# *GSTR 2003/8EC - Compendium*

 This cover sheet is provided for information only. It does not form part of *GSTR 2003/8EC - Compendium*

## Summary of issues raised and responses

| Issue No. | Issue raised | Tax Office Response/Action taken |
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| 1 | The Commissioner has determined that a supply is made in relation to rights if it fits within one of three categories (as set out in paragraphs 27B to 28 of the draft Addendum). …<br><br>Category 2 aims to expand the scope of item 4 for the specific situation considered in *Travelex*, and no further. This is overly restrictive.<br><br>*Travelex* provided guidance, *inter alia*, that the term 'rights' was not restricted to the 'rights' set out in paragraph 9-10(2)(e). As stated by Edmonds and Perram JJ in *Qantas Airways Limited v Commissioner of Taxation* [2011] FCAFC 113 (at [47]) 'French CJ and Hayne J (who with Heydon J comprised the majority) clearly supported recourse to the purpose of the transaction as identifying the relevant supply' in *Travelex* and (at [48]) 'Heydon J (at [47] relied on "the legal substance of the transaction" as characterising and answering the question of what was supplied in that case'. The legal substance being the rights attached to the tokens. Whilst Edmonds and Perram JJ did confirm that '[c]urrency has value only because of the right that attach to it' (at [26]) we do not believe that those words translate to the limitation in the last sentence in proposed paragraph 27F of the Draft Addendum:<br><br>The sentence states, 'For this to occur, any tangible thing that passes between supplier and recipient which evidences the rights (such as a bank note) must, without those rights, be worthless or of negligible value'.<br><br>That statement ignores the requirement to look at the 'legal substance' and 'purpose' of the underlying transaction, which | On review, we agree that the description of 'category 2' in the draft addendum may be too restrictive. The description will prevent a supply of a thing which, in essence, comprises a bundle of rights from qualifying as a supply that is made in relation to rights for the purposes of item 4 if a tangible thing that passes between supplier and recipient evidencing the rights has a value that is more than 'negligible'.<br><br>We consider that, if the tangible thing has some value, but that value could properly be viewed as being 'incidental' to the value of the rights (the latter being the substance of the supply), the supply would be a supply that is made in relation to rights for the purposes of item 4.<br><br>We have made a number of minor modifications to the draft to ensure the draft reflects this outcome. In particular, we have:<br><br>• replaced the requirement for a supply to derive its value ***solely*** from rights with the requirement that a supply derive its value ***exclusively, or almost exclusively***, from rights; and<br><br>• replaced the requirement for any tangible thing that may pass between supplier and recipient which evidences the rights (such as a bank note) to be of no or ***negligible*** value with the requirement that it be of no or ***incidental*** value |

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| | may mean that the 'tangible thing' has a value that is more than negligible.<br><br>Further, to require a Category 2 supply to be required to derive its value 'solely' from rights is inconsistent with Category 1 (supplies identified in paragraph 9-10(2)(e) of the GST Act), and Category 3 supplies, which only require the 'essential character or substance of the supply' to be a right.<br><br>This interprets the *Travelex* decision too narrowly. | |
| 2 | Category 3 includes within the scope of item 4 'a supply of services (including provision of advice or information) that has a relevant connection with rights'.<br><br>Proposed paragraph 76 uses the expression 'exempted from GST', which is not a term used in the GST Act. It is recommended that different language such as 'fall within item 4'.<br><br>Paragraph 76 of the Draft Addendum states in part:<br><br>> We consider that the context and the broad policy to tax domestic consumption expenditure both suggest that a reasonably close relationship must exist between a service and a right for the service to be covered by item 4. If this were not the case, and a more remote connection were sufficient, services supplied between Australian residents that would ordinarily be thought of as being consumed in Australia could, because of the remote connection, be **exempted** from GST. … [Emphasis added.] | The reference to 'exempted from GST' is consistent with the heading to chapter 3 of the GST Act, which encompasses Division 38. We agree, however, that an alternative expression should be used in paragraph 76.<br><br>We have replaced the words "be exempted from GST" with the words "be rendered GST-free". |
| 3 | The Commissioner does not make it clear how the services listed in proposed paragraph 79A relate to rights which are for | The Commissioner considers the 'for use test' in item 4 to be an intention-based test. As such, in any given case, the question of |

