the central management and control of the partnership is also located elsewhere).[45]

215. If the partnership is not carrying on business (that is, it is a partnership because the partners are in receipt of ordinary income or statutory income jointly), we consider that the test of central management and control may also be applied. While a partnership that is a partnership for GST purposes only because it is in receipt of income jointly may not have physical operations in the sense of carrying on of a business, it will nonetheless have person(s) exercising control over the activities generating the income of the partnership. We therefore consider it appropriate to apply a central management and control test with reference to the activities of the partnership.[46]

### *Non-resident corporate limited partnership[47]*

216. A corporate limited partnership is a non-resident if the corporate limited partnership is not a resident of Australia as defined in section 94T of the ITAA 1936. A corporate limited partnership, as defined, is a 'resident' of Australia if and only if:

- the partnership was formed in Australia;
- the partnership carries on business in Australia; or
- the partnership's central management and control is in Australia.

217. Thus, a corporate limited partnership is a 'non-resident' if:

- the partnership was formed outside Australia;
- the partnership does not carry on business in Australia; and
- the partnership's central management and control is not in Australia.

### *Non-resident trust[48]*

[44] A corporate limited partnership is an entity that meets the requirements of section 94D of the ITAA 1936.
[45] This is discussed fully in GSTR 2004/7 at paragraphs 127 to 157.
[46] This is discussed fully in GSTR 2004/7 at paragraphs 155.
[47] This is discussed fully in GSTR 2004/7 at paragraphs 158 to 168.
[48] This is discussed fully in GSTR 2004/7 at paragraphs 169 to 174.

218. We consider that a trust is a non-resident if its central management and control is not located in Australia and none of its trustees are residents of Australia. Conversely, we consider that a trust is a resident of Australia if at least one of its trustees is a resident of Australia, or the trust's central management and control is located in Australia (whether the central management and control of the trust is also located elsewhere).

### The elements of paragraph 38-190(3)(b)

#### *The supply*

219. 'The supply' refers to the supply covered by item 2.

#### *The meaning of 'a supply is provided to another entity'*

220. The word 'provided' is not defined in the GST Act. Its ordinary meaning is to supply or furnish.[49] 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,[50] making available,[51] and even acquisition.[52]

221. 'Provided' is used in subsection 38-190(3) to contrast with the term 'made' in item 2. As indicated by the example in the Supplementary Explanatory Memorandum,[53] (reproduced at paragraph 187), the intention of subsection 38-190(3) is to negate the GST-free status that would otherwise apply to a supply 'made' to a non-resident if that supply is 'provided' to another entity in Australia. In that example, the education services are made to the non-resident parents and provided to the children, each another entity, in Australia.

222. We consider, therefore, that 'provided' in the context of subsection 38-190(3) is used, in relation to a supply covered by item 2, to distinguish between the contractual flow of the supply to the non-resident recipient and the actual flow of the service or other thing supplied to another entity in Australia.

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[49] *Macquarie Dictionary*, Revised Third edition.
[50] *Fieldhouse v. FCT* (1989) 25 FCR 187 at 209-210.
[51] *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.
[52] *Milburn v. Shire of Glenelg* [1940] VLR 1, per Martin J at 4 and 5.
[53] Refer to paragraph 1.108 of the Supplementary Explanatory Memorandum to the A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999.

223. This view is supported by the construction of subsection 38-190(3). Paragraph 38-190(3)(a) requires that the supply covered by item 2 is under an agreement entered into with a non-resident. That paragraph establishes the contractual arrangements for the supply – an agreement with a non-resident. Paragraph 38-190(3)(b) looks to the provision of the supply and whether it is provided to another entity in Australia – that is, the actual flow of that supply. 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.

224. Therefore the expression a supply is 'provided to another entity' means that in the performance of a service (or in the doing of some other thing supplied), the actual flow of that supply is, in whole or part, to an entity that is not the non-resident entity with which the supplier made the agreement for the supply. The contractual flow is to one entity (the non-resident recipient) and the actual flow of the supply is to another entity.

225. For example, if a supply of entertainment services is made to a non-resident company and in the performance of that service the employees are entertained, the actual flow of that service is to another entity, each employee.

### *The meaning of 'another entity'*

226. 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;

(h) a *superannuation fund.

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

227. 'Another entity' is an entity, as defined above, other than the non-resident entity to which the supply is made. It is the entity to which the supply is provided and is a different entity to the non-resident entity to which the supply is made. In the example included in the Supplementary Explanatory Memorandum to the Bill[54] that inserted subsection 38-190(3) (reproduced at paragraph 187), the child of the non-resident parent is another entity.

[54] Enacted as the *A New Tax System (Indirect Tax and Consequential Amendments) Act (No. 2) 1999*.

*An employee is another entity*

228. An employee is an individual and therefore an entity as defined. If a supply is made to a non-resident employer, and the supply is provided, or required to be provided, to an employee, that supply is provided to 'another entity'. It is inherent in the nature of some supplies, for example, the training or entertainment of employees, or travel by employees, that those supplies can only be provided to the employee. The provision of a supply to an employee is discussed further at paragraphs 437 to 470, Part IV of the Explanation section of the Ruling.

*Alternative view*

229. Another view is that the employee is not a separate entity from the employer where a supply of services made to the employer relates to the business of the employer. It is argued, for example, that a supply of training services to train employees is made and provided to the non-resident employer.

230. We do not agree with this view. The nature of services to train employees is such that it is the employees that are trained; not the employer. The training services are provided to (and received by) the employees (see further Examples 15 and 16 at paragraphs 442 to 448 and 451 to 456 respectively, Part IV of the Explanation section of this Ruling).

231. Our preferred view is supported by examples included in the Explanatory Memorandum to the Bill[55] that inserted subsection 38-190(4). That subsection applies to supplies that are considered under item 3. Like subsection 38-190(3), subsection 38-190(4) is about identifying where a supply is consumed. If a supply is made to a recipient who is in Australia in relation to the supply but that supply is provided to another entity outside Australia, the supply is treated as being made to a recipient who is not in Australia.[56]

232. To illustrate the application of subsection 38-190(4), the following two examples of the types of supplies provided to another entity outside Australia are given in the Explanatory Memorandum:[57]

- a supply of mobile telephone roaming to an Australian business with an employee overseas; and
- a supply to an Australian business of a training course to be conducted overseas.

[55] Enacted as *Indirect Tax Legislation Amendment Act 2000*.
[56] For a supply covered by subsection 38-190(4) to be GST-free all of the requirements of item 3 must be satisfied. In addition, subsection 38-190(5) must not apply to the supply.
[57] Refer to paragraph 3.27 of the Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000.

233. In each of these examples, the supply is covered by subsection 38-190(4) because the supply is provided to another entity outside Australia, the employee. The view we take in subsection 38-190(3) that an employee is another entity is consistent with the approach intended by Parliament to be applied in the application of subsection 38-190(4) (a similarly worded provision which applies in a situation reverse to that in subsection 38-190(3), that is, the recipient of the supply is in Australia but the supply is provided to another entity outside Australia).

*An agent is another entity*

234. A non-resident principal may make an acquisition of a service or other 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.

235. An agent is typically an individual or a company and, therefore, an entity as defined (see paragraph 226). However, the mere fact that the supply is made through 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. If all the agent does is to 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.

236. In these circumstances, the supply of the service is made to the non-resident. (In the case of a non-resident entity, other than an individual, the presence of an agent in Australia can sometimes result in the non-resident entity failing the requirement in item 2 that the non-resident is not in Australia. To consider this aspect further, you should refer to GSTR 2004/7.[58])

237. The provision of a supply to an agent is discussed further at paragraphs 471 to 481, Part IV of the Explanation section of the Ruling.

*A partner is another entity*

238. A partner that is, for example, an individual or a company, is an entity as defined. So too is a partnership – see paragraph 226. Supplies and acquisitions that are made by or on behalf of partners in their capacity as partners are treated as supplies and acquisitions by the partnership. This position is confirmed by subsection 184-5(1) which provides:

> For the avoidance of doubt, a supply, acquisition or importation made by or on behalf of a partner of a partnership in his or her capacity as a partner:
>
> (a) is taken to be a supply, acquisition or importation made by the partnership; and

[58] Refer to paragraphs 319 to 332; 374 to 379 and 437 to 438 in GSTR 2004/7.

(b) is not taken to be a supply, acquisition or importation made by that partner or any other partner of the partnership.

239. As a consequence of the 'separate entity' status given to a partnership for GST, the GST Act applies to partnership transactions, in particular to dealings between partners and the partnership, in a manner that does not reflect the general law treatment of those transactions.[59]

240. If a supply is made to a non-resident partnership,[60] and the supply is provided, or required to be provided, to a partner, that supply is provided to 'another entity'. The provision of a supply to a partner is discussed further at paragraphs 482 to 498, Part IV of the Explanation section of the Ruling.

### *The meaning of 'a supply is provided to another entity in Australia'*

241. If a supply covered by item 2 is provided to another entity (as explained at paragraph 220 to 225), that in itself is not sufficient for subsection 38-190(3) to apply to that supply. The supply must be provided *to another entity in Australia*.

242. It is therefore relevant to determine when provision of the supply occurs and whether that provision is *to that other entity in Australia.*

#### *Provision of the supply occurs as and when the thing supplied is done*

243. A supply is provided as and when the thing supplied is done. Therefore, this is the relevant time for determining whether a supply is provided to an entity in Australia.

244. Consistent with the meaning of the 'thing is done' in subsection 9-25(5) (as discussed in GSTR 2000/31[61] at paragraphs 175 to 212) and 'when the thing supplied is done' in section 38-190 (as discussed in GSTR 2004/7[62] at paragraphs 198 to 199), we consider therefore:

- *if the thing provided is a service* – provision of that service occurs during the period of time when the service is performed;
- *if the thing provided is advice or information and the supply involves work to create, develop or produce that information or advice for the other entity* – the thing provided is the performance of services. The provision of the service occurs when the service is performed and includes the period of time during which the advice is prepared, produced or created, as the case may be;

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[59] Refer to GSTR 2003/13 Goods and services tax: general law partnerships and GSTR 2004/6 tax law partnerships and co-owners of property.
[60] To determine whether a partnership is a non-resident refer to paragraphs 214 to 215 and paragraphs 127 to 157 in GSTR 2004/7
[61] As above, note 32.
[62] As above, note 5.

- *if the thing provided is an instantaneous provision of advice or information* – the provision of that thing occurs at the time at which the advice or information is instantaneously provided;
- *if the thing provided is the creation, grant, transfer, assignment or surrender of a right* – the provision of that thing occurs at the time that the right is created, granted, transferred, assigned or surrendered; and
- *if the thing provided is the entry into, or release from, an obligation to do anything, or refrain from an act, or to tolerate an act or situation* – the provision of that thing occurs at the time at which the obligation is entered into or the release is effected.

245. In the case of a service performed over time, for example provision of advice or information created, developed or produced over time, the relevant period for determining whether any part of the supply is provided to another entity in Australia is therefore that period during which the advice or information is created, developed or produced.

*When provision of the supply is to that other entity in Australia*

246. On one view, the in Australia requirement in paragraph 38-190(3)(b) merely requires that the supply is provided to another entity and if that other entity is in Australia when the thing supplied is done, subsection 38-190(3) negates the GST-free status of the supply covered by item 2. This would be the case irrespective of whether or not that presence in Australia is in connection with the provision of that supply.

247. However, such an interpretation would sometimes lead to subsection 38-190(3) applying to negate, in a way that Parliament is very unlikely to have intended, the GST-free status of a supply otherwise covered by item 2.

248. For example, subsection 38-190(3) could potentially apply to a supply that is provided to a non-resident individual whose physical presence in Australia is unrelated to the supply being provided.

249. This could occur if the non-resident individual is in Australia on holidays and the supply does not relate to the individual's presence in Australia. The presence of the non-resident individual in Australia during the period that the service is performed being merely coincidental.

250. Subsection 38-190(3) could also negate the GST-free status of a supply covered by item 2 which is provided to the offshore presence of a non-resident company merely because that company has a branch in Australia.

251. This approach therefore does not, in our view, give effect to the policy intent to only tax supplies consumed in Australia.

252. We consider, therefore, that the requirement in paragraph 38-190(3)(b) that the supply covered by item 2 is provided to another entity in Australia requires that there is some connection between the provision of that supply and that entity's presence in Australia.

253. We examine this more fully in Part III when we explain, for different entity types, how to determine whether the supply is provided to an entity in Australia.

### *The meaning of 'the agreement requires it [a supply] to be provided'*

254. The agreement refers to the agreement entered into with a non-resident, whether directly or indirectly (refer to paragraph 190).

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

### The application of subsection 38-190(3)

256. It follows from the above explanation that in considering the application of subsection 38-190(3) to a supply covered by item 2 it is first necessary to determine whether paragraph 38-190(3)(a) is satisfied. That is, whether the supply covered by item 2 is under an agreement entered into, whether directly or indirectly, with a non-resident as explained above (see paragraphs 197 to 218).

257. It is then necessary to determine whether the requirements of paragraph 38-190(3)(b) are satisfied. This is a two step process as follows:

(i) establish whether the supply is provided to another entity. This is considered more fully at paragraphs 258 to 322, Part II of the Explanation section of this Ruling.

(ii) determine whether the supply is provided to that other entity in Australia. This is considered more fully at paragraphs 323 to 435, Part III of the Explanation section of this Ruling.

# Part II – determining whether a supply is provided (or is required to be provided) to another entity

258. To determine whether a supply made to a non-resident is provided (or is required to be provided) to another entity, it is necessary to establish the character of the supply that is made. That is, whether it is the supply of a right, service or some other thing.

259. It is also necessary to establish the exact nature of the supply. That is, what in substance and reality is being supplied.

260. In this Part we discuss how to determine:

- the character of the supply (at paragraphs 261 to 275); and
- the nature of the supply (at paragraphs 276 to 322).

### Characterisation of the supply covered by item 2

261. Correct characterisation of the supply is very important. Only when the supply covered by item 2 is properly characterised as a supply of a service, right or some other thing, is it possible to determine whether that supply is provided to another entity in Australia.

262. For instance, consider the example given in the Supplementary Explanatory Memorandum[63] and reproduced at paragraph 187 of the Explanation section above. Under the agreement between the supplier and the non-resident parents, the parents are supplied with certain rights which contribute to the supply as a whole. However, the essential character of the supply is a supply of services; not of rights. The services comprise the teaching, tutoring, etc of the children. That service is made to the non-resident parents and provided to the children.

263. In determining whether a supply is properly characterised as a supply of rights or services or something else it is necessary to consider all the circumstances of the transaction to ascertain its essential character. Consider the following example.

[63] Refer to paragraph 1.108 of the Supplementary Explanatory Memorandum to the A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999.

***Example 1 – characterisation of a supply of software and technical support services made by an Australian supplier to a non-resident company and provided to an Australian customer***

264. *US Co, a non-resident parent company, provides credit card and related payments system software world-wide to entities in the financial services industry. It adapts the software to the particular needs of each client. This software is supplied by the granting of a licence to use the intellectual property. The licence allows the financial service entities receiving the software to modify or adapt or copy the software as they like. These licences are granted outside of Australia.*

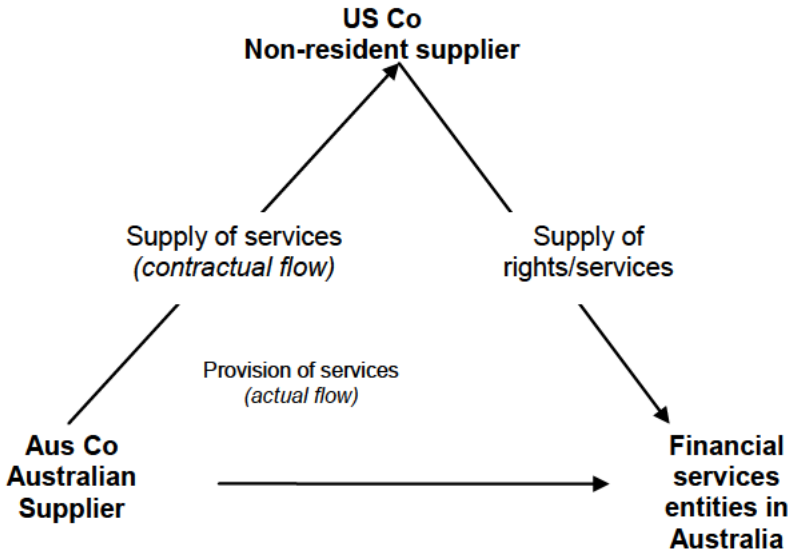
265. *US Co does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf.*

266. *US Co's contracts with its customers require US Co to provide technical support for the software supplied. As US Co has no presence in other countries, the non-resident company contracts with its global subsidiaries to perform the support services in relation to the software.*

267. *Aus Co, a GST registered Australian subsidiary of US Co, provides such technical support services in relation to software licensed by US Co to financial services entities in Australia.*

268. *The issues considered below are the characterisation of the thing supplied by Aus Co to US Co, and the impact that characterisation has on the GST treatment of the supply.*

269. *The facts are illustrated diagrammatically as follows:*



*Characterisation of the supply by Aus Co to US Co*

270. *Various rights are granted under the contract made between Aus Co and US Co. However, performance of the contract by Aus Co involves providing a service to the customers of US Co in Australia. In this circumstance, we do not consider that the supply by Aus Co to US Co could be characterised as anything other than the supply of a service. The fact that the service is provided to the financial services entities in Australia by Aus Co and not by US Co does not, in our view, transform the character of the supply made by Aus Co to US Co from a service to a right. Also, the character of the supply by Aus Co to US Co remains the same irrespective of whether the supply by US Co to the Australian financial service entities is determined to be a composite supply of rights or a mixed supply of rights and services to the Australian customer.*

*Item 2*

271. *The supply by Aus Co is made to a non-resident, US Co, which is not in Australia when the technical support services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

272. *The supply of technical support services by Aus Co to US Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

273. *Under the agreement with US Co, Aus Co is required to provide technical support services to financial service entities (in Australia). The supply is made to US Co but is provided to each of these other entities. The actual flow of the technical support services is to the Australian financial services entities. The services are not, therefore, provided to US Co.*

*(ii) Provided to that other entity in Australia*

274. *The Australian financial services entities are in Australia when the service is performed. The supply of technical support services is for the purposes of the Australian financial services entities in Australia.*

275. *Subsection 38-190(3) negates the GST-free status of the supply covered by item 2. (How to determine whether a supply is provided to another entity in Australia is discussed fully in the next Part at paragraphs 323 to 435).*

### The nature of the supply covered by item 2

276. It is also necessary to establish the exact nature of the supply. That is, what is really being supplied (sometimes a shorthand or colloquial description of the supply does not reflect what is really being supplied).

277. A clear understanding of the exact nature of the supply is essential to determining whether that supply is provided to another entity. By determining what is in substance and reality being supplied, it is possible to identify to which entity the supply is provided.

278. The exact nature of a supply in any given situation depends on the facts and circumstances of the supply and the agreement made between the parties. In this regard, it is necessary to look at the whole arrangement for the supply (including the contractual arrangements) and the way in which the supply is carried out. If there is no written contract, other documents such as correspondence between the parties may be useful in establishing the nature of the supply.

279. If a supply is the provision of advice or information which involves work to create, develop or produce that advice or information, for example, a legal opinion or an audit report, the supply is the performance of services.[64] Thus, in determining whether a supply is provided to another entity regard is to be had to the performance of the services in creating, developing or producing the opinion or audit report and whether those services are provided to another entity.

280. Thus, the focal point in working out whether a supply is provided to another entity is the facts and circumstances of the doing of the thing supplied. By the supplier examining what it is required to do and in what circumstances, the supplier is able to objectively determine to whom the supply is provided.

281. With some supplies, it is inherent in the nature of the supply that the supply is provided to a particular entity. For example travel, training or entertainment services are, by their very nature, provided to the individual that travels, or is trained or entertained, respectively.

[64] As explained in GSTR 2000/31 if a supply is the provision of advice or information and the supply involves work to create, develop or produce that information or advice for the recipient, the supply is one of performance of services.

282. In the case of delivery or freight services where goods from one entity are addressed for delivery to another entity, we accept that the delivery or freight services are provided to that addressee entity.[65] In Part III of the Explanation section of this Ruling we provide examples which illustrate this approach. See Examples 10 and 11 (paragraphs 380 to 391 and 392 to 400 respectively) for delivery or freight services provided to an individual. See Example 13 (paragraphs 419 to 430) for delivery or freight services provided to an entity other than an individual. Example 14 (paragraphs 431 to 435) illustrates the outcome if the goods are for delivery to, for example, 'The Householder', or the public at large. As illustrated in the examples, this approach produces an outcome consistent with the application of subsection 38-190(3), and recognises inherent practical difficulties in otherwise determining whether the supply is provided to another entity.

283. In the case of other supplies, for example, supplies that involve the supply of legal, accounting, auditing or advertising services, the question of whether the supply is provided to another entity depends on the facts and circumstances in any given case.

284. For example, consider a supply of tax return preparation services made to a non-resident company. If what is really being supplied are services to complete tax returns for particular employees that meet their personal tax obligations, those services are provided to each employee. If, on the other hand, the tax return services are to complete the non-resident company's tax return, meeting its tax obligations, the tax return preparation services are provided to the non-resident company.

285. In situations where the contractual flow of the supply is to an entity (other than an individual), and it is necessary to determine whether the actual flow of the supply is to another entity (other than an individual), we consider that a strong indicator that the supply is provided to another entity is that the contracting entity has no further interaction with, or participation in, the provision of the supply beyond contracting and paying for the supply. However, the application of subsection 38-190(3) is still dependent upon on all the facts and circumstances of the supply. Refer to Examples 5 (paragraphs 314 to 322) and 33 (paragraphs 580 to 587), Parts II and VI respectively of the Explanation section of this Ruling.

286. It is only in limited circumstances that any one fact, or a particular combination of facts, means or indicates that a supply is provided to another entity.

287. The importance of understanding the exact nature of the supply by having regard to the facts and circumstances of the supply is illustrated by the following two contrasting examples.

[65] This does not, however, include the delivery of goods that are generically addressed to, for example, 'The Householder' or are for delivery to the public at large. It also does not include the situation where an entity's own goods are simply freighted or moved from one location to another location. In that case the circumstances of the particular supply in question must be considered to determine whether the supply is provided to another entity.

***Example 2 – supply of audit services made to a non-resident United States (US) company and provided to its Australian subsidiary***

288. *A non-resident US parent company contracts with an Australian accounting firm for the audit of its subsidiary in Australia. The US parent company does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf. The supply by the Australian accounting firm is properly characterised as the supply of a service.*

289. *The Australian accounting firm is engaged by the non-resident US parent company to carry out an audit of the Australian subsidiary. The audit service is about effecting compliance by the Australian subsidiary with its obligations under the corporation's laws in Australia.*[66] *Under section 301 of the Australian Corporations Act 2001, the Australian subsidiary must have its annual financial report for a financial year audited in accordance with Division 3 of Part 2M.3 of that Act and obtain an auditor's report. The audit service is performed over a period of time culminating in the production of an audit report.*

*Item 2*

290. *The supply is made to a non-resident, the US parent company, which is not in Australia when the service is performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

291. *The supply of audit services by the Australian accounting firm is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

292. *What is being supplied is an audit service effecting compliance by the Australian subsidiary with its statutory obligations in Australia. The nature of the service is such that the supply of audit services is provided to the Australian subsidiary. The actual flow of the audit service is to another entity, the Australian subsidiary.*

[66] Engagement of the Australian accounting firm is in accordance with resolutions passed in general meetings of the US parent company and the Australian subsidiary.

*Alternative view*

293. *Under section 308 of the Corporations Act 2001, an auditor who audits the financial report of a company for a financial year must report to members on whether the auditor is of the opinion that the financial report is in accordance with that Act. An alternative view expressed is that this requirement means that the audit services are provided to the US parent company.*

294. *Notwithstanding this requirement, the supply is, in our view, provided to the Australian subsidiary. This additional requirement does not alter the fact that the service is about the Australian subsidiary meeting its obligations under Australian company law. It may be that the requirement under section 308 of the Corporations Act 2001 means that the supply is provided to both the non-resident parent company and the Australian subsidiary. However in that case, subsection 38-190(3) still applies. (For further discussion about a supply provided to more than one entity refer to paragraph 662 and Examples 40 and 43 at paragraphs 636 to 644 and 663 to 671 respectively, Part VII on apportionment.)*

*(ii) Provided to that other entity in Australia*

295. *The Australian subsidiary is in Australia when the audit service is performed. As the supply of audit services is for the purposes of the Australian subsidiary, the supply is provided to that entity in Australia.*

296. *Subsection 38-190(3) negates the GST-free status otherwise applicable to the supply of audit services covered by item 2. (How to determine whether a supply is provided to another entity in Australia is discussed fully in the next Part at paragraphs 323 to 435).*

297. The above example is contrasted with the following example.

***Example 3 – supply of audit services made and provided to a non-resident US company***

298. *A non-resident US parent company contracts with an Australian accounting firm for the audit of its subsidiary in Australia. The audit service is about effecting compliance by the US parent company with US accounting or securities requirements that apply to it. The US parent company does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf.*

*Item 2*

299. *The supply is made to a non-resident, the US parent company, which is not in Australia when the service is performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

300. *The supply of the audit services by the Australian accounting firm to the non-resident US parent company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

301. *What is being supplied is an audit service effecting compliance by the US parent company with its reporting requirements in the US. The nature of the service is such that the supply of audit services is provided to the US parent company. The supply is not provided to another entity. The supply is not provided to the Australian subsidiary. The actual flow of the audit service is to the US parent company, not the Australian subsidiary which is the subject of the audit.*

302. *Subsection 38-190(3) does not negate the GST-free status of the supply.*

303. *However, if the audit services also effect compliance by the Australian subsidiary with its* reporting *requirements under the Corporations Act 2001, the supply, which is made and provided to the non-resident, is also provided to another entity in Australia, the Australian subsidiary. The supply is provided to both the Australian subsidiary and the non-resident US parent company. Subsection 38-190(3) negates the GST-free status that would otherwise apply to the supply made by the Australian accounting firm to the non-resident US parent company. (For further discussion about a supply provided to more than one entity refer to paragraph 662 and Examples 40 and 43 at paragraphs 636 to 644 and 663 to 671 respectively, Part VII on apportionment.)*

304. The importance of understanding what is really being supplied is further illustrated by the following example.

***Example 4 – supply of legal services made and provided to a non-resident United Kingdom (UK) company***

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

306. *Upon registration of the trademark in accordance with the Trade Marks Act 1995, the Australian subsidiary becomes the registered owner and obtains the exclusive rights to use the trademark 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.*

307. *However, the non-resident UK parent company is the entity availing itself of the application services. It is the applicant.*[67] *In performing the legal service, that is, the application service, there is no interaction between the Australian law firm and the Australian subsidiary.*

*Item 2*

308. *The supply is made to a non-resident, the UK company, which is not in Australia when the service is performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

309. *The supply of legal services by the Australian law firm to the UK company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

310. *What is being supplied by the Australian law firm is a legal service of preparing and lodging an application for registration of the trademark on behalf of the applicant, UK Co. That legal service – that is, preparation and lodgement of an application on behalf of the non-resident, is to be distinguished from the outcome of that service, the registration of the trademark in the name of the Australian subsidiary.*

311. *The nature of the service is such that the legal services are provided to the applicant, the UK company. UK Co is provided with the services of applying for registration of the trademark in the name of the Australian subsidiary. While the outcome of that service is that the Australian subsidiary obtains the exclusive rights to use the trademark 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, on the above facts, this does not alter the nature of the legal service. The legal service is a service of applying for registration which, on the facts, is provided to the applicant company, the UK company.*

312. *As the supply is not provided to another entity, subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

[67] It is noted that the registration of a trademark may be opposed on the ground that the applicant is not the owner of the trademark – see section 58 of the *Trade Marks Act 1995*.

313. In the next example we illustrate that, where the contractual flow of the supply is to an entity (other than an individual), and it is necessary to determine whether the actual flow of the supply is to another entity (other than an individual), it is a strong indicator that the supply is provided to that other entity if the contracting entity has no further interaction with, or participation in, the provision of the supply beyond contracting and paying for the supply.

***Example 5 – supply of legal services made to a non-resident company and provided to its Australian subsidiary***

314. *A non-resident company, US Co, which has a wholly-owned subsidiary in Australia, enters into a contract with an Australian law firm for the supply of legal services. US Co does not carry on business in Australia either through a place of business of its own, through its Australian subsidiary, or through any other agent acting on behalf of the company.*

315. *The legal advice is advice to the Australian subsidiary on the legal consequences of dismissing its Chief Finance Officer (CFO) and its options. The law firm meets with the managing director of the Australian subsidiary and provides the subsidiary with a letter of advice. The law firm has no further contact with US Co beyond entering into the contract and rendering the bill for professional services to US Co. The provision of the legal advice is a supply of services performed over time culminating in a report.*

316. *The issue considered below is the GST treatment of the legal services supplied by the law firm to US Co.*

*Item 2*

317. *The supply of legal services is made to a non-resident that is not in Australia when the legal services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

318. *The supply of legal services by the Australian law firm to US Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

319. *US Co, the entity to which the supply is made, has no further involvement with the provision of the supply beyond entering into the contract and making payment for the professional services rendered. This is a strong indicator that the supply is provided to the Australian subsidiary.*

320. *What is being supplied is advice as to the legal consequences of the Australian subsidiary dismissing its CFO and the options that the Australian subsidiary has available to it. The law firm has no further contact with US Co beyond entering into the contract and rendering the bill for professional services to US Co. The nature of the advice is such that the supply is provided to another entity, the Australian subsidiary. While the contractual flow of services is to the non-resident, the actual flow of services is to the Australian subsidiary.*

*(ii) Provided to that other entity in Australia*

321. *The Australian subsidiary is in Australia when the services are performed and the supply is for the purposes of that subsidiary in Australia. The supply is, therefore, provided to the Australian subsidiary in Australia.*

322. *Subsection 38-190(3) applies to the supply covered by item 2 and the GST-free status of the supply is negated.*

# Part III – determining whether the supply is provided (or is required to be provided) to that other entity in Australia

323. If a supply that is covered by item 2 is provided to another entity, it is necessary to determine whether the supply is provided to that other entity in Australia.

### How to determine whether a supply is provided to an individual in Australia

324. Consistent with our approach in GSTR 2004/7[68] an individual is in Australia when the thing supplied is done, if that individual is physically in Australia. An individual is not in Australia when the thing supplied is done, if that individual is physically outside Australia.

325. However, while 'in Australia' has the same meaning in item 2 (and paragraph (a) of item 3 and paragraph (b) of item 4) and subsection 38-190(3), the reference to 'in Australia' in subsection 38-190(3) is not simply a presence test.

326. In item 2 (and paragraph (a) of item 3 and paragraph (b) of item 4) it is necessary to determine whether the entity to which the supply is made is not in Australia when the thing supplied is done. This is a presence test at a particular time. We resolve this issue by answering the question whether a recipient is in Australia in relation to the supply at the relevant time.

327. However, in subsection 38-190(3), the question at issue is whether there is provision of a supply *to another entity in Australia.* This is not simply a presence test. We resolve this issue not by determining whether that other entity is in Australia in relation to the supply, but by determining whether provision is *to that other entity in Australia.*

328. To determine whether a supply is provided *to an individual in Australia,* we distinguish between non-resident and resident individuals, according to whether they are physically in Australia, or not in Australia, when the thing supplied is done. This approach is consistent with the legislative framework of section 38-190 and our approach in GSTR 2004/7.

#### *Non-resident individual not physically in Australia when the thing supplied is done*

329. If a supply is provided (or is required to be provided) to a non-resident individual who is not physically in Australia when the thing supplied is done, the supply is not provided to that individual in Australia.

[68] Refer to GSTR 2004/7 at paragraphs 35, 60, 202 and 222.

330. This is consistent with the underlying presumption in item 2 and item 3 (as it applies to non-resident individuals) that a supply is consumed by a non-resident individual outside Australia, if that individual is not physically in Australia when the thing supplied is done.

331. As the supply is not provided to the non-resident individual in Australia, paragraph 38-190(3)(b) is not satisfied. Therefore subsection 38-190(3) does not negate the GST-free status of the supply.

### *Non-resident individual physically in Australia when the thing supplied is done*

332. If a non-resident individual is physically in Australia when the thing supplied is done, it is necessary to determine whether the supply is provided to that individual in Australia.

333. If a non-resident individual's presence in Australia is integral to, as distinct from being merely coincidental with, the provision of the supply, we consider that the supply is provided to the non-resident individual in Australia. The requirement in paragraph 38-190(3)(b) is satisfied and subsection 38-190(3) negates the GST-free status of the supply (assuming the other requirements of that provision are satisfied).

334. Conversely, if the non-resident individual's presence in Australia is not integral to the provision of the supply we consider that supply is not provided to the non-resident individual in Australia. In these circumstances, we consider that the supply can only be provided to that individual outside Australia. Paragraph 38-190(3)(b) is not satisfied and therefore subsection 38-190(3) does not negate the GST-free status of the supply.

335. This approach ensures that a supply provided to a non-resident individual is not taxable merely because the individual is coincidentally located in Australia when the thing supplied is done.

336. Apportionment is required if, for part of the time when the thing supplied is done, a non-resident individual is physically in Australia and that individual's presence in Australia is integral to the provision of the supply. That part of the supply is taxable[69] as subsection 38-190(3) applies to negate the GST-free status of the supply. Apportionment is discussed further in Part VII of this Ruling.

### *Resident individual physically in Australia when the thing supplied is done*

337. If a supply is provided (or is required to be provided) to a resident individual who is physically in Australia when the thing supplied is done, the supply is provided to that individual in Australia.

[69] Assuming that the requirements of section 9-5 are otherwise satisfied.

338. This is consistent with the underlying presumption in item 3 (as it applies to resident individuals) that a supply is consumed by a resident individual in Australia if that individual is physically in Australia when the thing supplied is done.

339. As the supply is provided to the individual in Australia, the requirement in paragraph 38-190(3)(b) is satisfied. Therefore, subsection 38-190(3) negates the GST-free status of the supply (assuming the other requirements of that provision are satisfied).

### *Resident individual not physically in Australia when the thing supplied is done*

340. If a resident individual is not physically in Australia when the thing supplied is done, it is necessary to determine whether the supply is provided to that individual outside Australia.

341. If a resident individual's presence outside Australia is integral to, as distinct from being merely coincidental with, the provision of the supply, we consider that the supply is provided to that individual outside Australia. Paragraph 38-190(3)(b) is not satisfied and therefore subsection 38-190(3) does not negate the GST-free status of the supply.

342. Conversely, if the resident individual's presence outside Australia is not integral to the provision of the supply, we consider that the supply is not provided to the resident individual outside Australia. In these circumstances, we consider that the supply can only be provided to that individual in Australia. The requirement in paragraph 38-190(3)(b) is satisfied and subsection 38-190(3) negates the GST-free status of the supply (assuming the other requirements of that provision are satisfied).

343. This approach ensures that a supply provided to a resident individual is not GST-free merely because the individual is coincidentally located outside Australia when the thing supplied is done.

344. This approach is also consistent with the treatment of non-resident individuals who are physically in Australia when the thing supplied is done but whose presence is merely coincidental with the provision of the supply.

345. Apportionment is required if, for part of the time when the thing supplied is done, a resident individual is physically outside Australia and that presence is integral to the provision of the supply. That part of the supply is GST-free as subsection 38-190(3) does not negate the GST-free status of the supply. Apportionment is discussed further in Part VII of this Ruling.

***How to determine whether an individual's presence at a particular location (that is, in Australia, if a non-resident or outside Australia, if a resident) is integral to the provision of the supply***

346. It is necessary to consider this section if a supply is provided to:

- a non-resident individual who is in Australia when the thing supplied is done (see paragraphs 332 to 336); or
- a resident individual who is outside Australia when the thing supplied is done (see paragraphs 340 to 345).

347. A supply is provided to an entity at a particular location (that is, in Australia, if a non-resident, or outside Australia, if a resident) if the facts and circumstances of the supply show that the individual's presence at that location is integral to, as distinct from being merely coincidental with, the provision of the supply.

348. Determining whether an individual's presence at a particular location is integral to the provision of the supply and not merely coincidental requires an examination of the facts and circumstances of the supply. Indicators that an individual's presence at a particular location is integral to the provision of the supply include:

- the need for the supply arises from the individual's presence at that location (see Example 6 at paragraphs 350 to 356); or
- the presence of the individual at a particular location is integral to the performance, receipt or delivery of the supply (see Example 7 at paragraphs 358 to 363).

349. In the following example the need for the supply arises from the resident individual's presence outside Australia.

***Example 6 – a supply of legal services made to a non-resident and provided to a resident individual who is outside Australia when the thing supplied is done – the supply is not provided to the individual in Australia***

350. *David, an Australian resident individual, is arrested and charged with an offence while in New Zealand on holiday. An Australian legal firm is engaged by a non-resident (who is not in Australia at any time) to provide legal services to David. The legal services are provided to David over a period of four weeks. During the first week David is in contact with the firm on a regular basis. However, as the matter is largely resolved during this week, there is no contact between the firm and David during the remaining three weeks he is in New Zealand. The firm continues to attend to some matters to finalise the issue on David's behalf during these three weeks. David continues on with his holiday through New Zealand.*

*Item 2*

351. *The supply of legal services is made to a non-resident who is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

352. *The supply of legal services by the supplier in Australia to the non-resident is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

353. *The legal services are required to be provided to David. The supply although made to a non-resident is provided to another entity, David.*

*(ii) Not provided to that other entity in Australia*

354. *The services are not provided to David in Australia if David is outside Australia when the thing supplied is done and his presence outside Australia is integral to the provision of the supply. The need for the supply of legal services arises from David's presence outside Australia; his presence outside Australia is not merely coincidental with the provision of the supply.*

355. *As David's presence outside Australia is integral to the provision of the legal services, the supply is provided to David outside Australia. Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

356. *If any legal services in relation to this matter are provided to David after his return to Australia those services are provided to David in Australia. To that extent subsection 38-190(3) applies to negate the GST-free status of the supply covered by item 2.*

357. In the next example the presence of the non-resident individual in Australia is integral to the receipt of the supply.

***Example 7 – a non-resident individual working in Australia – the non-resident employer purchases a ticket for the employee to attend a football game in Australia – the supply is provided to the individual in Australia***

358. *A UK non-resident employer purchases a ticket from a supplier in Australia for his employee in Australia to attend an Aussie rules football match in Melbourne.*

*Item 2*

359. *The supply of entertainment services is made to a non-resident, the employer, who is not in Australia when the entertainment services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

360. *The supply of entertainment services by the supplier in Australia to the non-resident employer is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

361. *What is being supplied is entertainment and the employee is the entity that attends the football match and who is entertained. The supply although made to the employer is provided to the employee.*

*(ii) Provided to that other entity in Australia*

362. *The employee attends the football match in Australia and is involved with the supply while in Australia. The employee is the entity that is entertained. Therefore, the supply is provided to another entity, the employee, in Australia.*

363. *Subsection 38-190(3) negates the GST-free status of the supply covered by item 2.*

364. The next two examples illustrate that an individual's presence at a particular location is not integral to the provision of the supply if the individual's presence is merely coincidental with the provision of the supply.

***Example 8 – supply of storage services provided to a non-resident individual who is in Australia when the thing supplied is done – the supply is not provided to the individual in Australia***

365. *John, who is a non-resident, has personal goods stored in Brisbane at a lock-up storage facility. The agreement for the storage is between John's employer, a non-resident company, and an Australian storage provider. John comes to Australia on holidays and calls in to check the condition and safety of the goods he has stored at the facility.*

*Item 2*

366. *The supply is made to a non-resident, the employer company, which is not in Australia when the storage services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

367. *The supply of storage services by the Australian storage provider to the non-resident employer company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

368. *What is being supplied is storage of personal goods of an employee. John's goods are stored for him. The nature of the service is such that the supply of storage services is provided to John, another entity.*

*(ii) Not provided to that other entity in Australia*

369. *In the circumstances of this supply, John is merely taking advantage of being in Australia to check on the condition and safety of the goods he has stored at the facility. John's presence is not integral to the provision of the supply; it is merely coincidental. The supply of storage services is therefore not provided to John in Australia.*

370. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

***Example 9 – supply of private investigation services made to a non-resident and provided to a resident individual outside Australia when the thing supplied is done – the supply is provided to the individual in Australia***

371. *Peter's relative, a non- resident individual, who is not in Australia when the thing supplied is done, engages an Australian private investigator to provide services to Peter in Australia. Peter, a resident individual, is trying to find a relative who may be either in Australia or outside Australia. Peter is on holidays outside Australia during part of the time when those services are performed. The private investigator provides weekly e-mail updates to Peter on the progress he is making in finding the missing relative.*

*Item 2*

372. *The supply of investigation services is made to a non-resident individual who is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

373. *The supply of investigation services by the supplier in Australia to the non-resident is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

374. *The investigation services are required to be provided to Peter. The supply although made to a non-resident is provided to another entity, Peter.*

*(ii) Provided to that other entity in Australia*

375. *The weekly e-mails to Peter while he is overseas are merely necessitated by his absence from Australia on holiday. His presence outside Australia is merely coincidental with the provision of the supply. Peter is only being updated on the progress of the supply. Peter's presence outside Australia is not integral to the provision of the supply. The supply is therefore provided to Peter in Australia.*

376. *Subsection 38-190(3) therefore negates the GST-free status of the supply covered item 2.*

*A supply of certain freight or delivery services*

377. In the case of delivery or freight services which are provided to an individual in the circumstances described at paragraph 75, we accept those services are provided to that individual in Australia, if the goods are addressed to the individual in Australia. Alternatively, if the goods are addressed to the individual outside Australia, we accept that those services are provided to that individual outside Australia. As illustrated in examples 10 and 11 at paragraphs 380 to 391 and 392 to 400 respectively, this approach produces an outcome consistent with the application of subsection 38-190(3), and recognises inherent practical difficulties in otherwise determining whether the supply is provided to an entity in Australia. This outcome is not dependent upon the residency status of the individual to whom the goods are addressed.

378. This does not, however, include the delivery of goods that are generically addressed to 'The Householder' or are for delivery to the public at large. See Example 14, paragraphs 431 to 435. It also does not include the situation where an individual's goods are simply freighted or moved from one location to another location. For example, where the individual is relocating overseas and the individual's household goods are freighted to an address overseas. The circumstances of the particular supply in question must be considered to determine whether the supply is provided to another entity and whether the supply is provided to that other entity in Australia.

379. Examples 10 and 11 which follow illustrate the application of this practical approach.

***Example 10 – international freight exports – domestic leg of transport – supply of transport services (freight services only) made to a non-resident company and provided to another entity***

380. *An Australian exporter sells goods to a Japanese customer on delivered duty paid terms. The exporter is obliged, therefore, to deliver the goods to the Japanese customer at the named place of destination, Tokyo. The Japanese Customer takes delivery of the goods in Tokyo.*

381. *The Australian exporter contracts with an overseas airline, Tokyo Air Freight, to transport the goods from Adelaide to Tokyo. Tokyo Air Freight does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf. Tokyo Air Freight contracts with an Australian transport supplier, Aus Transport, to undertake the domestic leg of the transport of the goods from Adelaide to Sydney.*

382. *Aus Transport supplies Tokyo Air Freight with domestic transport services. Aus Transport moves the goods from Adelaide to Sydney on behalf of Tokyo Air Freight.*

383. *Aus Transport arranges with the Australian exporter a suitable time to pick up the goods. The transport service occurs over the time from picking up the goods to delivery in Sydney.*

*Item 2*

384. *The supply of domestic transport services by Aus Transport to Tokyo Air Freight is a supply made to a non-resident company that is not in Australia when the transport services are performed. The supply of transport services is not a supply of work physically performed on goods.*[70] *The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

[70] Refer to GSTR 2003/7 at paragraphs 59 to 62.

*Subsection 38-190(3)*

385. *The supply of domestic transport services by Aus Transport to Tokyo Air Freight is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

386. *Under the export sale terms, the Australian exporter is required to provide the Japanese customer with the services of delivering the goods to the customer at the named place of destination. The Australian exporter effects provision of delivery services to the Japanese customer through Tokyo Air Freight. Tokyo Air Freight in turn subcontracts part of the provision of delivery services to the Japanese customer to Aus Transport.*

387. *On these facts the transport services supplied by Aus Transport to Tokyo Air Freight are provided to the Japanese customer. Delivery services are required to be provided to the Japanese customer and those services are provided to the customer under various subcontract arrangements.*

388. *However, we recognise that Aus Transport may not be aware of the full circumstances of the supply of transport, as described above, that it makes to Tokyo Air Freight. At a practical level the transport services supplied by Aus Transport are provided to the addressee, the Japanese customer. Thus, where goods from one entity are addressed for delivery to another entity, we consider that it is reasonable for Aus Transport to conclude that the transport services are provided to the addressee entity. Therefore, the supply of transport services is provided to another entity, the Japanese customer.*

*(ii) Not provided to that other entity in Australia*

389. *If the Japanese customer is not in Australia when the transport services are performed, the supply is not provided to another entity in Australia.*

390. *However, we recognise that Aus Transport is unlikely to know the specific whereabouts of the Japanese customer during the period when the transport services are performed. At a practical level the goods are addressed to an entity outside Australia and we therefore consider that it is reasonable for Aus Transport to conclude that the transport services are provided to that other entity outside Australia, that is, the supply is not provided to another entity in Australia. (Note: this approach does not rely on the individual's residency status. Therefore, the outcome is the same even if the Japanese customer is a resident of Australia.)*

391. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

***Note:*** *As the supply of transport services (that is, the freight services) made by Tokyo Air Freight to the Australian exporter is partly performed in Australia (under a subcontract arrangement with Aus Transport), the supply is partly connected with Australia. If Tokyo Air Freight is registered, or required to be registered, for GST in Australia, that part of the supply that is connected with Australia is not a taxable supply to the extent that the supply is GST-free. While the supply is made to a recipient who is in Australia (that is, the Australian exporter), the supply is provided to another entity outside Australia and satisfies the requirements of item 3 via subsection 38-190(4). From 1 July 2010, subsection 38-190(5) will apply to deny GST-free treatment of the supply of transport services that were performed in Australia through the subcontractor. However, the supply will be GST-free under item 5 of subsection 38-355(1) to the extent the supply of the transport services performed in Australia forms part of the supply by Tokyo Air Freight of international transport of the goods from Australia.*

### *Example 11 – supply of delivery services made to a non-resident and provided to another entity, an individual, in Australia*

392. *Booklovers Inc is a non-resident company which does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf. Booklovers Inc sells books in response to orders placed over the Internet. A delivery service is offered by Booklovers for a charge to cover the cost.*[71]

393. *Kate orders a book from Booklovers Inc and pays for delivery by Booklovers Inc to her home address in Australia. Booklovers Inc meets this delivery obligation by engaging a subcontractor, Ace Couriers, to deliver the book. Ace Couriers is an Australian resident company.*

*Item 2*

394. *The supply of delivery services is made to a non-resident company, Booklovers Inc that is not in Australia when the delivery services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

395. *The supply of delivery services by Ace Couriers to Booklovers Inc is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

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

*(i) Provided to another entity*

396. *Booklovers Inc is required to provide Kate with the services of delivering a book to her at a particular place. Booklovers Inc effects provision of delivery services to Kate through Ace Couriers. The nature of the supply is delivery services to Kate as required under the terms of sale.*

397. *However, we recognise that Ace Couriers may never be aware of the full circumstances of the supply of delivery services, as described above, that it makes to Booklovers Inc. At a practical level, the delivery services supplied by Ace Couriers are provided to the addressee, Kate. Thus, where goods from one entity are addressed for delivery to another entity, we consider that it is reasonable for Ace Couriers to conclude that the delivery services are provided to another entity, in this case, Kate.*

*(ii) Provided to that other entity in Australia*

398. *If Kate is in Australia when the delivery services are performed, the supply is provided to Kate in Australia.*

399. *However, we recognise that Ace Couriers is unlikely to know the specific whereabouts of Kate during the period when the delivery services are performed. At a practical level, the goods are addressed to Kate in Australia and we therefore consider that it is reasonable for Ace Couriers to conclude that the delivery services are provided to Kate in Australia. The supply therefore is provided to another entity in Australia. (Note: this approach does not rely on the individual's residency status. Therefore, the outcome is the same even if Kate is a non-resident.)*

400. *Subsection 38-190(3) negates the GST-free status of the supply covered by item 2.*[72]

**How to determine whether a supply is provided to a company, partnership, corporate limited partnership or trust in Australia**

401. Unlike an individual, an entity such as a company, partnership, corporate limited partnership or trust does not have a precise physical location. The entity, through its representatives, may be present in more than one location at the same time.