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| | use outside Australia. It is recommend that for each example the Commissioner explains how the relevant service relates to rights that are 'for use outside Australia'. For example, 'Brokerage services in relation to the sale or acquisition of shares listed on a foreign stock exchange' included as example 4 on the table in paragraph 79A. | whether rights are for use outside Australia will depend upon the facts and circumstances of that case, rather than on the nature of the rights themselves. The example in paragraph 116A, which involves a supply of foreign currency that is <u>not</u> for use outside Australia, illustrates this point.<br><br>At this stage, our priority is to amend GSTR 2003/8 to ensure that it reflects the Commissioner's revised view of the operation of item 4 following *Travelex*. The Commissioner's view on the 'for use test' remains unchanged. We acknowledge that some uncertainty may exist in relation to the application of this existing view to particular scenarios, but we consider that this uncertainty would be best addressed through a separate process, following publication of the addendum. This would enable us to consult with industry and other relevant stakeholders to (amongst other things):<br>• identify the types of rights to which the uncertainty over the 'for use test' relates;<br>• identify the best means of addressing the uncertainty; and<br>• in some cases, gain an understanding of the arrangements necessary for us to rule on the 'for use test' in any given circumstance |
| 4 | It is recommended that paragraphs 108 to 126 dealing with the meaning of 'for use' be expanded to include practical examples of supplies to which item 4 will, in the view of the Commissioner, apply. For example, by expanding on the examples in paragraph 79A:<br>• Brokerage services in relation to shares held on a | Covered by the above response. |

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| | foreign stock exchange<br>• Brokerage services in relation to insured property located in a foreign jurisdiction<br>• Legal services of preparing and lodging an application for registration of a trademark in a foreign jurisdiction. | |
| 5 | The Commissioner's view in proposed paragraph 79E to be unjustifiably restrictive. The words "in relation to" require a broad rather than narrow interpretation, as established by case law – see *HP Mercantile Pty Ltd v Commissioner of Taxation* [2005] FCAFC 126 where, at paragraph 35, Hill J stated that:<br>> It was common ground that the words "relates to" are wide words signifying some connection between two subject matters. The connection or association signified by the words may be direct or indirect, substantial or real. It must be relevant and usually a remote connection would not suffice. The sufficiency of the connection or association will be a matter for judgment which will depend, among other things, upon the subject matter of the enquiry, the legislative history, and the facts of the case. Put simply, the degree of relationship implied by the necessity to find a relationship will depend upon the context in which the words are found. So much appears from the various cases referred to by the Tribunal when discussing the meaning of these words: *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* [1961] HCA 35; (1960) 105 CLR 602 at 620 per Taylor J; *Joye v Beach Petroleum NL* [1996] FCA 1552; (1996) 67 FCR 275 at 285 per Beaumont and Lehane | We consider the position adopted in the draft addendum to be consistent with the comments of Hill J in *HP Mercantile* (see comment to which this response relates for a reproduction of those comments). In particular, in that case, Hill J at paragraph 35, stated:<br>> … Put simply, the degree of relationship implied by the necessity to find a relationship will depend upon the context in which the words are found.<br>We do not consider that, because the words 'in relation to' in item 4 are similar to the words 'relates to' in paragraph 11-15(2)(a), it follows that the nature of the relationship envisaged by the two provisions must be the same or similar. The nature of the relationship envisaged by each provision will, in keeping with the comments from Hill J, depend upon the context in which the provision is found. We consider the context of item 4 in section 38-190(1) to be very different from the context of paragraph 11-15(2)(a). Our reasons for adopting the view that item 4 only covers direct relationships are set out in paragraphs 79D and 79E. |

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| | JJ; and Australian Competition and *Consumer Commission v Maritime Union of Australia* [2001] FCA 1549; (2001) 114 FCR 472 at 487 per Hill J. It appears also in more recent High Court authority such as *North Sydney Council v Ligon 302 Pty Ltd* [1996] HCA 20; (1996) 185 CLR 470; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 387 and *O'Grady v Northern Queensland Co Ltd* ; [1990] HCA 16; (1990) 169 CLR 356 at 374 per Toohey and Gaudron JJ.<br><br>The term 'in relation to' should be similarly interpreted to the term 'relates to', in subsection 11-15(1). At paragraph 25 of GSTR 2006/3 the Commissioner states:<br><br>Under Divisions 11 and 15, you are not entitled to input tax credits to the extent you acquire or import goods, services or anything else that relates directly or indirectly to making input taxed supplies. [Emphasis added.]<br><br>Therefore, for the purposes of subsection 11-15(1) both the courts and the Commissioner have interpreted similar language broadly, yet for the purposes of item 4, the Commissioner is applying a narrow interpretation.<br><br>There is no justification for the Commissioner to interpret 'relates to' broadly in subsection 11-15(1) and narrowly in item 4 of subsection 38-2190(1). There is no contextual reason why the nexus test for both provisions should not be interpreted similarly.<br><br>It is therefore considered that item 4 does apply to indirect relationships, albeit not remote relationships, and that the | |

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| | examples listed in proposed paragraph 79C are supplies to which item 4 should apply. | |
| 6 | Under the view in the addendum, services must directly relate to rights in order to be covered by item 4. Rather than use the expression 'directly connected', the addendum instead tries to pinpoint broad groups of services that would be directly connected with rights. In taking this approach, the addendum runs the risk of not covering certain services that exhibit an equally direct relationship to those listed. | We have revised the relevant part of the addendum to expressly refer to a service having to be directly connected with rights. |