402. Consistent with GSTR 2004/7[73] we consider that a *company, corporate limited partnership or trust* is in Australia (irrespective of its residency status) if the entity carries on business, (or in the case of an entity that does not carry on business, carries on activities), in Australia at or through a fixed and definite place of its own, or through

[72] However the supply of delivery services is GST-free if it satisfies the requirements of section 38-355.
[73] As above, at note 5.

an agent at a fixed and definite place, for a sufficiently substantial period of time.[74]

403. Additionally (as we state in GSTR 2004/7[75]) a *company or corporate limited partnership* is in Australia if it is incorporated or formed in Australia respectively.[76]

404. Also as explained in GSTR 2004/7,[77] a *partnership,* in our view, is in Australia if the entity carries on business (or in the case of a partnership that is in receipt of ordinary income or statutory income jointly, other activities which generate that income) in Australia at or through a fixed and definite place of its own, or through an agent at a fixed and definite place, for a sufficiently substantial period of time.[78]

405. We consider that a supply is provided to a company, partnership, corporate limited partnership or trust in Australia to the extent that the supply is for the purposes of the entity's Australian presence.

406. Examples of the Australian presence of an entity are the Australian branch of a non-resident company or if it is an Australian incorporated company, the Australian head office.

407. Consider the following example.

***Example 12 – supply made to non-resident parent company and provided to an off-shore branch of its Australian subsidiary***

408. *A non-resident parent company contracts with a customs specialist for the provision of customs advice in relation to operations in the Asia-Pacific region. 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 its behalf.*

409. *The non-resident company has an Australian subsidiary with a branch in Malaysia. The branch operates an import/export business in Kuala Lumpur. The customs specialist provides advice to the Malaysian branch on aspects of new import restrictions recently introduced in Malaysia.*

*Item 2*

410. *The supply of advice is made by the customs specialist to the non-resident parent company that is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

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[74] Refer to GSTR 2004/7 at paragraphs 229 to 346 (company); paragraphs 412 to 416 (corporate limited partnership); paragraphs 422 to 427 (trust).
[75] See above, at note 5.
[76] Refer to GSTR 2004/7 at paragraphs 335 to 339 (company); .paragraph 415 (corporate limited partnerships).
[77] As above, at note 5.
[78] Refer to GSTR 2004/7 at paragraphs 381 to 397.

*Subsection 38-190(3)*

411. *The supply of advice by the customs specialist to the non-resident parent company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

412. *What is being supplied is advice on import restrictions impacting on the Malaysian operations of the Australian subsidiary and that advice is required to be provided to the Malaysian branch of the Australian subsidiary. The supply is provided to another entity, the Australian subsidiary. The actual services flow to the Australian subsidiary.*

*(ii) Not provided to that other entity in Australia*

413. *The Australian subsidiary is in Australia when the services are performed. However the advice is for the purposes of the Malaysian branch.*

414. *The supply is not therefore provided to another entity in Australia. Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

*A supply of certain freight or delivery services*

415. In the case of delivery or freight services which are provided to an entity other than an individual in the circumstances described at paragraph 75, we accept those services are provided to that entity in Australia, if the goods are addressed to that entity in Australia. Alternatively, if the goods, are addressed to that entity outside Australia, we accept those services are provided to that entity outside Australia.

416. This approach recognises the inherent practical difficulties in otherwise determining whether the supply is provided to another entity in Australia, particularly if the freight or delivery services are the subject of subcontract arrangements.

417. This approach does not, however, apply to the delivery of goods that are generically addressed to 'The Householder' or are for delivery to the public at large. It also does not apply to circumstances where an entity's own goods are freighted or moved from one location to another location. The circumstances of the particular supply in question must be considered to determine whether the supply is provided to another entity and whether the supply is provided to that other entity in Australia.

418. The following example illustrates this approach. This can be contrasted with Example 14 (paragraphs 431 to 435) where the delivery is to the public at large.

***Example 13 – import by Australian subsidiary – domestic leg of transport – supplier required to deliver goods to a customer in Australia – supply of transport services (freight services only) made to a non-resident and provided to an entity in Australia***

419. *A non-resident company, UK Co, supplies goods to an Australian resident company, Oz Co, on delivered duty paid (or unpaid) terms of sale. UK Co is obliged to deliver the goods to Oz Co. UK Co engages 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. Neither UK Co, nor UK Trans Co, carries on business in Australia through a place of business of its own or through an agent acting on its behalf.*

420. *UK Trans Co subcontracts to an Australian resident transport company, Aus Transport, the domestic transport of goods from Sydney to Adelaide.*

421. *Aus Transport picks up the goods in Sydney and delivers them to Adelaide.*

422. *Aus Transport arranges a suitable time with Oz Co to deliver the goods. The transport service occurs over the time from picking up the goods in Sydney, the journey to Adelaide, until they are delivered to Oz Co.*

*Item 2*

423. *Aus Transport makes a supply of transport services to UK Trans Co that is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

424. *The supply of transport services by Aus Transport to UK Trans Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

425. *Under the export sale terms, UK Co is required to provide Oz Co with the services of delivering the goods to Oz Co in Adelaide. UK Co effects provision of delivery services to Oz Co through UK Trans Co. UK Trans Co in turn subcontracts part of the provision of delivery services to Oz Co to Aus Transport.*

426. *On these facts the supply of domestic transport services by Aus Transport to UK Trans Co is provided to the Australian customer of the UK exporter. Delivery services are required to be provided to the Australian customer and those services are provided to the customer under various subcontract arrangements.*

427. *However, we recognise that Aus Transport may not be aware of the full circumstances of the supply of transport, as described above, that it makes to UK Trans Co. At a practical level, the transport services are provided to the addressee, the Australian customer, Oz Co. Thus where goods from one entity are addressed for delivery to another entity, we consider that it is reasonable for Aus Transport to conclude that the transport services are provided to another entity, in this case Oz Co.*

*(ii) Provided to that other entity in Australia*

428. *Oz Co is in Australia when the transport services are performed. If the transport services are for the purposes of Oz Co in Australia, the supply of transport services is provided to another entity, Oz Co, in Australia.*

429. *However, we recognise that Aus Transport is unlikely to know whether the transport services are for the purposes of Oz Co. At a practical level, the goods are addressed to Oz Co in Australia and we therefore consider that it is reasonable for Aus Transport to conclude that the transport services are provided to Oz Co for its purposes. Therefore, the supply is provided to another entity in Australia. (Note: the outcome is the same even if Oz Co is not a resident of Australia.)*

430. *Subsection 38-190(3), therefore, negates the GST-free status of the supply covered by item 2. However, from 1 July 2010, as the supply by Aus Transport is made to UK Trans Co, the supply will be GST-free under item 5 of subsection 38-355(1), due to the operation of paragraph 38-355(2)(a), to the extent the supply forms part of the international transport of the goods to Australia*

***Note:*** *As the supply of transport services (that is, the freight services) made by UK Trans Co to UK Co is partly performed in Australia (under a subcontract arrangement with Aus Transport), the supply is partly connected with Australia. If UK Trans Co is registered, or required to be registered, for GST in Australia, that part of the supply that is connected with Australia is not a taxable supply to the extent that the supply is GST-free. While the supply is made to a non-resident recipient who is not in Australia (that is, UK Co), the supply is provided to another entity in Australia (that is, Oz Co). The supply made to UK Co satisfies the requirements of item 2 but the GST-free status of the supply is negated by subsection 38-190(3). The supply is therefore not GST-free under item 2. However, from 1 July 2010, the supply will be GST-free under item 5 of subsection 38-355(1), due to the operation of paragraph 38-355(2)(b), to the extent the supply forms part of the international transport of the goods to Australia by UK Trans Co.*

***Example 14 – supply of delivery services made and provided to a non-resident***

431. *Booklovers Inc (a non-resident company) wants to distribute advertising material in Melbourne and Sydney to the public at large. Booklovers Inc contracts with Ace Couriers to distribute the advertising material on its behalf.*

*Item 2*

432. *The supply of delivery services is made to a non-resident company that is not in Australia when the delivery services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

433. *The supply of delivery services by Ace Couriers to Booklovers Inc is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

434. *The delivery services are not required to be provided to any entity other than Booklovers Inc. The unsolicited delivery of goods to the public at large is not the provision of delivery services to another entity. The supply of delivery services is therefore made and provided to Booklovers Inc.*

435. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

# Part IV – determining whether a supply covered by item 2 is provided to an employee, an agent, or a partner, in Australia

436. In this Part we discuss and illustrate the provision of a supply to an employee, agent or partner in Australia.

### Determining whether a supply, made to a non-resident employer, is provided to an employee in Australia

437. If an employer is a non-resident company, partnership, corporate limited partnership or trustee of a trust that has employees in Australia, it is first necessary to consider, in relation to a supply made to the non-resident employer, the impact, if any, of that presence in Australia on the 'not in Australia' requirement in item 2 (as explained in GSTR 2004/7[79]). If the not in Australia requirement is satisfied, (that is, the non-resident entity is not in Australia in relation to the supply) and the other requirements of item 2 are met, the application of subsection 38-190(3) is then considered, including whether the supply is provided to an employee in Australia.

438. 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. A supply made to a non-resident sole trader only fails the 'not in Australia' requirement of item 2 if the sole trader is physically in Australia in relation to the supply when the thing supplied is done.[80]

439. Therefore, if the non-resident sole trader is not physically in Australia when the thing supplied is done, a supply to that non-resident is covered by item 2, provided the other requirements of that item are satisfied. It is then necessary to consider whether subsection 38-190(3) applies. That subsection applies if the supply covered by item 2 is provided, or is required to be provided, to an employee of the sole trader in Australia.

440. To determine whether the supply is provided to an employee, it is essential to examine the nature of the supply closely. It is inherent in the nature of some supplies, for example, the training or entertainment of employees, or travel by employees, that those supplies can only be provided to the employee.

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[79] As above, at note 5.
[80] Refer to Goods and Services Tax Ruling GSTR 2004/7 at paragraphs 204 to 208

***A supply of training services made to a non-resident employer and provided to employee-s in Australia***

441. A supply of training services, the nature of which requires the physical attendance of the individual at that training in Australia is a supply provided to that individual in Australia. Consider the following example.

***Example 15 – supply of flight training services made to a non-resident company and provided to another entity, a non-resident employee, in Australia***

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

443. *The contractual arrangement is between the non-resident airline company and the flight school. The supply is made to the non-resident airline company which does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf. The employees, who are based in China, are required under the agreement to attend the training course in Australia.*

*Item 2*

444. *The supply of training services is made to a non-resident, the airline company, which is not in Australia when the training services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

445. *The supply of training services by the Australian-based flight training school to the non-resident airline company in China is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

446. *What is being supplied is the teaching and tutoring of the employees of the non-resident airline company. It is in the nature of such training services that it is the individuals that are trained, rather than the individuals' employer, and it is therefore the individual who is provided with the training. These services are of a kind that can only be provided to the employee. The flow of the actual services of teaching and tutoring is to the employee pilots and not to the non-resident airline company. The supply is provided to another entity, the employee.*[81]

*(ii) Provided to that other entity in Australia*

447. *The employee pilots are required to physically attend training in Australia. As their presence in Australia is integral to the performance of the supply, the supply is provided to the employees in Australia.*

448. *As the supply is provided to another entity (that is, each employee) in Australia, subsection 38-190(3) negates the GST-free status otherwise applicable to the supply of training services covered by item 2.*

449. While the services that effect provision of a supply to an entity might take place in Australia, that supply may nonetheless be provided to an entity that is not in Australia. If the supply of training in Example 15 was on-line (that is, via the internet to employees in China rather than physical attendance in a classroom in Australia), the supply is not provided to another entity in Australia. The non-resident individuals are not in Australia when the training services are performed.

450. In the next example we illustrate the provision of training to the employee of a sole trader.

[81] The decision in the UK case *Customs and Excise Commissioners v. G & B Practical Management Development Ltd* [1979] STC 280 provides support for the view that training is provided in the place where the individual being trained is located when the training is delivered. The Court held (at page 284) that the course participants '…used the supply of services made by the company when they attended the lectures and the other parts of the training programme'. In addition, it was held (at page 284) that 'The fact that the information imparted by the tuition and the visits to various companies could not be used by these particular students until they returned to Nigeria is … irrelevant'.

***Example 16 – supply of training services made to a non-resident sole trader and provided to an Australian employee***

451. *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.*

*Item 2*

452. *The supply of computer training services is made to Andrew a non-resident who is not in Australia when the computer training is performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

453. *The supply of computer training services by the Australian computer training company to Andrew is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

454. *The training services are provided to Barbara as she is the person that is trained (by analogy with the discussion of flight training services in Example 15 at paragraphs 442 to 448).*

*(ii) Provided to that other entity in Australia*

455. *Barbara is trained in Australia. As Barbara's presence in Australia is integral to the performance of the supply, the supply of training services is provided to Barbara, another entity, in Australia.*

456. *Subsection 38-190(3) negates the GST-free status otherwise applicable to the supply of training services covered by item 2.*

457. Where an employee is involved with the provision of a supply, the weight to be accorded to that fact in determining whether a supply is provided to that individual differs according to the circumstances of the supply in question. In some situations, contact by an employee with the supplier might indicate by itself, or together with other facts, that the supply is provided to that employee. This illustrated in the following example.

***Example 17 – preparation of foreign tax returns for employees of a non-resident company who are working in Australia***

458. *An Australian resident accounting firm enters into an arrangement with a non-resident company to complete foreign tax returns for the non-resident company's employees working in Australia on secondment with a client of the non-resident. 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 its behalf. While the employees (who are non-residents for Australian income tax purposes) are in Australia, they meet with the Australian resident accounting firm in the course of preparing their tax returns. The employees are available to answer questions and provide any further information. The returns are completed and signed by each employee while the employee is in Australia.*

*Item 2*

459. *The supply is made to a non-resident company that is not in Australia when the tax return services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

460. *The supply of tax return preparation services by the Australian accounting firm to the non-resident company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

461. *What is being supplied is the service of preparing the foreign tax returns of the employees. The nature of the service is such that the supply of tax return preparation services is provided to each employee, who is another entity.*

*(ii) Provided to that other entity in Australia*

462. *Each employee is in Australia when the tax return services are performed. On the facts their presence in Australia is integral to the provision of the supply. It is not merely coincidental to the provision of the supply. The supply is therefore provided to each employee in Australia.*

463. *If the finalised returns are sent to the non-resident company and on-forwarded to its employees in Australia, this does not alter the nature of the supply and the fact that the supply of tax return preparation services is provided to the employees in Australia.*

464. *Subsection 38-190(3) negates the GST-free status of the supply covered by item 2.*

465. In some situations, contact by an employee with a supplier may simply be to facilitate the provision of the supply to the non-resident employer. This is illustrated in the following example.

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

466. *A non-resident shipping company contracts with an Australian stevedore company to supply stevedoring services (that is, loading or unloading ships) to it when its ships are at Australian ports. The non-resident shipping company does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf.*

*Item 2*

467. *The supply of stevedoring services is made to the non-resident shipping company that is not in Australia when the loading/unloading services are performed. The supply of stevedoring services is not a supply of work physically performed on goods.*[82] *The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

468. *The supply of stevedoring services by the Australian stevedore company to the non-resident shipping company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

469. *The Australian stevedore company loads/unloads the ships for the non-resident shipping company at Australian ports. It is the ship of the shipping company that is loaded/unloaded. The involvement of the employees does not alter the nature of the supply which is to load/unload the ships of the non-resident shipping company. The supply of stevedoring services is provided to the non-resident shipping company. The actual flow of stevedoring services is to the shipping company, not the employees of the non-resident shipping company who are present when the ship is loaded/unloaded and may help to facilitate the loading/unloading process.*

470. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

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[82] Refer to 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*? at paragraphs 59 to 64.

### Determining whether a supply is provided to an agent

471. Sometimes a non-resident entity makes an acquisition through a resident agent. If all the agent does is to 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 resident agent in Australia.[83]

#### *Example 19 – Australian barrister engaged by an Australian solicitor who is acting as agent of a non-resident individual*

472. *An Australian solicitor acting as agent for a non-resident individual engages an Australian barrister to supply legal services to the non-resident individual on an immigration matter. 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.*

*Item 2*

473. *The supply of legal services by the barrister is made to the non-resident individual (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.*[84] *The supply by the barrister to the non-resident individual meets the requirements of item 2.*

*Subsection 38-190(3)*

474. *The supply of legal services by the barrister to the non-resident individual is a supply under an agreement entered into indirectly with a non-resident (that is, through the resident agent). Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

475. *What is being supplied is advice on immigration matters concerning the non-resident individual. The barrister has been engaged by the Australian solicitor to provide advice to the non-resident individual. The legal services are provided to the non-resident, not the agent. The supply by the barrister to the non-resident individual is both made and provided to the non-resident, through the solicitor as agent. The supply by the barrister is neither made nor provided to the solicitor.*

476. *Subsection 38-190(3) does not apply to the supply of the legal services provided by the barrister.*

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[83] In the case of a non-resident entity, other than an individual, the presence of an agent in Australia can sometimes result in the non-resident entity failing the requirement in item 2 that the non-resident is not in Australia. To consider this aspect further, you should refer to GSTR 2004/7, at paragraphs 319 to 332.

[84] Refer to Goods and Services Tax Ruling GSTR 2004/7, at paragraphs 204 to 213.

***Example 20 – Australian solicitor supplies legal services to a non-resident individual***

477. *Following on from Example 19, the solicitor supplies legal services to the non-resident individual. The solicitor arranges for the supply of barrister services to be made to the non-resident individual. The supply of the services is a distinct and separate supply from the supply of the legal services made by the barrister through the solicitor as agent of the non-resident.*

*Item 2*

478. *The supply by the solicitor to the non-resident individual meets the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

479. *The supply of services by the solicitor to the non-resident individual is a supply under an agreement entered into directly with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

480. *The legal services supplied by the solicitor are made and provided to the non-resident. The supply is not provided to another entity.*

481. *Subsection 38-190(3) does not apply to the supply covered by item 2.*

**Determining whether a supply is provided to a partner**

482. When the partner of a non-resident partnership contracts for the supply of a thing in the capacity of partner, the supply is taken to be made to the partnership.[85] However, the supply of a thing can be made to the partnership and provided in whole or in part to that partner or another partner for the purposes of subsection 38-190(3).

483. Consider the following example.

***Example 21 – a supply of training services made to a non-resident partnership and provided to a partner in Australia***

484. *A partner in a non-resident partnership contracts, on behalf of the partnership, for the supply of 'Managing for today and tomorrow' training to all newly appointed partners. The training course is conducted in Australia.*

[85] Refer to subsection 184-5(1).

*Item 2*

485. *The supply of training services is made to a non-resident partnership that is not in Australia when the training services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

486. *The supply of training services to the non-resident partnership is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

487. *The training services are provided to each partner as the partners are the persons that are trained (by analogy with the discussion of flight training services in Example 15 at paragraphs 442 to 448).*

*(ii) Provided to that other entity in Australia*

488. *The partners are required to physically attend training in Australia. As their presence in Australia is integral to the performance of the supply, the supply is provided to another entity, (that is, each partner) in Australia.*

489. *Subsection 38-190(3), therefore, negates the GST-free status otherwise applicable to the supply of training services covered by item 2.*

490. As with other situations, the application of subsection 38-190(3) to any given supply depends on the nature of the supply.

491. Contrast the following example.

***Example 22 – Australian supplier engaged by a non-resident individual who is a partner of a non-resident partnership***

492. *The partnership carries on business in New Zealand. Central management and control of the partnership is in New Zealand. The partnership is a non-resident partnership for Australian GST purposes.*[86] *All the activities of the partnership are currently conducted outside Australia.*

493. *The partnership is contemplating the acquisition of commercial real property in Australia. The partners request legal advice from an Australian law firm on foreign ownership requirements in Australia.*

[86] See GSTR 2004/7 at paragraphs 146 to 157.

494. *One of the partners comes to Australia to engage and consult with the Australian law firm about the proposed acquisition. The partner is in Australia when the supply of legal services is performed. As the partner acquires the legal services in his or her capacity as partner, this is an acquisition made by the partnership for Australian GST purposes.*[87]

*Item 2*

495. *The supply made by the Australian law firm to the non-resident partnership satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

496. *The supply of legal advice by the Australian law firm to the non-resident partnership is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

497. *What is being supplied is advice on foreign ownership requirements impacting on the partnership in relation to a potential property acquisition by the partnership in Australia. The advice is about the affairs of the partnership. The presence of the partner in Australia to consult with the law firm does not alter the nature of the supply. The supply of legal advice is made and provided to the partnership. The supply is not provided to another entity.*

498. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

[87] Subsection 184-5(1).

# Part V – other aspects of the operation of subsection 38-190(3)

### Later use of a supply, outside Australia, that is provided to another entity in Australia

499. If the nature of a supply covered by item 2 is such that the supply is provided to another entity in Australia, the fact that the results or outcomes of the supply are later used outside Australia does not alter the nature of the supply and the application of subsection 38-190(3) to that supply.

500. Refer to Example 15 at paragraphs 442 to 448. In that example, the nature of the supply is such that the training services are provided to the employee, another entity, in Australia. The fact that the non-resident employer makes use outside Australia of the skills that the employee pilots have gained from the training in Australia, does not alter the nature of this supply. The supplier has undertaken to supply flight training to the non-resident airline and those training services are provided to the employees in Australia.[88]

501. The enquiry for the purposes of subsection 38-190(3) is one of determining the exact nature of the supply having regard to the facts and circumstances of the supply and then whether that supply, as properly described, is provided to another entity in Australia.

### Another entity in Australia 'benefits' from a supply but that supply is not provided to another entity in Australia

502. If the nature of the supply is such that the supply is only provided to an entity that is not in Australia, subsection 38-190(3) does not apply. This outcome is not altered even if another entity in Australia benefits from a supply made to a non-resident and provided to another entity that is not in Australia.

503. Consider the following example.

#### *Example 23 – a supply of advertising services made and provided to a non-resident in respect of goods sold in Australia*

504. *A non-resident US company that is a 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. The non-resident US company does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf.*

[88] 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.

*Item 2*

505. *The supply of air time by the Australian television network is made to the non-resident company that is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

506. *The supply of air time by the Australian television network to the non-resident US company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

507. *What is being supplied is air time on an Australian television network advertising the US distributor's products in Australia generally. The nature of the supply of air time is such that the supply is provided to the US company. While Australian retailers potentially benefit from the supply of advertising air time through increased sales, this does not alter the nature of the supply and the fact that the supply, as properly described, is not provided to another entity.*

508. *Subsection 38-190(3) does not negate the GST-free status of the supply of advertising services covered by item 2.*

509. The advertising example illustrates that, for the purposes of applying subsection 38-190(3), the focus is on the nature of the supply and the actual flow of that supply. It is not about tracing benefits. The next example also illustrates this.

***Example 24 – a supply of repair services made and provided to a non-resident landlord in respect of a rental property in Australia***

510. *Angela is a non-resident individual who owns a residential apartment at Redcliffe which is currently being rented. The apartment is managed by a real estate agent on Angela's behalf. The real estate agent advises Angela that the air-conditioner needs repairing as it has ceased working. Angela authorises the repairs and the agent arranges for a person to carry out the repairs to the air-conditioner. Angela is not physically located in Australia at any time during which the repairs to the air-conditioner are performed. Angela is not registered, or required to be registered, for GST in Australia.*

*Item 2*

511. *The repair services are contracted for by Angela's agent on her behalf. The supply of the repair services to the rental property are therefore made to Angela, a non-resident who is not in Australia when*

*the repair services are performed. As Angela is not registered, or required to be registered, the supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

512. *The supply of repair services by the repairer is a supply under an agreement entered into indirectly with a non-resident (that is, through Angela's agent in Australia). Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

513. *What is being supplied is the service of repairing an air-conditioner. The circumstances of the supply are that Angela, as landlord, is maintaining the leased premises and all inclusions such as the air-conditioner in working order as leased by the tenant.*

514. *The supply of the repair services is provided, therefore, to Angela. It is not provided to the tenant. While the tenant benefits from the supply of the repair services as she is able to once again use the air-conditioner, this does not alter the nature of the supply and the fact that the supply, as properly described, is not provided to another entity, the tenant. (The supply is also not provided to the agent who merely arranges for the supply to be made to Angela.)*

515. *Subsection 38-190(3) does not negate the GST-free status of the supply of repair services covered by item 2.*

*Subsection 38-190(2A)*

516. *It is also necessary to consider subsection 38-190(2A) which could negate the GST-free status of the supply under item 2. This provision applies to a supply covered by item 2 if the acquisition of the supply (in this case the repair services) relates either directly or indirectly to the making of a supply of real property in Australia that would be wholly or partly input taxed under Subdivision 40-B or 40-C.*

517. *As the supply of the residential rental property by Angela would be input taxed, and the acquisition of the repair services relates to the making of that supply, the GST-free status of the supply is negated by subsection 38-190(2A) if the supply of the repair services is made on or after 1 April 2005.*[89] *If the supply of the repair services is made before 1 April 2005 subsection 38-190(2A) does not apply.*

518. As stated at paragraph 501, the enquiry for the purposes of subsection 38-190(3) is one of determining the exact nature of the supply having regard to all the facts and circumstances of the supply, and then whether that supply, as properly described, is provided to another entity in Australia.

[89] The amendment which inserted subsection 38-190(2A) applies to supplies made on or after 1 April 2005. See clause 3, Schedule 9 of the *Tax Laws Amendment (2004 Measures No. 6) Act 2005* which received Royal Assent on 21 March 2005.

# Part VI – further examples

519. In this section of the Ruling we provide further examples illustrating the application of subsection 38-190(3) to supplies covered by item 2. In each of the examples we look at the facts and circumstances of the supply to work out whether the supply is provided to another entity. If the supply is provided to another entity, we then determine whether provision of the supply is to another entity in Australia. The relevant time for determining this is when the thing supplied is done, refer paragraph 246 to 253, Part I of the Explanation section.

520. We summarise below in table format the key considerations relevant to determining whether, in a particular case, subsection 38-190(3) applies to a supply covered by item 2. The table provides a snapshot of the application of subsection 38-190(3). However you should refer to the examples themselves which discuss in full how to determine whether a supply is provided to another entity in Australia.

521. The examples are not statements of principles in themselves to be applied generally. The examples illustrate how we apply the provision in a given fact situation.

| E.g. No. | The character of the supply covered by item 2 | The nature of the supply (including the way the supply is carried out) covered by item 2 | Subsection 38-190(3) Provided to: | |
|---|---|---|---|---|
| | | | another entity | another entity in Australia |
| **25** | ***Supply of speaking services***<br>*(Made by a lawyer to a non-resident company)* | An Australian lawyer speaks about recent maritime law developments at an international conference held in Sydney. The lawyer is engaged, for a fee, by a non-resident company that organises the conference. The attendees of the conference are members of the legal profession in Australia and from overseas. | **Yes**<br>**(conference attendees)** | **Yes** |
| **26** | ***Supply of speaking services***<br>*(Made by a software expert to a non-resident company)* | An Australian software expert is engaged by a non-resident company to promote and market at various seminars throughout Australia its new software product to existing and potential customers. | **No** | **Not necessary to consider** |
| **27** | ***Supply of legal services (advice)***<br>*(Made by an Australian law firm to a non-resident company, US Finance)* | The advice concerns foreign ownership requirements which may impact on the possible purchase of shares in an Australian company by US Finance. An executive of US Finance comes to Australia and instructs an Australian law firm. Prior to his departure, he is issued with a letter of advice. | **No** | **Not necessary to consider** |
| **28** | ***Supply of legal services (advice)***<br>*(Made by an Australian law firm to a non-resident company, NR Co)* | Subject to NR Co obtaining legal advice on various tax issues, NR Co proposes to use its existing Australian subsidiary, Aus Sub, to acquire the shares in an Australian company, Oz Co. There is no interaction between the Australian law firm and personnel of Aus Sub. | **No** | **Not necessary to consider** |
| **29** | ***Supply of legal services (advice)***<br>*(Made by an Australian law firm to a non-resident company, US Co.)* | The legal advice concerns the dismissal of the Chief Executive Officer of the Australian subsidiary of US Co. US Co is assessing the impact dismissal would have on its Australian operations. The Australian law firm deals only with personnel of US Co and it has no interaction of any kind with any personnel of the Australian subsidiary in relation to the preparation of the advice. | **No** | **Not necessary to consider** |
| **30** | ***Supply of accounting services***<br>*(Made by an Australian accounting firm to a non-resident company, NR Co.)* | The Australian accounting firm is required to co-ordinate management reporting systems of the Australian subsidiary of NR Co with that of the global enterprise. The accounting firm works with the Australian subsidiary to modify its systems so that it can meet the group's global reporting standards. | **Yes**<br>**(Australian subsidiary)** | **Yes** |
| **31** | ***Supply of accounting services (tax advice)***<br>*(Made by an Australian accounting firm to a non-resident company, NZ Co.)* | The tax advice concerns the plans of NZ Co to either sell-off its Australian subsidiary or assets of the subsidiary. An Australian accounting firm supplies NZ Co with advice on the taxation implications of the different options to assist NZ Co in its deliberations. The Australian accounting firm deals only with personnel of NZ Co. | **No** | **Not necessary to consider** |
| **32** | ***Supply of advertising services***<br>*(Made by an Australian advertising agency to a non-resident company, Nile Co.)* | An Australian advertising agency develops and prepares advertising material for the products sold by the world-wide group of Nile Co including products sold by the Australian subsidiary. All work is carried out with and for the parent company, Nile Co and the Australian advertising agency only deals with Nile Co. | **No** | **Not necessary to consider** |

| E.g. No. | The character of the supply covered by item 2 | The nature of the supply (including the way the supply is carried out) covered by item 2 | Subsection 38-190(3) Provided to: | |
|---|---|---|---|---|
| | | | another entity | another entity in Australia |
| **33** | ***Supply of advertising services***<br>*(Made by an Australian advertising agency to a non-resident company, Sing Co.)* | An Australian advertising agency develops and prepares advertising material for the products sold by the Australian subsidiary of Sing Co. All work is carried out with and for the Australian subsidiary. Sing Co, the parent company, has no further participation in the supply beyond contracting and paying for the supply. | **Yes**<br>**(Australian subsidiary)** | **Yes** |
| **34** | ***Supply of telephone booking services***<br>*(Made by an Australian company, Aus Bookings Co, to a non-resident company, Trans-Europe Railways Co*) | The booking service is a service operated for Trans-Europe which is otherwise unable to conduct a booking service in Australia. The Australian customers benefit from the booking service supplied by Aus Bookings Co in that they receive information and are able to make bookings. | **No** | **Not necessary to consider** |
| **35** | ***Supply of computer helpline services***<br>*(Made by an Australian company, Help Line Co, to a non-resident company, Mumbai Technology)* | Mumbai Technology contracts with Help Line Co to supply technical support services to an Australian company (Aus Customer), which has purchased a computer network from Mumbai Technology. Help Line Co provides assistance, either over the phone or via email, to staff of Aus Customer when they have technical problems. While staff of Aus Customer receive individual attention and advice, the nature of the supply is maintaining in working order, the computer system of Aus Customer. | **Yes**<br>**(Aus Customer)** | **Yes** |
| **36** | ***Supply of testing services***<br>*Made by an Australian company, Oz Test Co, to a non-resident company, UK Co)* | Oz Test Co conducts tests on ore samples of an Australian company, Oz Miner, for UK Co. The test results are provided to UK Co which conducts further analysis culminating in a comprehensive report for Oz Miner. Other than receipt of the samples from Oz Miner, Oz Test Co has no further interaction with Oz Miner. | **No** | **Not necessary to consider** |
| **37** | ***Supply of assembly services***<br>*(Made by an Australian company, Aus Engineering, to a non-resident company, UK Co).* | UK Co sells furniture in kit form but offers an assembly service to the customer in Australia if the customer requires the furniture to be assembled prior to delivery. UK Co engages Aus Engineering to assemble furniture which is sold to Australian customers in kit form.<br>**(The supply is covered by item 2 provided UK Co is not registered or required to register for GST in Australia) | **Yes**<br>**(Australian customer)** | **Yes** |
| **38** | ***Supply of assembly services***<br>*(Made by an Australian company, Aus Engineering, to a non-resident company, UK Co)* | UK Co sells furniture as an assembled unit but to lower costs it has the furniture assembled by Aus Engineering once it arrives in Australia. The assembly is undertaken on behalf of UK Co as the goods are sold as assembled goods.<br>**(The supply is covered by item 2 provided UK Co is not registered or required to register for GST in Australia) | **No** | **Not necessary to consider** |
| **39** | ***Supply of assembly services***<br>*(Made by an Australian company, Aus Engineering, to a non-resident company, UK Co)* | UK Co imports furniture into Australia in kit form and has Aus Engineering assemble the furniture for sale to future, but as yet, unidentified customers. The assembly is undertaken on behalf of UK Co. It is not known whether any customer will ultimately be found.<br>**(The supply is covered by item 2 provided UK Co is not registered or required to registered for GST in Australia) | **No** | **Not necessary to consider** |

### A supply of speaking services

522. Depending on the exact nature of a supply of speaking services covered by item 2, subsection 38-190(3) may or may not negate the GST-free status of the supply. This is illustrated by the following two contrasting examples.

#### *Example 25 – supply of speaking services made to a non-resident company and provided to other entities, individuals, in Australia*

523. *An Australian legal specialist, the sole proprietor of a boutique legal practice in Melbourne specialising in maritime law, is engaged, for a fee, by a non-resident company to speak at an international trade law conference in Sydney. The topic is recent developments in maritime law affecting international trade and in particular the impact of a recent High Court decision on current industry arrangements. The conference is attended by members of the legal profession, both from Australia and overseas. The non-resident company, the conference organiser, does not carry on business in Australia through a place of business of its own or through an agent acting on its behalf.*

*Item 2*

524. *The supply of speaking services is made by the Australian legal specialist to the non-resident company. The non-resident company is not in Australia when the speaking services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

525. *The supply of speaking services by the Australian legal specialist is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

526. *What is supplied is information and knowledge for the professional development of the members of the audience. The supply of speaking services is akin to a supply of training services. In performing the speaking service the members are updated and trained on recent developments. Therefore, the nature of the supply is such that the speaking services are provided to the members of the legal profession attending the conference, each another entity, and not to the non-resident company organising the conference.*

*(ii) Provided to that other entity in Australia*

527. *Each audience member is in receipt of professional development in Australia. As their presence in Australia is integral to the performance of the supply, the supply is provided to another entity, each member of the audience, in Australia.*

528. *Subsection 38-190(3) negates the GST-free status otherwise applicable to the supply of speaking services made by the lawyer and covered by item 2.*

***Example 26 – supply of speaking services made and provided to a non-resident company***

529. *A non-resident software company sells just-in-time inventory control software designed for the construction industry. To ensure the success of the release of its new software, the non-resident software company holds seminars in Australia for both current users of earlier versions of the software, and potential users of the new software, from the construction industry. The non-resident software company does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf.*

530. *An Australian software expert enters into an agreement with the non-resident software company to speak at various seminars to be held around Australia.*

531. *At the seminars the software expert promotes the new software. The expert advocates the benefits of its use and highlights the new features for the current users of previous versions to promote and encourage sales of the new version.*

*Item 2*

532. *The supply of speaking services by the Australian software expert is made to the non-resident software company. As the non-resident software company is not in Australia when the speaking services are performed, the supply of speaking services by the Australian software expert satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

533. *The supply of speaking services by the Australian software expert to the non-resident software company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

534. *Unlike the previous example, the nature of the service is not the professional development of members of the audience. Rather, the nature of the supply is promoting and marketing a new product, that is, the new software of the non-resident software company, to potential customers, the members of the construction industry attending the conference. While knowledge and information about the software capabilities flow to the audience members, this is only a by-product of the supply of speaking services and it does not alter the true nature of the service, that is, the promotion and marketing of the new software.*

535. *Therefore, the supply is made and provided to the non-resident software company. (See further Example 32 at paragraphs 573 to 578 about the provision of a supply to a particular entity while another entity benefits from the supply.)*

536. *As the supply is not provided to another entity subsection 38-190(3) does not negate the GST-free status of the supply of speaking services covered by item 2.*

### A supply of legal services

537. Depending on the exact nature of a supply of legal services covered by item 2, subsection 38-190(3) may or may not negate the GST-free status of the supply. In each of the following examples we look at the facts and circumstances of the supply to determine whether a supply is provided to another entity. If that is the case, we then consider whether there is provision to another entity in Australia when the thing supplied is done. However, this second step is unnecessary in the following three examples.

538. Consider the following three examples which can be contrasted with Example 5, paragraphs 314 to 322, Part II of the Explanation section of the Ruling.

#### *Example 27 – supply of legal services made and provided to a non-resident company with an executive in Australia when the service is performed*

539. *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 US Finance acquiring shares in an Australian company. While in Australia the executive meets with an Australian law firm and issues instructions on behalf of US Finance for advice on foreign ownership requirements in Australia, which may impact on the plans of US Finance to acquire shares in an Australian company. The Australian law firm provides a letter of advice to the executive before his departure from Australia.*

*Item 2*

540. *The supply of advice is made to US Finance, a non-resident that is not in Australia when the legal services are performed. US Finance does not carry on business in Australia through a place of its own or through an agent acting on behalf of it. The presence of the executive, whether he or she has the authority to issue instructions on behalf of US Finance, or not, does not alter this. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

541. *The supply of legal services by the Australian law firm to US Finance is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

542. *What is being supplied is advice on foreign ownership requirements in relation to a possible share acquisition by US Finance in an Australian company. The nature of the advice is such that the supply is provided to US Finance Co. The interaction between the Australian law firm and the employee of US Co does not alter the nature of the advice and the fact that the supply is provided to US Finance Co.*

543. *The supply of legal advice is made and provided to US Finance and subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

***Example 28 – supply of legal services made and provided to a non-resident company in relation to a share acquisition by its Australian subsidiary***

544. *A non-resident parent company, NR Co, proposes to buy shares in an Australian company, Oz Co. Subject to obtaining legal advice about certain taxation matters, NR Co proposes to use its existing Australian subsidiary, Aus Sub, to acquire the shares. An Australian law firm supplies taxation advice to the head office of NR Co on various tax issues associated with NR Co acquiring Oz Co through an existing Australian subsidiary. NR Co does not carry on business in Australia either through a place of business of its own, through Aus Sub, or any other agent acting on behalf of the company.*

545. *In preparing the advice the Australian law firm has no dealings with any party in Australia or with any directors or employees of Aus Sub. The Australian law firm provides no professional services to Aus Sub.*

*Item 2*

546. *The supply by the Australian law firm is made to NR Co, a non-resident company that is not in Australia when the legal services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

547. *The supply of legal services by the Australian law firm to NR Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

548. *What is being supplied is advice on tax issues relevant to NR Co's proposal to acquire Oz Co through Aus Sub. The legal firm has no interaction with Aus Sub, nor is any advice given to Aus Sub. The nature of the advice is such that the supply of legal advice is made and provided to NR Co. The actual flow of the legal services is to NR Co.*

549. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

***Example 29 – supply of legal services made and provided to a non-resident company***

550. *An Australian law firm contracts with a non-resident company, US Co, to supply legal services. US Co has an Australian subsidiary. However, US Co does not carry on business in Australia either through a place of business of its own or through its subsidiary, or any other agent acting on its behalf. The Australian law firm has agreed to provide US Co with advice on legal issues associated with the dismissal of the Chief Executive Officer (CEO) of its Australian subsidiary. US Co is assessing the impact this matter will likely have on its Australian operations. The Australian law firm deals only with personnel of US Co and has no interaction of any kind with any personnel from the Australian subsidiary in relation to the advice. The advice is prepared and once finalised sent to US Co.*

*Item 2*

551. *The supply of legal services by the Australian law firm is made to a non-resident company that is not in Australia when the legal services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

552. *The supply of legal services made by the Australian law firm to US Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

553. *What is being supplied is advice on matters associated with the dismissal of the CEO of the Australian subsidiary, relevant to the deliberations of US Co. The Australian law firm has no dealings with the Australian subsidiary. The nature of the advice is such that the supply of legal advice is made and provided to US Co. The supply is not provided to another entity.*

554. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

### A supply of accounting services

555. Depending on the exact nature of a supply of accounting services covered by item 2, subsection 38-190(3) may or may not negate the GST-free status of the supply. In each of the following examples, we look at the facts and circumstances of the supply to determine whether a supply is provided to another entity. If that is the case, we then consider whether there is provision to another entity in Australia when the thing supplied is done.

556. Consider and contrast the following two examples.

#### *Example 30 – supply of accounting services made to a non-resident company and provided to another entity in Australia*

557. *The Australian subsidiaries of NR Co (the non-resident parent company) are required to update their reporting systems so that their systems comply with the requirements of NR Co's global enterprise. NR Co contracts with an Australian accounting firm to co-ordinate management reporting systems for each Australian subsidiary of its global enterprise. Management consultants from the Australian accounting firm are required to work with the Australian subsidiaries to modify their systems so that the subsidiary can meet the group's global reporting standards.*

558. *NR Co does not carry on business in Australia either through a place of business of its own, through its Australian subsidiaries, or any other agent acting on its behalf.*

559. *The issue considered below is the GST treatment of the accounting services supplied by the Australian accounting firm to NR Co.*

*Item 2*

560. *The supply of accounting services by the Australian accounting firm is made to NR Co a non-resident company that is not in Australia when the accounting services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

561. *The supply of accounting services by the Australian accounting firm to NR Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

562. *The accounting firm works with each Australian subsidiary modifying its existing reporting systems to comply with group reporting standards. The nature of the service is such that the supply is provided by the accounting firm to another entity, each Australian subsidiary.*

*(ii) Provided to that other entity in Australia*

563. *The Australian subsidiary is in Australia when the services are performed and the supply is for the purposes of the Australian subsidiary in Australia. The supply is, therefore, provided to the Australian subsidiary in Australia.*

564. *Subsection 38-190(3) applies to the supply covered by item 2 and the GST-free status of the supply is negated.*

***Example 31 – supply of tax advice made and provided to a non-resident company***

565. *A non-resident company, NZ Co, has a subsidiary in Australia. NZ Co is contemplating selling the subsidiary in Australia or down-sizing the Australian operations by selling-off key assets owned by the subsidiary. An Australian accounting firm supplies NZ Co with advice on the Australian taxation implications of the different options to assist NZ Co in its deliberations. NZ Co does not carry on business in Australia either through a place of business of its own, through its Australian subsidiary, or any other agent acting on its behalf.*

566. *The Australian accounting firm deals only with personnel of NZ Co. It has no interaction of any kind with any personnel from the Australian subsidiary in relation to the advice. The advice is prepared and once finalised sent to NZ Co.*

*Item 2*

567. *The supply of tax advice by the Australian accounting firm is made to NZ Co a non-resident company that is not in Australia when the accounting services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

568. *The supply of accounting services by the Australian accounting firm to NZ Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

569. *What is being supplied is advice informing NZ Co about the Australian tax consequences of its different options for down-sizing its operations in Australia. The nature of the advice is such that the supply of advice is provided to NZ Co. The supply is not provided to another entity.*

570. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

### A supply of advertising services

571. Depending on the exact nature of a supply of advertising services covered by item 2, subsection 38-190(3) may or may not negate the GST-free status of the supply. In each of the following examples we look at the facts and circumstances of the supply to determine whether a supply is provided to another entity. If that is the case, we then consider whether there is provision to another entity in Australia when the thing supplied is done.

572. Consider and contrast the following two examples which also illustrate that the application of subsection 38-190(3) is not about tracing benefits.

#### *Example 32 – supply of advertising services made and provided to a non-resident parent company*

573. *An Australian advertising agency, Aus Ad Co, wins a contract to supply advertising services to an Egyptian company, Nile Co. The services are to develop and prepare advertising material for the products sold by the Nile Co group world-wide including products sold by the Australian subsidiary of Nile Co, Aust Co. Nile Co does not carry on business in Australia either through a place of business of its own or its subsidiary or any other agent acting on behalf of the company.*

574. *The advertising service supplied by Aus Ad Co is the development of an advertising campaign and the preparation of print,*

*television and radio advertisements including those for the Australian market. Aus Ad Co only deals with Nile Co in relation to the development and preparation of the advertising campaign for the Australian brand of products. Nile Co exercises full control over the conduct of the advertising services and Aus Ad Co only talks to and works with the marketing staff of Nile Co in developing the campaign and the advertising material. The Australian subsidiary is not involved with the supply. Aus Ad Co delivers the advertising 'copy' (that is, the product) directly to the media in Australia.*

*Item 2*

575. *The supply of advertising services is made by Aus Ad Co to Nile Co, a non-resident company that is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

576. *The supply of advertising services by Aus Ad Co to Nile Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

577. *What is being supplied is an advertising campaign for the world-wide products of the Nile group. Having regard to the facts and circumstances of the supply including the way the supply is carried out – see paragraph 574, it follows that the supply of advertising services is made and provided to Nile Co. The nature of the supply is such that the supply is not provided to another entity, even though other entities in the Nile group, in particular, Aust Co, benefit from the advertising campaign run by Nile Co. The actual flow of the advertising service is to Nile Co, not Aust Co.*

578. *Subsection 38-190(3) does not negate the GST-free status of the supply of the advertising services covered by item 2.*

579. The above example is contrasted with the following example.

***Example 33 – supply of advertising services made to a non-resident parent company and provided to its Australian subsidiary***

580. *An Australian advertising agency, Aus Ad Co wins a contract to supply advertising services to a Singapore company, Sing Co. The contract for the supply is between Aus Ad Co and Sing Co. Sing 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. Aust Co, a subsidiary of Sing Co in Australia, is not the*

*agent of Sing Co in Australia. The contract is for the development and preparation of advertising material for products sold by Aust Co.*

581. *Aus 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. Aus Ad Co does not deal with Sing Co in relation to the development and approval for the advertising copy. Aust Co exercises full control over the conduct of the advertising services. Aus Ad Co talks to the marketing staff of Aust Co and works with them to develop the campaign and the advertising material. Sing Co has no further participation in the supply beyond contracting and paying for the supply.*

*Item 2*

582. *The supply of advertising services by Aus Ad Co is made to Sing Co, a non-resident company that is not in Australia when the advertising services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

583. *The supply of advertising services by Aus Ad Co to Sing Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

584. *What is being supplied is an advertising campaign to advertise the goods sold by the Australian subsidiary. Aus Ad Co only deals with the Australian subsidiary throughout the course of developing the advertising campaign for those products. Aus Ad Co does not deal with Sing Co in relation to the development and approval for the advertising copy. Aust Co exercises full control over the conduct of the advertising services. Aus Ad Co talks to the marketing staff of Aust Co and works with them to develop the campaign and the advertising material.*

585. *The nature of the advertising service is such that the supply is provided to the Australian subsidiary. In contrast to the previous example, the offshore parent company contracts for advertising services to be provided to the Australian subsidiary. Other than contracting for the supply, Sing Co is not otherwise involved with the supply. The supply is provided to another entity, Aust Co. The actual flow of the advertising services in this example is to Aust Co, another entity.*

*(ii) Provided to that other entity in Australia*

586. *Aust Co is in Australia when the services are performed. As the services are for the purposes of Aust Co in Australia, the supply*

*of advertising services is provided to another entity, Aust Co, in Australia.*

587. *Subsection 38-190(3) negates the GST-free status of the supply covered by item 2.*

### A supply of telephone booking services

588. The following example also illustrates like the previous advertising examples that the application of subsection 38-190(3) is not about tracing benefits. Rather it is a matter of determining, having regard to the exact nature of the supply, whether the supply as properly described and understood, is provided to another entity in Australia.

#### *Example 34 – supply of a telephone booking service made and provided to a non-resident*

589. *Trans-Europe Railways Co is a non-resident company which operates passenger rail in Europe. Trans-Europe engages an Australian company, Aus Bookings Co, to operate a telephone bookings centre in Australia. Aus Bookings Co operates a successful telephone bookings centre for other foreign transport operators. Customers call Aus Bookings Co to enquire about time tables, make reservations and buy tickets. Aus Bookings Co passes on the relevant information and money to Trans-Europe.*

590. *Trans-Europe does not carry on business in Australia either through a place of business of its own or through an agent at a fixed and definite place.*

*Item 2*

591. *The supply of booking services by Aus Bookings Co is made to Trans-Europe a non-resident company that is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

592. *The supply of booking services by Aus Bookings Co to Trans-Europe Railway Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

593. *What is being supplied is a service of operating a telephone bookings/enquiry service – the receiving of telephone calls, the giving of train timetable and other information and the taking of telephone bookings and payments for Trans-Europe. The nature of the service*

*is such that the supply is provided to Trans Europe. While the customers get information and other benefits, such as their travel booked, by calling Aus Bookings Co, the customers are not provided with the service of operating a bookings and enquiries service. This is provided to Trans-Europe.*

594. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

### A supply of technical support services

595. In the following example, having regard to all the facts and circumstances, the supply is provided to another entity in Australia. Subsection 38-190(3) applies, therefore, to negate the GST-free status of the supply of computer helpline services covered by item 2.

#### *Example 35 – supply of computer helpline services made to a non-resident and provided to another entity in Australia*

596. *Mumbai Technology is a non-resident company which operates a business in India selling computers. Mumbai Technology wins a contract to supply a large Australian company (Aus Customer) with a computer network. The computers are imported by Aus Customer. Mumbai Technology does not make supplies connected with Australia and is not registered, or required to be registered for GST.*

597. *The contract also requires Mumbai Technology to provide Aus Customer with a help line service to maintain the computer network in good working order. The staff of Aus Customer can ring the help line when problems are encountered. Mumbai Technology does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf. Mumbai Technology subcontracts provision of this support service to Aus Customer to an Australian firm, Help Line Co. The issue considered below is the GST treatment of the support services supplied by Help Line Co to Mumbai Technology.*

*Item 2*

598. *The supply of technical support services by Help Line Co is made to Mumbai Technology a non-resident company that is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

599. *The supply of technical support services by Help Line Co to Mumbai Technology is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

600. *What is being supplied is a service of fixing computer problems of Aus Customer. While staff of Aus Customer receive individual attention and advice, the supply is a service of maintaining in working order, the computer system of Aus Customer. The supply by Help Line Co to Mumbai Technology of support services is provided to Aus Customer, another entity.*

*(ii) Provided to that other entity in Australia*

601. *Aus Customer Ltd is in Australia when the services are performed and the supply is for the purposes of Aus Customer in Australia. The supply is provided to another entity, Aus Customer, in Australia.*

602. *Subsection 38-190(3) applies and the GST-free status of the supply covered by item 2 is negated.*

**A supply of testing services**

603. In the following example, having regard to all the facts and circumstances, the nature of the supply is such that the supply is not provided to another entity in Australia. Subsection 38-190(3) does not, therefore, negate the GST-free status of the supply of testing services covered by item 2.

***Example 36 – the supply of testing services made and provided to a non-resident***

604. *A non-resident company, UK Co, provides a world-wide service of testing, analysing and reporting on the quality of certain ore types. UK Co does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf. UK Co is not registered or required to be registered for GST.*

605. *UK Co enters into a contract with an Australian resident customer, Oz Miner, to test, analyse and report on the quality of certain mineral ores found by Oz Miner during its recent exploration activities in Queensland.*

606. *UK Co enters into an agreement with an Australian company, Oz Test Co, to perform certain tests on the ore samples and report on the findings of those tests directly to UK Co. UK Co uses this information to conduct further analysis culminating in a comprehensive report to send to Oz Miner on the quality of the ores.*

607. *UK Co arranges for Oz Miner to deliver its ore samples to Oz Test Co. Other than delivery of the samples to Oz Test Co, Oz Test Co has no further interaction with Oz Miner.*

*Item 2*

608. *The supply of the testing services by Oz Test Co is made to a UK Co non-resident company that is not in Australia when the testing service is performed. What is supplied is information that UK Co uses in further analytical work culminating in a full report to Oz Miner. In this circumstance, the supply by Oz Test Co to UK Co is not a supply of work physically performed on goods in Australia but rather a supply of information.*[90] *The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

609. *The supply of testing services by Oz Test Co to UK Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

610. *The tests are carried out by Oz Test as part of analytical work to be carried out by UK Co, in the UK. Other than delivery of the samples to OZ Test Co, Oz Test Co has no involvement with the supply. The supply of services is made and provided to UK Co. The supply is not provided to Oz Miner, even though Oz Miner likely benefits from the testing work carried out by Oz Test. The supply is not provided to another entity.*

611. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

### A supply of assembly services

612. Depending on the exact nature of a supply of assembly services covered by item 2, subsection 38-190(3) may or may not negate the GST-free status of the supply. In each of these examples we look at the facts and circumstances of the supply to determine whether a supply is provided to another entity. If that is the case, we then consider whether there is provision to another entity in Australia when the thing supplied is done.

613. Consider and contrast the following three examples.

#### *Example 37 – supply of assembly services made to a non-resident and provided to individuals in Australia*

614. *UK Co sells furniture in kit form to customers in Australia (individuals) on a delivered duty paid basis. UK Co does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf. When ordering goods from*

[90] Refer to GSTR 2003/7 at paragraphs 68 to 73.

*UK Co, customers may specify that they would prefer, for an additional fee, that the furniture is assembled prior to delivery.*

615. *UK Co contracts with Aus Engineering to assemble the furniture in Australia if an Australian customer has specified and paid for the furniture to be assembled prior to delivery. If a customer has requested the furniture to be delivered assembled, UK Co arranges for the importation and delivery of the furniture in kit form to the premises of Aus Engineering. Aus Engineering assembles the furniture so that it is ready to be delivered, as assembled, to the Australian customer of UK Co. The supply from Aus Engineering to UK Co is a service of assembling the furniture for the specified Australian customer.*

*Item 2*

616. *The supply of the assembly services by Aus Engineering Co is made to a non-resident company, UK Co, which is not in Australia when the assembly services are performed. 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 UK Co is not registered, or required to be registered, the supply meets the requirements of paragraph (b) of item 2 and the supply is, therefore, a supply covered by item 2. (Note: as UK Co is making supplies connected with Australia (paragraph 9-25(3)(a)), it will be required to register for GST if it meets the registration turnover threshold.[91])*

*Subsection 38-190(3)*

617. *The supply of assembling furniture by Aus Engineering to UK Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

618. *The supply is a service of assembling furniture, supplied in a kit form, for a specified customer of UK Co. In doing this assembly, Aus Engineering assembles the furniture kit for specified customers. The supply is provided to another entity, the customer.*

*(ii) Provided to that other entity in Australia*

619. *The Australian customer is in Australia when the services are performed. If the customer is a resident individual the supply is provided to that individual in Australia. If the customer is a non-resident individual the need for the supply arises from the presence of that individual in Australia. The supply of assembly services is, therefore, provided to another entity, the Australian*

[91] Division 23.

*customer, in Australia, irrespective of whether that customer is a non-resident or resident individual.*

620. *Subsection 38-190(3) negates the GST-free status of the supply covered by item 2.*

***Example 38 – supply of assembly services made and provided to a non-resident company***

621. *Following on from Example 37, the result would be different if UK Co sold assembled furniture but to lower costs UK Co delays assembly of the furniture until it arrives in Australia where upon it is assembled by Aus Engineering. The assembly of the furniture is not an additional or optional component of the supply of the furniture by UK Co to the customer. While in this case the agreement is for the supply of furniture (assembled), sometimes depending on the nature of the goods it may be implicit the goods are supplied in an assembled form (for example, the supply of a car).*

*Item 2*

622. *The supply of the assembly services by Aus Engineering Co is made to a non-resident company, UK Co, which is not in Australia when the assembly services are performed. 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 UK Co is not registered, or required to be registered, the supply meets the requirements of paragraph (b) of item 2 and the supply is, therefore, a supply covered by item 2. (Note: as UK Co is making supplies connected with Australia (paragraph 9-25(3)(a)), it will be required to register for GST if it meets the registration turnover threshold.[92])*

*Subsection 38-190(3)*

623. *The supply of assembling furniture by Aus Engineering to UK Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

624. *UK Co sells assembled furniture to customers in Australia. The supply by Aus Engineering is a service of assembling furniture that UK Co has sold to customers in Australia in an assembled form. The nature of the services is such that the supply of assembly services is provided to UK Co, not for a particular customer of UK Co, as in the previous example.*

625. *Thus, on the facts of this case, the supply of the assembly services by Aus Engineering actually flow to UK Co, not the customer*

[92] Division 23.

*in Australia. The supply of assembly services is not provided to another entity in Australia. Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

***Example 39 – supply of assembly services made and provided to a non-resident company***

626. *The result in Example 37 would also be different if UK Co imported the furniture into Australia in kit form and had Aus Engineering assemble the kits without any particular customer in mind but anticipating that customers will subsequently be found.*

*Item 2*

627. *The supply of the assembly services by Aus Engineering Co is made to a non-resident company, UK Co, which is not in Australia when the assembly services are performed. 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 UK Co is not registered, or required to be registered, the supply meets the requirements of paragraph (b) of item 2 and the supply is, therefore, a supply covered by item 2. (Note: if UK Co makes supplies connected with Australia it will be required to register for GST if it meets the registration turnover threshold.[93])*

*Subsection 38-190(3)*

628. *The supply of assembling furniture by Aus Engineering to UK Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

629. *UK Co intends selling assembled furniture to future customers in Australia. The supply by Aus Engineering is a service of assembling furniture that UK Co will later sell to customers, not yet identified, in Australia, in an assembled form.*

630. *Thus, the supply of the assembly services by Aus Engineering is provided to UK Co. In fact, there is no other entity to which the supply could be provided. It is not known whether any customer will ultimately be found or whether any future customer that is found will be in Australia. The supply of assembly services is not provided to another entity in Australia. Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

[93] Division 23.

# Part VII – apportionment

631. In this Part we explain the requirement for apportionment of the supply where part of the supply is provided, or required to be provided, to an entity in Australia. We provide examples illustrating how apportionment arises. We also discuss how to apportion when a supply is provided, or required to be provided, on a periodic or progressive basis.

### When apportionment is necessary

632. Section 9-5 provides that a supply is not a taxable supply to the extent that it is GST-free or input taxed. We are of the view that the GST Act requires apportionment of consideration as between the taxable component and the non-taxable component of a supply.[94]

633. If a supply made to a non-resident meets the requirements of item 2 and part of the supply covered by item 2 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 negates that GST-free status).

634. Therefore, the need to apportion in the context of subsection 38-190(3) arises if the supply is only partly provided to another entity in Australia.

635. This can occur where there is provision of the supply in part to another entity in Australia.

#### *Example 40 – supply made to a non-resident parent company and provided in part to a non-resident subsidiary and in part to an Australian subsidiary*

636. *NZ Co is a non-resident parent company which has a subsidiary company in Australia and a subsidiary company in New Zealand. NZ Co does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf. The subsidiary entities have no presence outside of New Zealand or Australia respectively.*

637. *The non-resident parent company engages an Australian management consultant company, AMC, to assist each subsidiary company in restructuring its operations. The restructuring operations are required to be effected by each subsidiary to achieve cost savings and efficiency gains.*

[94] Refer to GSTR 2001/8 at paragraphs 82 to 91 for a discussion of the general rule of apportionment.

*Item 2*

638. *The supply of management consultancy services by AMC is made to NZ Co, a non-resident company that is not in Australia when the consultancy services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

639. *The supply of consultancy services by AMC is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

640. *The consultancy work is undertaken by the consultant with each of the subsidiaries. The management consultant consults with each subsidiary in turn to restructure its operations to effect cost savings and efficiency gains.*

641. *The nature of the service is such that the supply is provided to each subsidiary. The actual flow of the services is to each subsidiary. The supply is, therefore, provided to another entity, each subsidiary, and not the non-resident parent company.*

*(ii) Provided to that other entity in Australia*

642. *The New Zealand subsidiary is not in Australia and therefore the services are not provided to that subsidiary in Australia.*

643. *The Australian subsidiary is in Australia when the services are performed. That part of the supply that is for the purposes of NZ Co's Australian subsidiary is provided to that subsidiary in Australia. The supply is provided to another entity in Australia to the extent that the supply is provided to the Australian subsidiary.*

644. *Therefore, subsection 38-190(3) negates the GST-free status of that part of the supply that is provided to the Australian subsidiary. The consideration for the supply is therefore required to be apportioned between the GST-free part of the supply (that part of the supply which is provided to the New Zealand subsidiary), and the taxable[95] part of the supply (that part of the supply that is provided to the Australian subsidiary).*

645. Apportionment also arises if the supply is provided over a period of time to another entity and the supply is provided to that other entity in Australia for part of the time. That part of the supply that is provided to that entity in Australia is the taxable[96] part of the

[95] Assuming that the requirements of section 9-5 are otherwise satisfied.
[96] Assuming that the requirements of section 9-5 are otherwise satisfied.

supply. That part of the supply that is not provided to that entity in Australia is GST-free.

646. This is illustrated by the following two examples.

***Example 41 – the supply is provided to a non-resident individual in Australia for part of the time over which the services are performed***

647. *Tom, a non-resident individual, holidaying in Australia, falls over while shopping in a store in Australia. While in Australia Tom seeks legal advice from an Australian legal firm contracted for by his parents in New Zealand. Tom's parents are not in Australia when the legal services are performed. The legal firm, on behalf of Tom, writes to the shopping centre seeking out of pocket expenses and an amount for pain and suffering. Tom returns to New Zealand before the claim is settled. Further contact with the legal firm occurs from New Zealand.*

*Item 2*

648. *The supply of legal services is made to a non-resident, the parents, who are not in Australia when the legal services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

649. *The supply of legal services by the Australian legal firm to Tom's parents is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

650. *What is being supplied is a service of seeking, on Tom's behalf, compensation resulting from an accident in Australia. The nature of the service is such that the supply is provided to another entity, Tom.*

*(ii) Provided to that other entity in Australia*

651. *Tom is a non-resident who is in Australia when part of the services is performed. As the need for the supply arises from Tom's presence in Australia, the supply is provided to Tom while he is in Australia. Once Tom returns to New Zealand, Tom is not in Australia when the services are performed.*

652. *That part of the supply that is provided to Tom in Australia is the taxable[97] part of the supply. That part of the supply that is*

[97] Assuming that the requirements of section 9-5 are otherwise satisfied.

*provided to Tom when he is not in Australia is GST-free. The consideration for the supply is therefore required to be apportioned between the GST-free part of the supply and the taxable part of the supply.*

***Example 42 – supply made to a non-resident parent company and provided to another entity which is only in Australia for part of the time that the supply is provided to it***

653. *NZ Co is a non-resident parent company. NZ Co does not carry on business in Australia either through a place of its own or through an agent acting on its behalf.*

654. *NZ Co engages an Australian market research company to assist its New Zealand subsidiary with product promotion in Australia. The New Zealand subsidiary has a presence in Australia, that is, an Australian branch, which sells various products to the Australian market. The Australian market research company deals only with personnel of the Australian branch and supplies all reports to the branch.*

655. *However, during the period over which the market research services are provided the New Zealand subsidiary closes its Australian branch and centralises all product sales in New Zealand. The Australian market research company continues to undertake the same work for the New Zealand subsidiary and provides all reports to the Head Office in New Zealand.*

*Item 2*

656. *The supply of market research services by the Australian research company is made to NZ Co, a non-resident company that is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

657. *The supply of market research services by the Australian research company to NZ Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

658. *The agreement requires the Australian research company to provide market research services to the New Zealand subsidiary of NZ Co to promote and market its products in Australia. The nature of the service is also such that the supply is provided to the New Zealand subsidiary. The supply is, therefore, provided to another entity, the New Zealand subsidiary.*

*(ii) Provided to that other entity in Australia*

659. *The New Zealand subsidiary has a branch in Australia. The New Zealand subsidiary is therefore in Australia when the services are performed. The market research undertaken by the Australian research company is for the purposes of the Australian branch of the New Zealand subsidiary. The supply is therefore provided to another entity, the New Zealand subsidiary, in Australia.*

660. *However, the New Zealand subsidiary only has a presence in Australia for part of the time that the supply is provided to it. Once the Australian branch of the New Zealand subsidiary is closed, the New Zealand subsidiary no longer has a presence in Australia. The New Zealand subsidiary is no longer in Australia when the services are performed. Therefore, the supply is provided to another entity in Australia to the extent that the New Zealand subsidiary is in Australia at the relevant time.*

661. *Subsection 38-190(3) therefore negates the GST-free status of that part of the supply that is provided to the Australian branch of the New Zealand subsidiary. The consideration for the supply is required to be apportioned between the GST-free part of the supply (that part of the supply which is provided to the New Zealand subsidiary when it no longer has a branch in Australia), and the taxable[98] part of the supply (that part of the supply which is provided to the Australian branch of the New Zealand subsidiary).*

**A supply is provided to both a non-resident entity that is not in Australia and another entity in Australia**

662. Sometimes a supply of services might, for example, be made and provided to a non-resident entity that is not in Australia and also provided to another entity in Australia in circumstances where the supply is not divisible with separate parts of the supply being provided to each entity. Section 9-5 provides that a supply is not a taxable supply to the extent that it is GST-free (or input taxed).

662A. As explained at paragraph 66 of GSTR 2006/4 the High Court in *Ronpibon Tin v. FC of* T[98A] (*Ronpibon Tin*) indicated, in the income tax context, that if a certain expense, such as directors' fees, has a 'double aspect', it will need to be apportioned if it 'cannot be

[98] Assuming that the requirements of section 9-5 are otherwise satisfied.
[98A] (1949) 78 CLR 47.

dissected'.[98B] As further explained in GSTR 2006/4 the High Court also emphasised the necessity of considering the facts of the particular case.[98C]

662B. Thus if a supply is provided to both a non-resident entity outside Australia and another entity in Australia, but it cannot be said that there are separate and distinct parts of the supply provided to each entity, that supply is nonetheless apportionable on a fair and reasonable basis.

662C. The method used by the supplier to apportion the supply must result in a fair and reasonable reflection of the extent to which the supply is provided to the non-resident entity outside Australia (GST-free part of the supply) and the other entity in Australia (taxable part of the supply). The method used must also be appropriately documented by the supplier.[98D]

662D. Having determined the taxable and GST-free parts of the supply, the consideration for the supply is required to be apportioned between those parts. The Commissioner considers that the GST Act requires apportionment of consideration as between the taxable component and the non-taxable component of a supply.[98E]

662E. The following example illustrates a supply that is provided to both a non-resident entity and other resident entities.

***Example 43 – supply of pathology services made and provided to a non-resident and also required to be provided to another entity in Australia***

663. *A non-resident pharmaceutical company 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. The company does not carry on business in Australia either through a place of business of its own or through any agent acting on its behalf.*

664. *The non-resident pharmaceutical company contracts with an Australian pathology company for the testing of samples from the Australian patients. The testing of samples is part of the pharmaceutical company's assessment of the effectiveness of the drug and the medical practitioners' services of monitoring the health of their trial patients, as required under the contract with the pharmaceutical company. It is essential to the performance of the contract between the non-resident pharmaceutical company and the Australian medical practitioners that the pathology services are carried out for both the Australian medical practitioners and the non-resident pharmaceutical company.*

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[98B] See *Ronpibon Tin* (1949) 78 CLR 47 at 59.
[98C] See *Ronpibon Tin* (1949) 78 CLR 47 at 58-9 and paragraph 99 of GSTR 2006/4.
[98D] See *Ronpibon Tin v. FC of T* (1949) 78 CLR 47 at 58-9 and paragraph 100 of GSTR 2006/4.
[98E] Refer to paragraphs 82 to 91 of GSTR 2001/8 for a discussion of the general rule of apportionment.

*Item 2*

665. *The supply of pathology services is made to the non-resident pharmaceutical company that is not in Australia. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2. The supply is not a supply of work physically performed on goods. The supply is a supply of information that involves work to produce that information and thus the supply is one of performing services.*

*Subsection 38-190(3)*

666. *The supply of pathology services by the Australian pathology company to the non-resident pharmaceutical company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

667. *The pathology service is a service of carrying out certain tests and preparing a report. The service as a whole (the testing and the report) is carried out as part of the drug company assessment of the effectiveness of the new drug and the medical practitioners monitoring of the health of their patients involved in the drug trial, as required under the terms of their contract with the non-resident pharmaceutical company. The medical practitioners are not merely supplied with a copy of the report for interest only. If the medical practitioners did not receive the pathology reports commissioned by the non-resident company, each practitioner would need to order his or her own pathology tests in monitoring the patients' health, as required.*

668. *In this circumstance the supply of pathology services is provided to both the non-resident pharmaceutical company and the Australian medical practitioners.*

669. *To the extent that the supply of pathology services is provided to each medical practitioner those services are provided to another entity.*

*(ii) Provided to that other entity in Australia*

670. *To the extent that the supply of pathology services is provided to each medical practitioner those services are provided to another entity in Australia. To this extent subsection 38-190(3) negates the GST-free status of the supply of those services from the pathology company to the pharmaceutical company. To the extent that the supply of pathology services is provided to the non-resident pharmaceutical company outside Australia subsection 38-190(3) does not negate the GST-free status of the supply of those services.*

671. *The consideration for the supply is required to be apportioned between the GST-free part of the supply (that part of the supply that is provided to the non-resident pharmaceutical company) and the taxable part of the supply (that part of the supply which is provided to the Australian medical practitioners). Apportionment is required on a fair and reasonable basis taking into account the particular facts of the case. In the circumstances of this case the Australian pathology company might take into account how many medical practitioners in Australia are supplied with the results of the tests (taxable part of the supply) as against the supply to the non-resident pharmaceutical company outside Australia (GST-free part of the supply) in apportioning the consideration received for the supply.*

### Apportionment method

672. If a supply covered by item 2 is partly GST-free and partly taxable because of the operation of subsection 38-190(3), the supplier is required to apportion the consideration between the GST-free and taxable parts of the supply.

673. The supplier can use any reasonable method that is supportable in the particular circumstances to apportion the consideration.[99]

674. The supplier should keep records that explain the method used.[100]

### Apportionment when a supply is provided on a periodic or progressive basis

675. Under Division 156, if a taxable supply is made for a period or on a progressive basis and the consideration is provided on a periodic or progressive basis, the GST payable is attributed as if each progressive or periodic component of the supply were a separate supply.[101]

676. If a supply is provided for a period with consideration to be given on a periodic basis and the supply is provided to another entity in Australia for part of the time when the supply is provided (or is required to be so provided), it may not be possible for the supplier to identify the taxable part of the supply at the beginning of the period over which the supply is provided. This is because there may be no way for the supplier to determine in advance whether and to what extent the supply is provided to that entity in Australia during the whole period over which the supply is provided. However, it will be possible for the supplier to identify this in relation to the periodic components of the supply. Accordingly, we accept that this is the basis on which GST

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[99] Refer to GSTR 2001/8 at paragraphs 92 to 113.
[100] Refer to paragraphs 25 to 30 of GSTR 2001/8 and paragraph 382-5(1)(a) in Schedule 1 to the *Taxation Administration Act 1953*.
[101] Section 156-25 provides that Division 156 does not apply to a supplier who accounts on a cash basis.

payable on the supply (and input tax credits, if it is a creditable acquisition for the other entity) is attributable to tax periods.

***Example 44 – a supply is provided to a non-resident individual who is in Australia for part of the time when the service is performed***

677. *Sylvia is a New Zealand resident who carries on business in New Zealand and Australia as a sole trader. She has a one year contract with an Australian company, Aus Computers, under which the company is to provide services including:*

- *software development; and*
- *training as required.*

678. *The contract provides for charges to be calculated on an hourly basis ($100/hour plus GST (if any)) and invoices issued on a monthly basis. Aus Computers does not account for GST on a cash basis. It has one month tax periods.*

679. *It is agreed that staff of Aus Computers will travel to Auckland to discuss Sylvia's business requirements at various times throughout the course of the supply and that Sylvia and or her employees will come to Australia as necessary.*

680. *In March, Sylvia sends two employees for training in Australia. The employees are in Australia to attend training classes for two weeks in March. The employees also take in the sights of Sydney during this time.*

681. *Aus Computers charges for the first three months of the supply including the GST treatment are as set out below:*

| ***Invoice date*** | ***Amount*** | ***Hours billed*** |
|---|---|---|
| *4 March 2003*<br>*(for services performed in February)* | *$3,000*<br>*(no GST payable)* | *30* |
| *6 April 2003*<br>*(for services performed in March)* | *$10,600*<br>*(including $600 GST)* | *100*<br>*(60 hours attributable to training the employees in Australia)* |
| *5 May 2003*<br>*(for services performed in April)* | *$2,000*<br>*(no GST payable)* | *20* |

***Explanation***

*Item 2*

682. *The supply of software development and computer training services is made to Sylvia a non-resident who is not in Australia when those services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

683. *The supply of software development and computer training services by the Australian computer training company to Sylvia is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

*(a) Software development*

684. Aus Computers develops software in respect of the business requirements of Sylvia. The supply of software services is provided to Sylvia. The nature of the supply is such that the supply is not provided to another entity.

*(b) Training*

685. *The training services are provided to each employee as it is the employee that is trained (by analogy with the discussion of flight training services in Example 15 at paragraphs 442 to 448, Part IV of the Explanation section).*

*(ii) Provided to that other entity in Australia (training only)*

686. *The supply made to Sylvia is GST-free under item 2 to the extent that the supply is not provided to another entity in Australia (that is, subsection 38-190(3) does not negate the GST-free status).*

687. *There is no GST payable for the tax period ending 31 March 2003 (refer to invoice of 4 March 2003)*[102] *because the supply is covered by item 2 and, therefore GST-free. Subsection 38-190(3) does not apply. For the whole of the time when the services are performed, the services are not provided to another entity in Australia. Similarly, there is no GST payable for the tax period ending 31 May 2003 (refer to invoice of 5 May 2003).*

[102] As Aus Computers does not account for GST on a cash basis, any GST payable by Aus Computers is attributable to the tax period in which any of the consideration is received or, if before any consideration is received, an invoice is issued, the tax period in which the invoice is issued. Therefore, the invoice issued on 4 March 2003 is relevant to the tax period ending 31 March 2003.

688. *To work out the GST payable that is attributable to the tax period ending 30 April 2003 (refer to invoice of 6 April 2003), it is necessary to identify the taxable part of the supply. The supply is taxable to the extent that the supply is provided to another entity in Australia.*[103]

689. *The employees are in Australia when the training services are performed. As the employees' presence in Australia is integral to the performance of the supply, the supply is provided to another entity in Australia to the extent of the two weeks training provided to employees in Australia. This is the taxable part of the supply.*

690. *Consideration for the supply must therefore be apportioned between the taxable and GST-free parts of the supply. To work out the value of the taxable part of the supply, it is necessary to apportion the consideration on a reasonable basis. The circumstances of this supply are such that a time basis is a reasonable basis on which to apportion the consideration, that is, using the hours billed and attributable to the training provided to the employees in Australia (60 hours) as a proportion of the total hours billed for that tax period (100 hours) to work out the value of the taxable part of the supply.*

691. *The GST attributable to the tax period ending 30 April 2003 is calculated as follows:*

*Value of the taxable part: (60* ÷ 100**) × $10,000*** = $6,000*

*GST payable: $6,000 × 10% = $600*

*Consideration payable: $10,000 + $600 = $10,600*

** Number of hours billed and attributable to the training provided to the employees in Australia*

*** Total number of hours billed in the relevant tax period to which the amount invoiced relates*

**** Total amount invoiced (excluding GST) in the relevant tax period*

*Supplier accounts on a cash basis*

692. If a supplier who accounts on a cash basis makes a supply for a period or on a progressive basis and the consideration is given on a periodic or progressive basis, similar issues may arise to those referred to at paragraph 676. The following example illustrates how to attribute GST payable in that case.

***Example 45 –a supply is provided to a non-resident individual in Australia for part of the time when the legal services are performed***

693. *William, an English tourist, is injured while on holidays in Australia. While in Australia recovering from his injuries, William's*

[103] Assuming that the requirements of section 9-5 are otherwise satisfied.

*parents, who are non-residents, engaged Simon, a solicitor, to seek compensation on behalf of William.*

694. *The case took three months to finalise. During the first month (April 2005) while William was in Australia he met with Simon and discussed his case. Simon also commenced action on behalf of William. William continued his holiday returning home to England at the end of the first month (April 2005). Subsequently, William travelled to Australia to attend a mediation conference on 20 June 2005. William met with Simon prior to and after the conference. The matter was settled as a result of the conference.*

695. *Simon's hourly rate is $200 (plus GST (if any)) and he bills clients on a monthly basis for work done during the month. He accounts for GST quarterly and on a cash basis.*

696. *Simon receives the following payments for his services to William:*

| ***Payment date*** | ***Amount*** | ***Hours billed*** |
|---|---|---|
| *15 May 2005*<br>*(for services provided in April while William was in Australia)* | *$7,480*<br>*(including $680 GST payable)* | *34* |
| *17 June 2005*<br>*(for services provided in May while William was not in Australia)* | *$2,600*<br>*(no GST payable)* | *13* |
| *20 July 2005*<br>*(for services provided in June while William was in Australia for part of the time and outside Australia for part of the time)* | *$2,100*<br>*(including $100 GST)* | *10*<br>*(5 hours attributable to the period when William was in Australia)* |

***Explanation***

*Item 2*

697. *The supply of legal services is made to non-residents who are not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

698. *The supply of legal services by Simon to the parents is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

699. *What is being supplied is a service of seeking, on behalf of William, compensation. The nature of the service is such that the supply is provided to William (as required).*

*(ii) Provided to that other entity in Australia*

700. *The supply is GST-free under item 2 to the extent that the supply is not provided to William in Australia (that is, subsection 38-190(3) does not negate the GST-free status).*

701. *As Simon accounts for GST on a cash basis, GST payable on the supply of legal services is attributable to a tax period to the extent that the consideration is received in that tax period. Therefore the consideration received in a quarterly tax period for the supply of the legal services must be apportioned on a reasonable basis to the extent that the supply is provided to William in Australia during that quarterly tax period.*

*Quarterly tax period ended 30 June 2005*

702. *The need for the legal services arises from William's presence in Australia. William is provided with legal services while in Australia in April 2005. The part of the supply performed during this time is therefore the taxable part of the supply. However, the supply is not provided to William in Australia to the extent that William is not physically located in Australia (that is, May 2005). Therefore the supply performed in the quarterly tax period ending 30 June 2005 is partly taxable[104] and partly GST-free.*

703. *The circumstances of this supply are such that a time basis is a reasonable basis on which to apportion the consideration, that is, using the hours billed while William is in Australia (34 hours × $200 = $6,800) as a proportion of the total hours billed for that tax period (47 hours × $200 = $9,400) to work out the value of the taxable part of the supply.*

704. *The GST attributable to the tax period ended 30 June 2005 is calculated as follows:*

*Value of the taxable part: (34* ÷ 47**) × $9,400*** = $6,800*

*GST payable: $6,800 × 10% = $680*

*Consideration payable: $9,400 + $680 = $10,080*

** Number of hours billed during the period the supply is provided to William in Australia and to which the consideration received relates*

*** Total number of hours billed in the period to which the consideration relates*

**** Consideration (excluding GST) received in the tax period*

[104] Assuming that the requirements of section 9-5 are otherwise satisfied.

*Quarterly tax period ended 30 September 2005*

705. *There is also GST payable on the supply for the quarterly tax period ending 30 September 2005. The consideration received in that tax period includes consideration for services that are performed when William is in Australia and consideration for services performed while William is not in Australia. The supply is taxable to the extent that the supply is provided to William in Australia. To work out the value of the taxable part of the supply, it is necessary to apportion the consideration on a reasonable basis.*

706. *William is in Australia attending the mediation conference. William's presence in Australia is integral to the provision of the supply. That part of the supply is provided to William in Australia and is the taxable part of the supply. The circumstances of this supply are such that a time basis is a reasonable basis on which to apportion the consideration that is, using the hours billed while William is in Australia (5 hours × $200 = $1,000) as a proportion of the total hours billed for that tax period (10 hours × $200 = $2,000) to work out the value of the taxable part of the supply.*

707. *The GST attributable to the tax period ended 30 September 2005 is calculated as follows:*

*Value of the taxable part: (5* ÷ 10**) × $2,000*** = $1,000*

*GST payable: $1,000 × 10% = $100*

*Consideration payable: $2,000 + $100 = $2,100*

** Number of hours billed during the period the supply is provided to William in Australia and to which the consideration received relates*

*** Total number of hours billed in the period to which the consideration relates*

**** Consideration (excluding GST) received in the tax period*

**Apportionment when a supply is performed over more than one tax period but consideration is paid in earlier tax period**

708. If a supply is performed over more than one tax period and the GST (if any) on the supply is attributable to a tax period prior to the completion of the supply (for example, consideration is fully paid in one tax period but provision of the supply to another entity in Australia is spread across two or more later tax periods), the supplier must use a reasonable basis for determining the extent to which the supply is taxable. That is, the supplier must use a reasonable basis to determine the extent to which the supply is provided to another entity in Australia.

709. If there is a change in circumstance such that the supply is taxable to a greater or lesser extent than determined in an earlier tax period (for example, the entity to which the supply is provided is in Australia to a greater or lesser extent), the supplier has an adjustment

event. The adjustment may be either an increasing or a decreasing adjustment depending upon whether the corrected GST amount is greater than, or less than, the previously attributed GST amount.[105]

[105] Refer to paragraphs 12 to 15 and 72 to 87 in GSTR 2000/19 Goods and services tax: making adjustments under Division 19 for adjustment events.

# Part VIII – the application of subsection 38-190(3) to subcontract arrangements and global supplies

710. In this Part we explain the application of subsection 38-190(3) to certain complex arrangements as follows.

711. We discuss **subcontract arrangements** and provide the following two examples:

- supply of accounting services to a non-resident entity subcontracted to another supplier in Australia (Example 46, paragraphs 733 to 740); and
- a supply of an arranging service to a non-resident entity (Example 47, paragraphs 742 to 754).

712. We also discuss **global supply arrangements** and in particular:

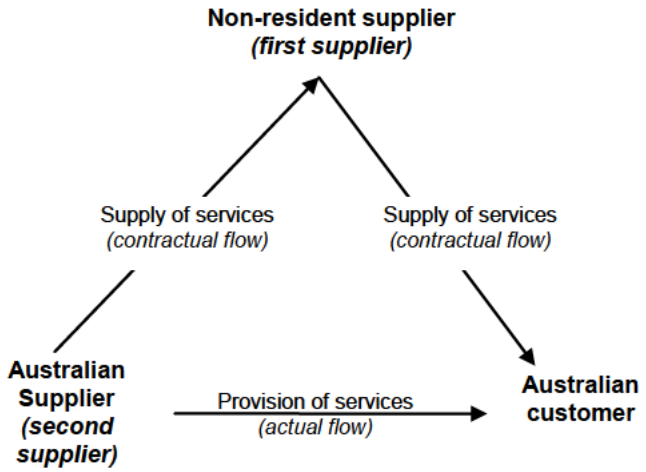
- the nature of the supply by the internal or other service provider;
- the application of subsection 9-25(5), section 38-190 and Division 84; and
- provide the following four examples:
  - global supply of audit services involving due diligence services (Example 48, paragraphs 762 to 787);
  - global supply of taxation services involving arranging services (Example 49, paragraphs 789 to 810);
  - global supply of general accounting services (Example 50, paragraphs 812 to 831);
  - global supply of data processing and IT services (Example 51, paragraphs 833 to 859).

### Subcontract arrangements

713. Sometimes, a supplier (with no presence in Australia) makes a supply to a customer in Australia and subcontracts the provision of that supply to an Australian based supplier.

714. For example, 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, therefore, enters into another contract with an Australian entity for the provision of those services to the Australian customer.

715. This is shown in diagrammatic form as follows:




### *The first supplier*

*The character and nature of the supply by the non-resident supplier*

716. The non-resident (first supplier) is obliged to supply services (for example, technical support services) to the Australian customer. To meet that obligation the non-resident subcontracts to an Australian supplier (the second supplier) the provision of that support service to the customer in Australia.

717. On one view the character of the supply by the first supplier once subcontracted to a second supplier changes from a supply of a service to the supply of a right. However, in our view the agreement between the supplier and the customer is for the supply of a service and that does not change because performance of the service is carried out by an entity other than the first supplier.

718. Another view is that the nature of the supply by the first supplier changes from the supply of the relevant service (in the example above a technical support service) to the supply of an arranging service. However, in our view, the subcontract arrangement does not transform the supply from being the supply of a service of a particular kind to that of a supply of arranging for that service to be provided to the customer.

719. In particular we consider that regardless of the basis of the subcontracting arrangement, whether it is because the non-resident supplier has no physical presence in Australia to undertake the performance of the service or the non-resident supplier does not have the necessary capabilities to perform the service in Australia itself, the nature of service does not change to an arranging service.

720. We consider that a supply is only the supply of arranging for a service to be provided to a customer (that is, an arranging service) if that is precisely what the first supplier has, in fact, been engaged to supply. If, for example, the first supplier arranges for a second supplier to contract with the customer to supply the required thing, we agree the first supplier is only responsible for arranging that service. This is not the case in the example above. (Refer paragraph 788 to 810 where we illustrate, in the context of a global supply arrangement, the supply of an arranging service by a non-resident supplier to an entity in Australia.)

721. Further, if the first supplier arranges for a second supplier to supply a particular thing to a customer, the customer typically has no legal recourse against the first supplier for the second supplier's failure to supply the thing. If the second supplier fails to supply that thing, the customer usually only has legal recourse against the second supplier. If the first supplier promises to arrange for the supply of a thing and that promise is not carried out, the customer then usually has legal recourse against the first supplier for breach of its promise to arrange for the supply by a second supplier.

*Supply connected with Australia*

722. The supply of services by the non-resident to the Australian customer is connected with Australia as those services are performed in Australia (paragraph 9-25(5)(a)).

*Alternative view*

723. On one view the service supplied by the non-resident is not done in Australia because the non-resident does not itself physically perform the service in Australia. However, the enquiry for the purposes of paragraph 9-25(5)(a) is only where the thing is done. It is not relevant for the purposes of paragraph 9-25(5)(a) who actually performs the thing.

724. Thus, regardless of whether it is the employees of the non-resident who perform the service in Australia or the employees of a subcontractor, the service is performed in Australia.

725. If the other requirements for making a taxable supply[106] are met, the supply by the non-resident to the Australian customer is a taxable supply.

[106] Section 9-5.

### *The second supplier*

*The character and nature of the supply by the Australian supplier*

726. The subcontract arrangements including the provision of the supply by the Australian supplier to the Australian customer do not in our view alter the character and nature of the supply by the second supplier (the Australian supplier) to the first supplier (that is, the non-resident). The supply made by the Australian supplier to the non-resident is, and remains, the supply of a service.

*Alternative view*

727. Another view is that the supply by the Australian subcontractor to the non-resident is a supply of a right to have services supplied to the Australian customer. If, as in the example described at paragraph 715, the arrangement is one under which a subcontractor contracts to supply a particular service, the supply is properly described as the supply of that particular service. While there may be a right to have a particular service supplied, that right is not the dominant part of the supply. The essential character of the supply is the supply of a service, not the supply of a right.

*Supply connected with Australia*

728. The supply by the Australian supplier is connected with Australia as the supply is performed in Australia (paragraph 9-25(5)(a)).[107]

*Item 2*

729. The supply of services by the Australian supplier is made to a non-resident company that is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.

*Subsection 38-190(3)*

730. The supply of services by the Australian supplier to the non-resident is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.

731. The services are required to be provided to another entity in Australia. Therefore, subsection 38-190(3) negates the GST-free status of the supply covered by item 2.

732. In the next two examples we contrast the GST treatment of a supply made to a non-resident that is the supply of a required service (see example 46) and, in the alternate, the supply of a service to arrange for the supply of the required service (see example 47).

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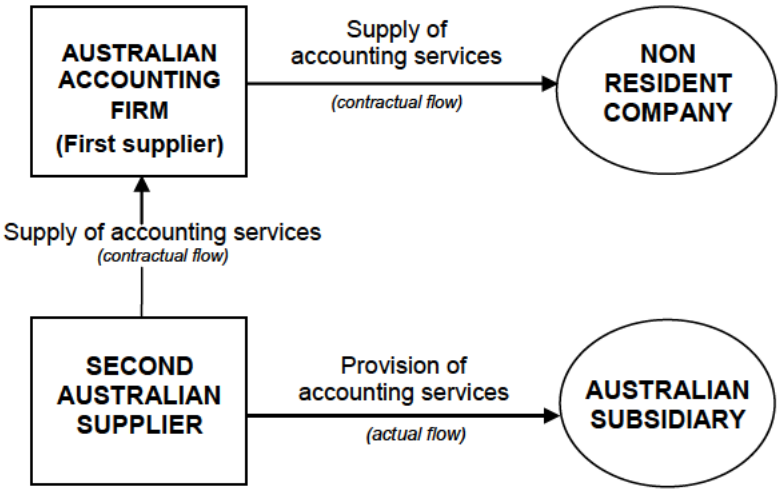
[107] The supply is also connected with Australia under paragraph 9-25(5)(b).

***Example 46 – supply of accounting services to a non-resident entity subcontracted to another supplier***

733. *A non-resident company contracts with an Australian accounting firm for the supply of accounting services. The accounting services are required under the agreement to be provided to the Australian subsidiary of the non-resident company. The non-resident does not carry on business in Australia either through a place of business of its own or through an agent acting on its behalf. The Australian accounting firm subcontracts with another Australian supplier to provide the accounting services to the Australian subsidiary.*

734. *The facts are shown diagrammatically as follows:*




735. *The issue considered below is the GST treatment of the accountings services supplied by the Australian accounting firm to the non-resident company.*

*Item 2*

736. *The supply of accounting services is made by the Australian accounting firm to the non-resident company that is not in Australia when the services are performed. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

737. *The supply of accounting services by the Australian accounting firm to the non-resident company is a supply under an*

*agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

738. *Under the agreement the accounting services are required to be provided to another entity, the Australian subsidiary. The fact that the service is provided to the Australian subsidiary by a subcontracted supplier does not, in our view, transform the nature of the supply from a supply of accounting services to the supply of an arranging service. The supply by the Australian accounting firm is made to the non-resident company but is required to be provided to the Australian subsidiary.*

*(ii) Provided to that other entity in Australia*

739. *The Australian subsidiary is in Australia when the thing supplied is done. As the supply is for the purposes of the Australian subsidiary in Australia, the supply is, therefore, required to be provided to another entity (that is, the Australian subsidiary) in Australia.*

740. *Subsection 38-190(3) negates the GST-free status otherwise applicable to the supply of accounting services covered by item 2.*

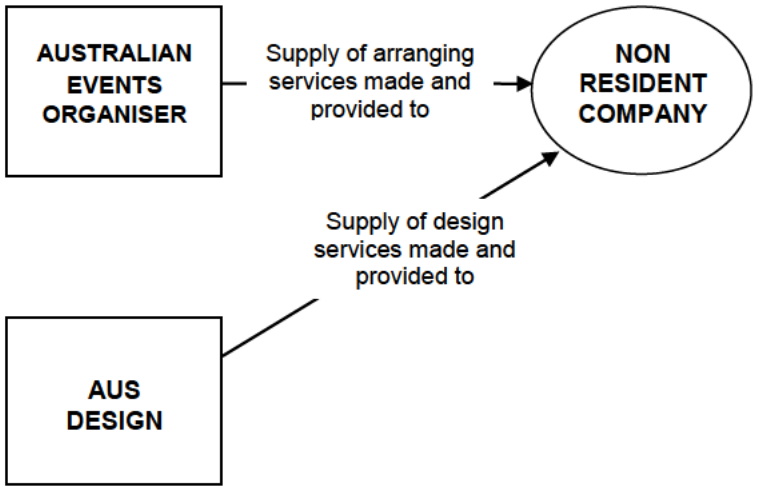
741. The above example is contrasted with the following example.

***Example 47 – supply of an arranging service to a non-resident entity***

742. *An events organiser in Australia agrees with a non-resident company to arrange for the making of a supply of design services for the non-resident's forthcoming exhibition in Australia. The non-resident company does not carry on business in Australia through a place of business of its own or through an agent acting on its behalf.*

743. *The events organiser has dealt with Aus Design in the past and arranges for contracts to be made between that company and the non-resident company for the supply of the design services for the proposed product displays of the non-resident.*

744. *The facts are shown diagrammatically as follows:*




*The nature of the supply by the Australian events organiser to the non-resident company*

745. *The supply made by the events organiser to the non-resident company is the supply of an arranging service. The events organiser has been engaged to specifically arrange for a supply of design services to be made to the non-resident by an appropriate supplier.*

*Item 2*

746. *The supply of the arranging service by the Australian events organiser is made to a non-resident company that is not in Australia when the arranging services are performed. 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. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

747. *The supply of arranging services by the Australian events organiser to the non-resident company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

748. *What is being supplied is the service of arranging for a supply to be made to the non-resident company. The Australian events organiser arranges for Aus Design to make a supply of design services to the non-resident company. The actual flow of the arranging services is to the non-resident company. The supply of the arranging service is not provided to another entity.*

749. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

*Supply of design services made and provided by Aus Design to the non-resident company*

750. *Aus Design provides the non-resident company with various drawings featuring possible product displays.*

*Item 2*

751. *The supply of design services made by Aus Design to the non-resident company is made to a non-resident who is not in Australia when the design services are performed 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. The supply satisfies the requirements of item and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

752. *The supply of design services by Aus Design to the non-resident company is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

753. *What is being supplied is a service of designing product displays for the non-resident. Aus Design provides the non-resident with various drawings featuring possible product displays. The actual flow of the design services is to the non-resident company. The supply of the design service is not provided to another entity.*

754. *Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

755. In summary, we expect that an arranging service typically involves two separate supply contracts: one between the primary supplier (the first supplier) and the customer entity for the service of arranging for a second supplier to supply a particular service (that is, the first supplier undertakes to arrange for a second supplier to contract or otherwise agree with the customer entity to supply a

service or thing to the customer entity); and a second contract between the second supplier and the customer entity for the supply of that service or thing (that is, the second supplier undertakes to supply a particular thing).

### Global supplies

756. In many multi-national groups, a range of services are provided to group members through an internal service provider – typically the parent or a separate dedicated entity. Such services include accounting, auditing, legal, information technology, research and development and financial services. The internal service provider may charge a specific fee to the relevant group member that receives the service or make a cost allocation to that group member to recover costs. The fee or cost allocation may be separately identified or form part of a bundled charge or cost allocation, incorporated into a management fee.

#### *The nature of the supply by the internal service provider*

757. The internal service provider may either perform the services for the group members itself or contract with an external provider to perform the services. In the latter case, there is usually a head agreement between the internal service provider and the external provider (the head supplier) and a range of subcontracting agreements (between the head supplier and other entities) to enable the head supplier to fulfil its obligations to provide services to members of the global group.

758. Irrespective of whether the service is provided by the internal service provider itself or is subcontracted out, the nature of the supply made by the internal service provider does not, in our view, change even if the internal service provider is not in a position to physically perform those services. If the internal service provider has agreed (either by written agreement or otherwise) to supply services to members of the multi-national group, the supply that it makes to members of the group is the supply of those services, regardless of whether that entity performs those services itself or subcontracts the performance to another entity (or entities). (Refer paragraphs 713 to 755 for a discussion of subcontract arrangements.)

#### *The application of subsection 9-25(5), section 38-190 and Division 84*

759. In global supply arrangements, there are a number of important GST issues to consider. We discuss below, by way of examples, the application of the following provisions:

- subsection 9-25(5) – supplies of anything, other than goods or real property, connected with Australia;

- subsection 38-190(1) – supplies of things, other than goods or real property, for consumption outside Australia;
- subsection 38-190(3) – supplies covered by item 2 and provided to another entity in Australia; and
- Division 84 – offshore supplies other than goods or real property.

760. The examples discussed in this section are listed in the following table.

| ***Example No*** | ***Description of the supply*** |
|---|---|
| 48 | Global supply of audit services involving due diligence services |
| 49 | Global supply of taxation services involving arranging services |
| 50 | Global supply of general accounting services |
| 51 | Global supply of data processing and IT services |

### Global supply of audit services

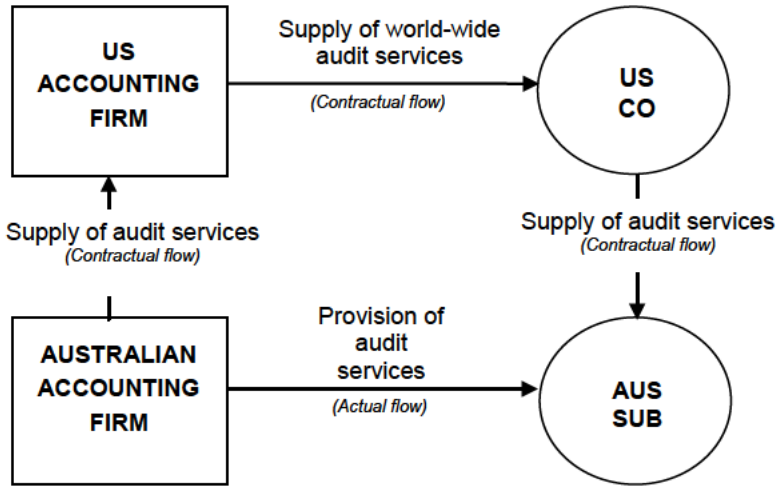
761. In the following example the non-resident parent company has agreed to supply audit services to members of the global group as needed.

#### *Example 48 – a supply of global audit services*

762. *A US resident parent company, US Co, engages a US accounting firm to supply audit services to the world-wide company group. The US accounting firm charges US Co on a monthly basis for services rendered in the immediately preceding month. Neither US Co, nor the US accounting firm, carry on business in Australia through a place of business of its own or through an agent acting on its behalf.*

763. *Aus Sub, an Australian subsidiary of US Co, requires audit services – in particular a due diligence service for a possible business acquisition. The US accounting firm contracts with an Australian resident accounting firm for the provision of audit services to Aus Sub.*

764. *The facts are illustrated as follows:*




765. *US Co is billed by the US accounting firm for the audit services provided to the Australian subsidiary. US Co charges Aus Sub for the cost of the audit.*

*Supply by US accounting firm to US Co*

766. *The US accounting firm is engaged to provide audit services to the world-wide group of US Co. The US accounting firm has affiliates throughout the world with the expertise to carry out country-specific audits. As and when a foreign subsidiary requires audit services, US accounting firm subcontracts the performance of that service to an affiliate in the relevant foreign country.*

*Character and nature of the supply by US accounting firm to US Co*

767. *The character of the supply by US accounting firm to US Co is a service. The US accounting firm is engaged to supply audit services. The exact nature of the supply depends on the facts and circumstances of the particular audit. In this example, a due diligence service is to be carried out for Aus Sub.*

768. *The fact that the US accounting firm subcontracts this part of the audit service to another supplier, the Australian accounting firm, does not alter the character and nature of the service supplied by the US accounting firm to US Co. The supply remains the supply of audit services (refer paragraphs 713 to 755 for a discussion of subcontract arrangements).*

*Supply partly connected with Australia (paragraph 9-25(5)(a))*

769. *The supply by the US accounting firm of audit services to US Co is partly done in Australia. The thing, the audit service, is partly performed in Australia. The supply is, therefore, partly connected with Australia under paragraph 9-25(5)(a).*[108]

*Alternative view*

770. *Another view is that paragraph 9-25(5)(a) only applies if the entire thing is done in Australia. As explained in GSTR 2000/31, we do not accept this view (see paragraphs 92 to 94 and paragraphs 226 to 228 of that Ruling).*

771. *To the extent the supply is not connected with Australia it is outside the scope of the Australian GST and it is unnecessary to consider the application of either item 2 or subsection 38-190(3) to that part of the supply.*

772. *To the extent the supply is connected with Australia that part of the supply by the US accounting firm to US Co is a taxable supply if the supply is made for consideration in the course of an enterprise carried on by the US accounting firm and the US accounting firm is registered or required to be registered for GST in Australia. However the supply is not a taxable supply to the extent that it is GST-free. This is discussed next.*

*Item 2*

773. *The supply of audit services by the US accounting firm is made to US Co, a non-resident that is not in Australia when the audit is performed 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. The supply satisfies the requirements of item and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

774. *The supply of audit services by the US accounting firm to US Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

775. *What is being supplied is the service of auditing a business as part of a due diligence report required by Aus Sub in respect of its possible business acquisition. The audit service is required to be provided to Aus Sub, another entity.*

---

[108] This is consistent with the ATO view expressed in paragraph 92 and paragraphs 226 to 235 of GSTR 2000/31.

*(ii) Provided to that other entity in Australia*

776. *The Australian subsidiary, Aus Sub, is in Australia when the service is performed. As the supply is for the purposes of the Australian subsidiary in Australia, the supply is therefore required to be provided to another entity Aus Sub, in Australia.*

777. *Subsection 38-190(3) negates the GST-free status of the supply of audit services made to US Co by the US accounting firm and covered by item 2.*

*Supply by Australian accounting firm to US accounting firm*

*Item 2*

778. *The supply of audit services is made by the Australian accounting firm to the US accounting firm, a non-resident that is not in Australia when the audit is performed 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. The supply satisfies the requirements of item and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

779. *The supply of audit services by the Australian accounting firm to the US accounting firm is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

780. *The contractual flow of audit services is to the US accounting firm. The actual flow is to another entity, Aus Sub. The audit service is required to be provided to Aus Sub. The supply is therefore provided to another entity, Aus Sub.*

*(ii) Provided to that other entity in Australia*

781. *The Australian subsidiary, Aus Sub, is in Australia when the service is performed. The supply is for the purposes of the Australian subsidiary in Australia. The supply by the Australian accounting firm to the US accounting firm is made to the US accounting firm but provided to Aus Sub in Australia.*

782. *Subsection 38-190(3) negates the GST-free status of the supply of audit services by the Australian accounting firm to the US accounting firm and covered by item 2.*

*Supply by US Co to Aus Sub*

783. *US Co charges Aus Sub for the cost of the audit service by making a cost allocation to Aus Sub. The cost allocation covers the audit service and associated administrative and management costs.*

*Identifying a supply to Aus Sub*

784. *US Co provides audit services (through subcontract arrangements) to Aus Sub to meet an identified need of Aus Sub. The service is the audit of a business that Aus Sub is acquiring pending a satisfactory due diligence report. US Co supplies audit services to Aus Sub.*

*Alternative view*

785. *If the nature of the audit service is such that only a registered auditor can perform those services, US Co is not a registered auditor and is, therefore, incapable of supplying audit services to Aus Sub. The nature of the supply that US Co makes to its Australian subsidiary is not that of audit services but of management services. US Co performs these services outside of Australia and the supply of the services is, therefore, not connected with Australia.*

786. *We do not agree with this view. This situation is in our view no different to that of an overseas supplier that subcontracts provision of a supply to a customer in Australia, to a second supplier in Australia because the overseas supplier, while carrying on a business of providing services of the requisite kind, does not have the resources or presence in Australia to provide that service in Australia. In both cases the nature of the supply by the overseas supplier to the Australian customer remains the same. Subcontracting, for whatever reason, does not, in our view, alter the character or nature of the identified supply.*

*Supply connected with Australia (paragraph 9-25(5)(a))*

787. *The supply of audit services by US Co to Aus Sub is performed in Australia, albeit by subcontractors. The supply is, therefore, connected with Australia under paragraph 9-25(5)(a). As the supply by US Co to Aus Sub is made for consideration in the course of an enterprise carried on by US Co and is connected with Australia, the supply is a taxable supply if US Co is registered or required to be registered for GST in Australia. The supply by US Co to Aus Sub is not GST-free. The supply is not GST-free (under item 3) as the supply is made and provided to Aus Sub, an entity that is in Australia when the service is performed.*

### Global supply of taxation services involving arranging services

788. In the next example the non-resident parent company undertakes to arrange for taxation services to be supplied to the global group.

#### *Example 49 – global supply of taxation services*

789. *Swiss Co, a Swiss resident parent company for a world-wide group, contracts with a Swiss accounting firm for that firm to arrange for the preparation of tax returns of its foreign subsidiaries to meet the tax law requirements of each of the countries in which a subsidiary is incorporated.*

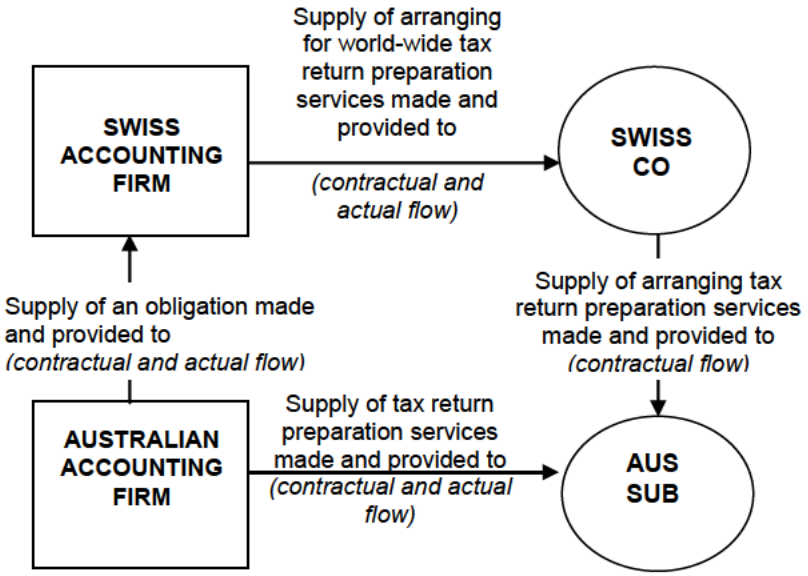
790. *The Swiss accounting firm arranges for the Australian tax return to be prepared for Aus Sub, the Australian subsidiary of Swiss Co, by an Australian resident accounting firm. The Australian accounting firm contracts with Aus Sub to supply to it taxation return preparation services. Aus Sub pays the Australian accounting firm for the tax return preparation services.*

791. *Neither Swiss Co, nor the Swiss accounting firm, carry on business in Australia through a place of business of its own or through an agent acting on its behalf.*

792. *If the tax return is prepared incorrectly by the Australian accounting firm, Aus Sub only has recourse to the Australian accounting firm. If arrangements for the tax return preparation services do not occur at all because the Swiss accounting firm fails to arrange for an Australian supplier, Swiss Co has recourse against the Swiss accounting firm for failing to make the necessary arrangements.*

793. *Swiss Co recovers the cost of arranging the taxation services by making a cost allocation to Aus Sub.*

794. *Aus Sub is registered for GST and acquires the tax return preparation services solely for a creditable purpose.*




*Supply by Swiss accounting firm to Swiss Co*

795. *The Swiss accounting firm makes a supply of arranging services to Swiss Co. The Swiss accounting firm is contracted to arrange for the preparation of tax returns for world-wide subsidiaries of Swiss Co. As a result of arrangements the Swiss Accounting firm makes with the Australian accounting firm, the tax return preparation services for Aus Sub are performed under a contract between the Australian accounting firm and Aus Sub.*

*Supply not connected with Australia (subsection 9-25(5))*

796. *The arranging services are performed by the Swiss accounting firm from its premises in Switzerland. This supply is not connected with Australia as it is not done in Australia, is not made through an enterprise that the Swiss accounting firm carries on in Australia and is not a supply of a right or option to acquire another thing the supply of which would be connected with Australia. (As the supply is outside the scope of the Australian GST it is unnecessary to consider the application of either item 2 or subsection 38-190(3).)*

*Supply by Australian accounting firm to Swiss accounting firm*

797. *The Swiss accounting firm arranges with the Australian accounting firm for the Australian accounting firm to supply taxation services to Aus Sub.*

*Identifying a supply*

798. *The Australian accounting firm has entered into an obligation to supply tax return preparation services to Aus Sub. The entering into an obligation to do anything is a supply (subparagraph 9-10(2)(g)(i)).*

*Item 2*

799. *The supply of the obligation is made by the Australian accounting firm to the Swiss accounting firm, a non-resident that is not in Australia when the service is performed 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. The supply satisfies the requirements of item and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

800. *The supply of the obligation, by the Australian accounting firm to the Swiss accounting firm, to supply tax return preparation services, is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

801. *The supply is that of an obligation to do something. The entry into that obligation is not provided to another entity. Aus Sub receives a supply of tax return preparation services under a separate contractual arrangement.*

802. *Subsection 38-190(3) does not apply and the supply of the obligation to do something remains GST-free under item 2.*

*Supply by Australian accounting firm to Aus Sub*

803. *The Australian accounting firm makes a supply of tax return preparation services to Aus Sub. The supply by the Australian accounting firm to Aus Sub is not GST-free. The supply is not GST-free (under item 3) as the supply is made and provided to Aus Sub, an entity that is in Australia when the service is performed. The supply is a taxable supply assuming the requirements of section 9-5 are met.*

*Supply by Swiss Co to Aus Sub*

804. *Swiss Co charges Aus Sub for the cost of the arranging service by making a cost allocation to Aus Sub.*

*Identifying a supply to Aus Sub*

805. *Swiss Co supplies an arranging service to Aus Sub. Pursuant to that arrangement, Swiss Co has arranged through a Swiss accounting firm for tax return preparation services to be supplied to Aus Sub. Swiss Co makes a cost allocation to Aus Sub for the arranging service which is bundled up in the form of a management fee.*

806. *Swiss Co supplies arranging services to Aus Sub to meet an identified need of Aus Sub.*

*Supply not connected with Australia (subsection 9-25(5))*

807. *The arranging services are performed under a subcontract arrangement outside Australia. This supply is not connected with Australia as it is not done in Australia, is not made through an enterprise that Swiss Co carries on in Australia and is not a supply of a right or option to acquire another thing the supply of which would be connected with Australia. (As the supply is outside the scope of the Australian GST it is unnecessary to consider the application of either item 2 or subsection 38-190(3).)*

*Division 84*

808. *Section 84-5 has the effect of treating a supply that is either not connected with Australia or connected with Australia because of paragraph 9-25(5)(c)*[108A] *as a taxable supply if the supply is for consideration, the recipient is registered or required to be registered, and the recipient of the supply acquires the thing supplied solely or partly for the purpose of an enterprise carried on by the recipient in Australia, but not solely for a creditable purpose.*

809. *GST on a supply, that is a taxable supply because of the operation of section 84-5, is payable by the recipient of the supply and is not payable by the supplier.*

810. *As the facts state that Aus Sub acquires the supply solely for a creditable purpose Division 84 does not apply.*

### Global accounting services

811. In the next example a non-resident parent company undertakes to supply each of its global subsidiaries with general accountancy services as needed.

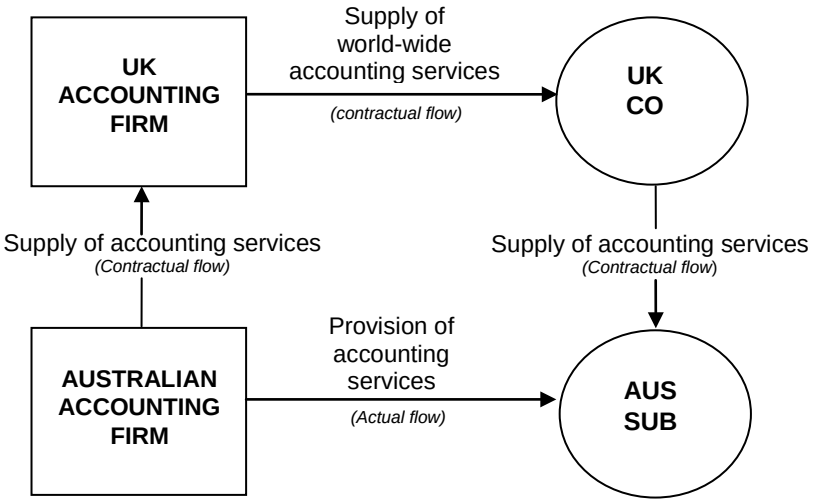
#### *Example 50 – global supply of general accounting services*

812. *UK Co, a UK resident parent company for a world-wide group, has agreed with each of its subsidiaries, including the Australian subsidiary, Aus Sub, to supply general accounting services to the subsidiaries addressing the specific needs of each subsidiary. Aus Sub pays a fee to its parent in consideration for the accounting services.*

[108A] That is, a supply connected with Australia because of paragraph 9-25(5)(c) can continue to be reverse charged. If the supply is a taxable supply under both sections 9-5 and 84-5 GST is only payable under section 84-10 (instead of section 9-40): subsection 84-10(3).

813. *UK Co contracts with a UK accounting firm for the supply of accounting services to the world-wide subsidiaries of UK Co. The UK accounting firm in turn contracts with an Australian resident accounting firm to meet the general accounting requirements of Aus Sub.*

814. *Neither UK Co, nor the UK accounting firm, carry on business in Australia through a place of business of its own or through an agent acting on its behalf.*




*Supply by UK accounting firm to UK Co*

*Supply partly connected with Australia (paragraph 9-25(5)(a))*

815. *The UK accounting firm makes a supply of general accounting services to UK Co. The UK accounting firm is contracted to supply general accounting services for all of the world-wide subsidiaries of UK Co. The general accounting services for Aus Sub are performed in Australia (under a subcontract arrangement with an Australian accounting firm). The supply is connected with Australia to the extent that the accounting services are performed in Australia (paragraph 9-25(5)(a) and see further paragraphs 92 and 226 to 235 of GSTR 2000/31).*

816. *To the extent the supply is not connected with Australia it is outside the scope of the Australian GST and it is unnecessary to consider the application of either item 2 or subsection 38-190(3) to that part of the supply.*

817. *To the extent the supply is connected with Australia that part of the supply by the UK accounting firm to UK Co is a taxable supply if the supply is made for consideration in the course of an enterprise carried on by the UK accounting firm and the UK accounting firm is registered or required to be registered for GST in Australia. However*

*the supply is not a taxable supply to the extent that it is GST-free. This is considered next.*

*Item 2*

818. *The supply of accounting services is made by the UK accounting firm to UK Co, a non-resident that is not in Australia when the thing supplied 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. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

819. *The supply of accounting services by the UK accounting firm to UK Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

820. *The supply of general accounting services is a service of performing general accounting services as required by Aus Sub. The supply is therefore required to be provided to another entity, Aus Sub. While the contractual flow of accounting services is to UK Co, the actual flow of accounting services is to Aus Sub.*

*(ii) Provided to that other entity in Australia*

821. *The Australian subsidiary, Aus Sub, is in Australia when the service is performed. As the supply is for the purposes of Aus Sub, the supply is therefore required to be provided to another entity in Australia.*

822. *Subsection 38-190(3) negates the GST-free status of the supply of accounting services made to UK Co by the UK accounting firm and covered by item 2.*

*Supply by Australian accounting firm to UK accounting firm*

823. *The Australian accounting firm makes a supply of general accounting services to the UK accounting firm.*

*Item 2*

824. *The supply of the general accounting services is made by the Australian accounting firm to the UK accounting firm, a non-resident that is not in Australia when the accounting services are performed 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. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

825. *The supply of the general accounting services by the Australian accounting firm to the UK accounting firm is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*(i) Provided to another entity*

826. *The supply made by the Australian accounting firm is one of performing general accounting services as required by Aus Sub. The supply is required to be provided to another entity, Aus Sub.*

*(ii) Provided to that other entity in Australia*

827. *The Australian subsidiary, Aus Sub, is in Australia when the service is performed. As the supply is for the purposes of Aus Sub in Australia, the supply is therefore provided to another entity in Australia, Aus Sub.*

828. *Subsection 38-190(3) negates the GST-free status of the supply covered by item 2.*

*Supply by UK Co to Aus Sub*

829. *UK Co charges Aus Sub for the supply of general accounting services it makes to Aus Sub, effected through subcontract arrangements with the UK accounting firm.*

*Identifying a supply to Aus Sub*

830. *UK Co supplies accounting services to Aus Sub to meet an identified need of Aus Sub.*

*Supply connected with Australia (paragraph 9-25(5)(a))*

831. *The supply of general accounting services made by UK Co to Aus Sub is connected with Australia because the services are performed in Australia (paragraph 9-25(5)(a)). As the supply by UK Co to Aus Sub is made for consideration in the course of UK Co's enterprise and is connected with Australia, it is a taxable supply if UK Co is registered or required to be registered for GST in Australia. However, the supply is not a taxable supply to the extent that it is GST-free. The supply is not GST-free (under item 3) as the supply is*

*made and provided to Aus Sub, an entity that is in Australia when the service is performed.*

### Global IT services

832. In this example the non-resident parent company supplies management reports to its subsidiaries to enable the subsidiary to track its progress against performance standards set by the parent company. The information that is used by the parent company to prepare the management reports is collected from each subsidiary and processed by a global IT company.

#### *Example 51 – global data processing and IT services*

833. *A non-resident US company, US Fin Services Co, the parent company of a global financial services (investment banking, asset management etc) group contracts with a US IT company (US IT Co) for the supply of global data processing and IT services.*

834. *US Fin Services Co has a subsidiary in Australia, Aus Fin Services Co, which supplies financial services in Australia. US IT Co also has a subsidiary in Australia, Aus IT Co.*

835. *Neither US Fin Services Co, nor US IT Co, carries on business in Australia either through a place of business of its own or through an agent acting on its behalf. Aus Fin Services Co, is not the agent of US Fin Services Co in Australia. Aus IT Co is not the agent of US IT Co in Australia.*

836. *The data processing service supplied by US IT Co involves collecting financial data from the world-wide financial services group, including Aus Fin Services Co, processing that data (which occurs outside of Australia), and providing the processed data to US Fin Services Co.*

837. *The IT service supplied by US IT Co involves the development of software products, the copyright in which is assigned, upon completion, to US Fin Services Co.*

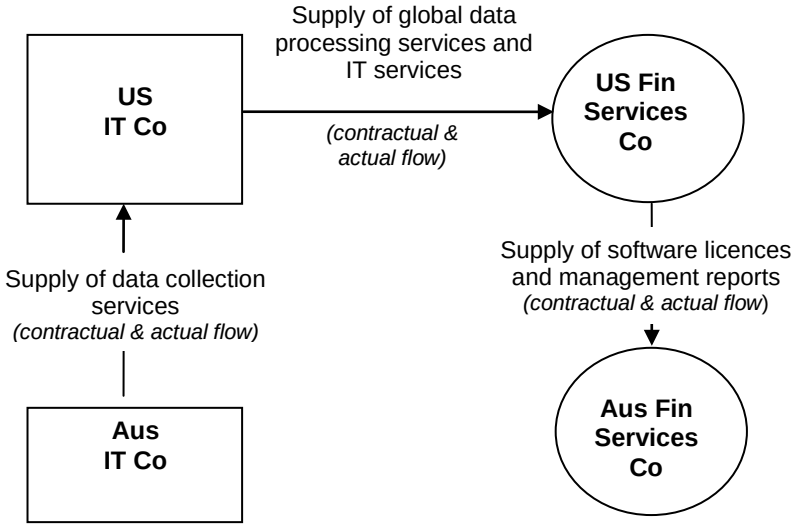
838. *US IT Co contracts with its Australian resident subsidiary, Aus IT Co, to collect data from Aus Fin Services Co. To perform this data collection service, Aus IT Co installs and maintains certain hardware at the premises of Aus Fin Services Co. After the raw data has been collected, Aus IT Co sends the data offshore to US IT Co.*

839. *US IT Co processes all the data collected world-wide to convert it to a form that is required by US Fin Services Co. US IT Co sends this processed data to US Fin Services Co.*

840. *US Fin Services Co analyses this processed data and from this builds customised management reports for its world-wide subsidiaries, including Aus Fin Services Co. US Fin Services Co charges a fee to Aus Fin Services Co for the supply of the management reports. Aus Fin Services Co is registered for GST and*

*uses the reports in analysing the performance of its financial supply business.*

841. *US Fin Services Co also brings together the various software products that have been supplied to it by US IT Co. US Fin Services Co makes the software products available to its subsidiaries under a licensing agreement in return for payment.*




*Supply of data collection and processing services by US IT Co to US Fin Services Co*

*Supply partly connected with Australia (paragraph 9-25(5)(a))*

842. *The supply of data collection and processing services involves the collection of data from the world-wide financial services subsidiaries including Aus Fin Services Co. Some of the data collection is performed in Australia under a subcontract arrangement with Aus IT Co (that is, the collection of data relating to Aus Fin Services Co is done by Aus IT Co pursuant to a contract between US IT Co and Aus IT Co). The data processing services are not performed in Australia. Therefore, the supply is connected with Australia to the extent that the data collection services are performed in Australia.*

843. *To the extent the supply is not connected with Australia it is outside the scope of the Australian GST and it is unnecessary to consider the application of either item 2 or subsection 38-190(3) to that part of the supply.*

844. *To the extent the supply is connected with Australia that part of the supply by the US IT to US Fin Services Co is a taxable supply if the supply is made for consideration in the course of an enterprise carried on by US IT and US IT is registered or required to be*

*registered for GST in Australia. However, the supply is not a taxable supply to the extent that it is GST-free. We discuss this next. .*

*Item 2*

845. *The supply of data collection services is made by US IT Co to US Fin Services Co, a non-resident that is not in Australia when the data collection services are performed 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. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

846. *The supply of data collection services by US IT Co to US Fin Services Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

847. *What is being supplied is a service of collecting data from world-wide financial services subsidiaries including Aus Fin Services Co for processing of data for US Fin Services Co. Aus Fin Services Co does not receive a service of data collection, even though the data collection is performed on its premises. The supply is not provided to another entity.*

848. *The supply of data collection services is therefore made and provided to US Fin Services Co. Subsection 38-190(3) does not negate the GST-free status of the data collection services performed in Australia and covered by item 2.*

*Supply of IT services by US IT Co to US Fin Services Co*

*Supply not connected with Australia (subsection 9-25(5))*

849. *The IT services supplied by US IT Co comprise the development of software products and the assignment of the copyright to those products. This is a mixed supply comprising the development and supply of the program, and the assignment of the copyright in the program – see paragraph 93 of GSTR 2003/8. Assignment of the copyright is the supply of a right but the supply of the program is not. The development and supply of the computer program are done outside Australia.* [109] *The copyright is assigned*

[109] A computer program is essentially encoded instructions designed to cause a computer to perform a particular task or to produce a particular result. It is, in substance, knowledge or information (that is, intellectual property). We therefore consider that the supply of the computer program is the supply of information. As the supply of information involves work to develop that information, the supply is

*outside Australia. None of these supplies are made through an enterprise carried on in Australia. Further, none of these supplies are rights or options to acquire another thing the supply of which would be connected with Australia. The supply is not, therefore, connected with Australia.*

*Division 84*

850. *Division 84 does not apply to the supply of IT services as US Fin Services Co is not acquiring the supply for the purpose of an enterprise that it carries on in Australia.*[110]

*Supply by Aus IT Co to US IT Co*

*Item 2*

851. *The supply of data collection services is made by Aus IT Co to US IT Co, a non-resident that is not in Australia when the data collection services are performed 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. The supply satisfies the requirements of item 2 and is, therefore, a supply covered by item 2.*

*Subsection 38-190(3)*

852. *The supply of data collection services by Aus IT Co to US IT Co is a supply under an agreement entered into with a non-resident. Paragraph 38-190(3)(a) is therefore satisfied.*

*Provided to another entity*

853. *What is being supplied is a service of collecting data from Aus Fin Services Co on behalf of US IT Co. The data collection services are provided to US IT Co, the collected data is not provided to Aus Fin Services Co. This is so even though the data collection service is performed on the premises of Aus Fin Services. The supply is not provided to another entity. Subsection 38-190(3) does not negate the GST-free status of the supply covered by item 2.*

*Supply of management reporting services by US Fin Services Co to Aus Fin Services Co*

*Identifying a supply to Aus Fin Services*

854. *US Fin Services Co provides Aus Fin Services Co with a range of management reports for use by Aus Fin Services Co. The*

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one of the performance of a service. The computer program/supply of information is therefore 'done' where the information is developed.

[110] Refer to paragraph 84-5(1)(c).

*reports meet an identified need of Aus Fin Services Co. US Fin Services Co supplies information services to Aus Fin Services Co.*

*Supply not connected with Australia (subsection 9-25(5))*

855. *If the supply is a service of analysing the processed data and developing management reports for Aus Fin Services Co to use, those services are done where the services are performed. As this service is performed outside Australia, the supply of management reports is not connected with Australia.*

*Division 84*

856. *However, because Aus Fin Services Co makes financial supplies (that is, its acquisition of the management reports is for the purposes of its enterprise but is not solely for a creditable purpose), provides consideration for the supply of the management reports and is registered for GST, Division 84 applies to the supply. The supply to Aus Fin Services Co by US Fin Services Co is therefore a taxable supply except to the extent that the supply is GST-free or input taxed. As the supply is not GST-free or input taxed, Aus Fin Services Co (that is, the recipient) is liable to pay the GST payable on the supply of the management reports made to it by US Fin Services Co. US Fin Services Co is not liable for the GST payable.*

*Supply of software licences by US Fin Services Co to Aus Fin Services Co*

*Supply not connected with Australia (subsection 9-25(5))*

857. *US Fin Services Co licences Aus Fin Service Co to use the computer program which it has acquired from US IT Co. Aus Fin Services Co downloads the software from the computer systems of US Fin Services Co. What is supplied is the computer program (essentially encoded instructions designed to cause a computer to perform a particular task or to produce a particular result and is in substance, knowledge or information).*

858. *The supply of the computer program is the supply of information. This supply is an instantaneous supply of information done in the US and is not done through an enterprise carried on in Australia. The supply is not connected with Australia.*

*Division 84*

859. *However, for the reasons explained at paragraph 856, Division 84 applies to the supply. The supply of the software programs to Aus Fin Services is therefore a taxable supply and Aus Fin Services Co is liable to pay the GST payable.*

# PART IX – overseas legislation and case law

860. In this Part we discuss provisions in the New Zealand and Canadian GST legislation that are similar to subsection 38-190(3). We also discuss the following four UK VAT cases which concern tripartite arrangements:

- *British Airways plc v. Customs and Excise Commissioners*;
- *Customs and Excise Commissioners v. Redrow Group plc*;
- *Customs and Excise Commissioners v. Plantiflor Ltd*; and
- *WHA Limited and Viscount Reinsurance Company limited v. Customs and Excise Commissioners*.

### Similar provisions in other jurisdictions

#### *New Zealand*

861. Subsection 38-190(3) is similar to a provision found in the New Zealand GST legislation.[111] In New Zealand, zero-rating (equivalent to our GST-free) does not apply to services supplied under an agreement entered into, whether directly or indirectly, with a person who is not a resident of New Zealand if:

- the performance of the services is, or it is reasonably foreseeable at the time the agreement is entered into that the performance of the services will be, received in New Zealand by another person including an employee or company director of the non-resident; and
- it is reasonably foreseeable, at the time the agreement is entered into that the person receiving the performance of services, will not receive those services in the course of making taxable or exempt supplies.[112]

862. This exception in New Zealand to zero-rating was introduced in 1999 in response to the 1995 Court of Appeal decision in *Wilson & Horton v. Commissioner of Inland Revenue.*[113] 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 *Goods and Services Tax Act 1985* (NZ), were directed to the contractual arrangements between the supplier and the recipient. Any benefits that accrued in New Zealand arising from the advertising were

[111] Subsection 11A(2) of the *Goods and Services Tax Act 1985* (NZ).
[112] Subsection 11A(2) of the *Goods and Services Tax Act 1985* (NZ).
[113] (1995) 17 NZTC 12,325.

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 were contracted with a non-resident who is outside New 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.

863. A government review in 1999[114] recognised that '[t]his interpretation can, in a number of situations, allow the zero-rating of services that are consumed in New Zealand when the contract is made with a non-resident who is outside New Zealand'.[115]

864. 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.'[116]

865. 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 which, although supplied to a non-resident, benefited 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*

866. A similar provision to subsection 38-190(3) is also found in the Canadian GST legislation.

867. In Canada, under the general zero-rating provision for exported services[117] 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.

868. In the Explanatory Memorandum that accompanied the introduction of this provision in the Canadian GST law 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

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[114] New Zealand Inland Revenue Department (Policy Advice Division) 1999, *GST: A review. A tax policy discussion document*.
[115] New Zealand Inland Revenue Department (Policy Advice Division) 1999, *GST: A review. A tax policy discussion document*, at paragraph 9.12, on page 61.
[116] Taxation (Annual Rates & Remedial matters) Bill.
[117] Section 7 of Part V of Schedule VI to the *Excise Tax Act* (Canada).

> individuals while the individuals were in Canada, unless the service is zero-rated (GST-free) under another provision.[118]

869. Like Australia (and New Zealand), Canada makes a distinction between the contractual parties to the supply and the party that is provided with the thing supplied, though all three countries use slightly different language to achieve this.

### Consideration of four United Kingdom VAT cases involving 'tripartite arrangements'

870. '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.

871. 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 (*Plantiflor*) are three well know United Kingdom VAT cases that involve tripartite arrangements. A more recent VAT case is that of *WHA Limited and Viscount Reinsurance Company Limited v. Customs and Excise Commissioners* [2004] EWCA Civ 559 (*WHA*).

872. In this Part we discuss certain aspects of these cases with a view to dispelling any views that *Redrow*, *British Airways* and *Plantiflor* support the proposition that under a tripartite arrangement a supply made to one entity is a different supply, for example, the supply of a right, from the supply that is provided to another entity, that is a service. As discussed below the more recent case of *WHA* recognises that the same service can be supplied to one party and provided to a different party.

873. The cases of *Redrow*, *British Airways* and *WHA* each concern a claim for input tax deductions (equivalent to our input tax credits).

874. The basic principle under the UK VAT system (similar to Australia) is that VAT on supplies of goods or services 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.

#### *British Airways plc v. Customs and Excise Commissioners*

875. In *British Airways* the facts were as follows. 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

[118] Revenue Canada, 1998, *GST/HST Memoranda Series, 4.5.3, Exports – Services and Intellectual Property*, at page 6, paragraph 18.

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.

876. 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 expense which was for the purpose of its business.

877. 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.'[119] British Airways was entitled to an input tax deduction.

878. 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, nor whether that was different from what was provided to the customer.

### *Customs and Excise Commissioners v. Redrow Group plc.*

879. In *Redrow* the facts were 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

[119] *British Airways Plc* [2000] BVC 2207, at 2209.

event that Redrow was not liable to pay the fee because the prospective purchaser decided to go elsewhere to buy a new home.

880. 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.

881. 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.[120]

882. Lord Hope 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. (That this is the case finds support in the *WHA* case – see paragraph 888 to 894.)

883. His Lordship commented that the prospective purchaser 'also received a service as part of the same transaction'. Where a transaction comprises a bundle of features and acts, it is necessary to consider all of the circumstances of the transaction to ascertain its essential character. However, as already noted above, the characterisation of the transaction was not in dispute in *Redrow*. It was simply a matter of finding something – anything at all that Redrow received as part of the transaction in the course or furtherance of its business. Unless it received some thing as part of the transaction Redrow was not entitled to claim an input tax deduction.

884. Lord Millett said:

> ..anything done for consideration which is not a supply of goods constitutes a supply of services.. This makes it unnecessary to

[120] *Customs and Excise Commissioners v. Redrow Group plc.* [1999] UKHL 4; [1999] BVC 96 at 99-100.

> define the services in question. ….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.[121]
>
> …
>
> The services[122] obtained by [Redrow] ..... consist of the right to have the householder's home valued and marketed in accordance with the taxpayer's instructions.[123]

885. This is the ratio relied on in *British Airways*. The reference by Lord Millett to the grant of a right does not mean that the supply by the real estate agent to Redrow is properly characterised as the supply of a right. The essential character of the supply is not considered. Lord Millet simply identifies some thing that was clearly provided to Redrow, a right. (Under the United Kingdom VAT provisions the supply of a right is classified as the supply of a 'service' as distinct from the supply of goods.)

886. 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 events. 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

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[121] *Customs and Excise Commissioners v. Redrow Group plc.* [1999] UKHL 4; [1999] BVC 96 at 105.

[122] 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.

[123] *Customs and Excise Commissioners v. Redrow Group plc.* [1999] UKHL 4; [1999] BVC 96 at 105.

> 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 householder sells his home and completes the purchase of a Redrow home, however, the taxpayer is not liable for the agent's 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 bear 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.[124]

887. In our view, when Lord Millett remarked that the services rendered to Redrow are different to the services rendered to the householder, it appears His Lordship was referring here to the two separate contracts co-existing for the supply of real estate agent services, and the separate supplies under those contracts. That this is the case is supported by comments that Lord Millet made in *Plantiflor* about *Redrow*. His Lordship said:

> In Customs and Excise Comrs v Redrow Group plc [1999] 1 WLR 408 there were *three separate bilateral contracts between the three parties (our emphasis),* but only one of them was liable to pay the consideration and accordingly there was only one taxable supply. The taxpayer, which built houses for sale, offered prospective purchasers who bought a new house from it the free services of a firm of estate agents to value and market their existing homes. *It entered into an agreement with the firm to pay their fees for the work, but only where a customer sold his existing home and bought a new house from the taxpayer (our emphasis).* In order to recover their fees if a prospective customer found a buyer for his home but did not proceed to buy a house from the taxpayer, the *firm entered into separate contracts with the customers. The firm were held to have made two different supplies* (our emphasis). One, made to the customer, was a supply of the ordinary services of an estate agent in valuing and marketing his house. The other, made to the taxpayer, was the supply of the services of an estate agent in valuing and marketing its customer's house. Thus a single course of conduct by one party may constitute two or more supplies to different persons.[125]

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[124] *Customs and Excise Commissioners v. Redrow Group plc.* [1999] UKHL 4; [1999] BVC 96 at 105-106.

[125] *Customs and Excise Commissioners v. Plantiflor Ltd* [2002] UKHL 33; [2002] BVC 572 at paragraph 50.

### *WHA Limited and Viscount Reinsurance Company Limited v. Customs and Excise Commissioners*

888. That services can be supplied to one party and provided to another is recognised in the *WHA* case. In that case Viscount, a Gibraltar based company, contracted with WHA, an English company, to instruct certain garages to carry out any works required to be effected under motor break-down insurance policies and to pay for those works. On each occasion that such work was carried out by a garage on WHA's instructions, the garage rendered an invoice to WHA. VAT was payable on this invoice. The effectiveness of the scheme before the Court of Appeal primarily depended upon WHA being able to treat this VAT as input tax (that is, WHA can claim a deduction for the VAT payable). The ability to claim that deduction depended on whether there was a supply of services to WHA.

889. Lord Justice Neuberger found that:

> In these circumstances, it appears to me that, unless there is some reason for reaching a contrary conclusion, there is indeed a 'supply of services' by the garage to WHA when the garage carries out repair work to a vehicle under a policy. ….WHA receives a benefit from the carrying out of the repairs (namely satisfaction of an obligation to Viscount and the ability to earn the £17.60) and it is work which WHA will have authorised to be done. The fact that there is another beneficiary of the work, who may even fairly be said to be the primary beneficiary, namely the owner of the vehicle, should not, at least of itself, prevent the arrangement operating as a supply of 'services' to WHA.[126]

890. Lord Justice Neuberger concluded that:

> Even assuming that Mr Peacock is correct in his contention that there cannot have been a 'supply of services' both to the owner and to WHA, it appears to me that *the proper analysis in the present case is that the services were 'supplied' to WHA, albeit that they were also provided to the owner* (our emphasis).[127]

891. Lord Justice Neuberger added that:

> I believe that this conclusion is supported by authority and in particular by the decision of the House of Lords in *Redrow* to which I have referred.[128]

892. Lord Justice Neuberger referred to the comments of both Lord Hope of Craighead (including those comments quoted at paragraph 881 from the third sentence on) and Lord Millet (as quoted at paragraph 886 in the first paragraph of the quote) in *Redrow*.

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[126] *WHA Limited and Viscount Reinsurance Company limited v. Customs and Excise Commissioners* [2004] EWCA Civ 559; [2004] BVC 485 at paragraph 37.
[127] *WHA Limited and Viscount Reinsurance Company limited v. Customs and Excise Commissioners* [2004] EWCA Civ 559; [2004] BVC 485 at paragraph 40.
[128] *WHA Limited and Viscount Reinsurance Company limited v. Customs and Excise Commissioners* [2004] EWCA Civ 559; [2004] BVC 485 at paragraph 41.

893. Lord Justice Neuberger in commenting on the final paragraph he quoted from the speech of Lord Millett in *Redrow* (reproduced at paragraph 886– the first paragraph), His Lordship stated that:

> I consider that the final paragraph quoted above was included merely to emphasise the extent to which it could not be said that Redrow was receiving a merely adventitious benefit from the agents' activities.[129]

894. We consider that this comment by Lord Justice Neuberger supports our view that *Redrow* is simply about identifying whether anything, anything at all, was supplied to Redrow. The proper characterisation of the supplies involved in the arrangement was not at issue and therefore not considered.

### *Customs and Excise Commissioners v. Plantiflor Ltd*

895. 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.

896. 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.

897. 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 customer's goods to him).

898. Under the United Kingdom 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.

899. The identification of these different supplies in *Plantiflor* does not support 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 in the United Kingdom and Australia 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 entity. This is not the issue in *Plantiflor*. *Plantiflor* has, in our

[129] *WHA Limited and Viscount Reinsurance Company limited v. Customs and Excise Commissioners* [2004] EWCA Civ 559; [2004] BVC 485 at paragraph 52.

view, no impact as far as the interpretation and application of subsection 38-190(3) is concerned.

900. Some have suggested that the following comments of Lord Millett in *Plantiflor* support the view that where a supply is contracted for by one entity and provided to another the supply made to one entity is a different supply, for example, the supply of a right, from the supply that is provided to another entity, that is a service, with the result that subsection 38-190(3) cannot apply:

> When Parcelforce made delivery of a parcel pursuant to its contract with Plantiflor, then like the estate agents in the Redrow case it made two different supplies. One was the supply to Plantiflor's customer of the service of delivering his goods to his order that is to say to the addressee. The other was the supply to Plantiflor of the service of delivering its customer's goods to the addressee. These supplies were made for reward, and if the supply of postal services by Parcelforce were not an exempt supply there would be at least one taxable supply and possibly more than one.[130]

901. Nothing in these comments precludes the finding for the purpose of subsection 38-190(3) that the supply made by Parcelforce to Plantiflor was provided to the customer. This is because the question for subsection 38-190(3) purposes is whether the supply made to one entity is provided to another entity.

902. In our view, Parcelforce's supply under its contract with Plantiflor is made to Plantiflor and provided to the customer.

903. Our view is supported by comments of Lord Neuberger in the *WHA* case when reflecting on the *Plantiflor* case. Lord Neuberger said:

> ..Plantiflor can be said to involve the converse of the present case. In that case, the single act of delivery of the horticultural products to the customer could be said to involve supplies by two different people, namely arranging for the parcels to be delivered, which was effected by Plantiflor, and the actual delivery, which was effected by Parcelforce. ..the present case can be said to be the converse in the sense that there are two recipients of the single set of services provided by the garage, namely WHA and the insured, but only one of them gives rise to a liability for VAT, *(It could be added that Plantiflor also involved a similar arrangement to that in the present case, in that Parcelforce's delivery involved a service both to the taxpayer and to the customer.)*[131] (Our emphasis)

904. At paragraphs 713 to 755, Part VIII of the Explanation section we discuss supplies of arranging services and our expectations that where a supplier contracts with a customer to arrange for a supply of a particular service there would typically be two contracts: namely, a contract of arranging services between the arranger and the customer and a second contract for the supply of a particular service between the supplier and the customer.

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[130] *Customs and Excise Commissioners v. Plantiflor Ltd* [2002] UKHL 33; [2002] BVC 572 at paragraph 55.

[131] *WHA Limited and Viscount Reinsurance Company limited v. Customs and Excise Commissioners* [2004] EWCA Civ 559; [2004] BVC 485 at paragraph 49.

905. In *Plantiflor* we observe that while it was found that there was a supply of an arranging service as between Plantiflor and the customer, there was no separate contract for services as between Parcelforce and the customer. However, we note that when *Plantiflor* was heard by the VAT tribunal the Commissioners of Customs and Excise conceded that there were two supplies by Plantiflor: a sale of goods and a service of arranging delivery of those goods. The Court of Appeal refused to allow the Commissioners to renege on this concession and to argue that there was only one supply of delivered goods.

906. It appears that Lord Slynn, in the absence of this concession, would have found a single supply of delivered goods (with which we would agree). His Lordship said:

> If, as I considered in Customs and Excise Comrs v British Telecommunications plc [1999] 1 WLR 1376, 1382-1383, and as I still consider, the appropriate question is whether one act (here arranging the delivery) is 'ancillary or incidental to another' (here the supply of bulbs) or is 'a distinct supply', it seems to me on the contractual documents between Plantiflor and the customer which are before the House that these arrangements constituted a single supply. What the customer wanted and what Plantiflor agreed to provide was bulbs delivered to the home.
>
> There was a separate supply consisting of the delivery of the bulbs from Plantiflor to Parcelforce, under a distinct contract. However, under the contract between the customer and Plantiflor arranging the delivery is ancillary to the making available of the bulbs. I do not consider that the answer to this question will vary according to, or depend on, the precise event or time when as a matter of English contract law the property in the bulbs passed to the customer. The reality is that Miss Brierley paid one total sum for one supply of delivered bulbs.[132]

907. We provide an example of the application of subsection 38-190(3) in circumstances similar to *Plantiflor,* see Example 11 (paragraphs 392 to 400), Part III of the Explanation section of this Ruling.

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[132] *Customs and Excise Commissioners v. Plantiflor Ltd* [2002] UKHL 33; [2002] BVC 572 at paragraph 23-24.

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