# *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)*

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There is a Compendium for this document: **GSTR 2003/8EC** .

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 The scope of the new term, however, remains the same as the now repealed definition of 'Australia' used in those Acts.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 document has changed over time. This is a consolidated version of the ruling which was published on *31 October 2012*

# Goods and Services Tax Ruling

Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2)

Contents Para

**What this Ruling is about** 1
**Date of effect** 7
**Legislative context** 9
**Ruling** 20
**Explanation (this forms part of the Ruling)** 43
**Detailed contents list** 151

***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 examines the operation of paragraph (a) of item 4 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act). That subsection sets out supplies of things for consumption outside Australia (other than goods or real property) that are GST-free.

2. In particular, the Ruling examines:

- how to identify the relevant supply when considering transactions involving supplies that may be covered by item 4;

- what types of supplies are capable of being covered by item 4;
- the meaning of the expressions 'supply that is made in relation to rights' in item 4 and 'the rights are for use outside Australia' in paragraph (a) of item 4; and
- the operation of subsection 38-190(2).

3. The Ruling does not address the meaning of the expression 'the supply is to an entity that is not an Australian resident and is outside Australia when the thing supplied is done' in paragraph (b) of item 4.

4. The Ruling does not otherwise address the operation of the other provisions of section 38-190.

5. While this Ruling outlines the broad principles relating to all kinds of supplies to which item 4 applies, it does not examine in detail how these principles apply to specific types of financial supplies in the context of item 4. Financial supplies for consumption outside Australia are dealt with at paragraphs 144 to 170 in Goods and Services Tax Ruling GSTR 2002/2.[1]

6. 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

7. 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).

8. **Note 1:** Changes made to this Ruling by the Addendum that issued on 17 October 2007 have been incorporated into this version of the Ruling.[1A]

8A. **Note 2:** The Addendum to this Ruling that issued on 21 December 2011 explains the Commissioner's view of the law as it applies both before and after its date of issue.[1B]

[1] GSTR 2002/2: GST treatment of financial supplies and related supplies and acquisitions.
[1A] Refer to the Addendum to see how it is that the Addendum amends this Ruling.
[1B] Refer to the Addendum to see how it is that the Addendum amends this Ruling.

# Legislative context

9. Under section 9-5, you make a taxable supply if:

(a) you make the supply for consideration; and

(b) the supply is made in the course or furtherance of an enterprise that you carry on; and

(c) the supply is connected with Australia;[2] and

(d) you are registered, or required to be registered.

However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.

### Connected with Australia

10. Section 9-25 establishes when a supply is connected with Australia. In the case of supplies of things other than goods or real property, a supply is connected with Australia if the thing is done in Australia or the supply is made through an enterprise that the supplier carries on in Australia.[3] If the supply is not connected under either of these tests, and the supply is a right or option to acquire another thing and the supply of the other thing would be connected with Australia, the supply of the right or option is connected with Australia.[3A]

11. With a supply of a right or option ,the thing that is done is the creation, grant, transfer, assignment or surrender of the right or option. Whether a right or option is created, granted, transferred, assigned or surrendered in Australia will depend on how the creation, grant, transfer, assignment or surrender is effected. For example, if a right to use intellectual property is granted by the execution of a written contract, the grant of the right is done in Australia if the contract is executed in Australia.[4]

11A. With a supply of a right or option to acquire another thing, the supply of which would be connected with Australia, it is the Commissioner's view that the creation, grant, transfer or assignment of the right is connected with Australia if the supply of the other thing would be connected with Australia, irrespective of whether or not the supply of the other thing is in fact made.[4A]

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[2] Goods and Services Tax Ruling GSTR 2000/31 explains when a supply is connected with Australia under section 9-25.
[3] Paragraphs 9-25(5)(a) and (b).
[3A] Paragraph 9-25(5)(c).
[4] For further detail, see paragraphs 202 to 208 of GSTR 2000/31.
[4A] This is consistent with Hill J's comments (at paragraph 42) in *HP Mercantile Pty Ltd v. FC of T* 2005 ATC 4571 with respect to the requirement in paragraph 11-15(2)(a) that an acquisition relates to making supplies that 'would

11B. However, with respect to the *surrender* of a right or option to acquire another thing it is the Commissioner's view that the surrender of the right or option is not connected with Australia merely because the right or option being surrendered concerned the supply of some other thing that would have been connected with Australia. That is, the surrender of a right or option is only connected with Australia if the right or option is surrendered in Australia (that is, paragraph 9-25(5)(a) applies) or the supply is made through an enterprise that the supplier carries on in Australia (that is, paragraph 9-25(5)(b) applies).

11C. As explained in the Explanatory Memorandum[4B] paragraph 9-25(5)(c) was inserted to address a deficiency in the GST Act under which certain rights or options provided offshore were not subject to GST even when they were for goods, services and other things that will be consumed in Australia. This outcome is contrary to the policy intent of the GST legislation which, broadly, is to tax private consumption of most goods, services and other things in Australia, including imports.

11D. It would, however, be inconsistent with the policy intent of the amendment for a supply of a surrender of a right or option to acquire another thing to be connected with Australia merely because the supply of the other thing, which will not be supplied as the right or option is being surrendered, would have been connected with Australia had it been supplied. In contrast to the creation, grant, transfer or assignment of a right or option to acquire some other thing that is connected with Australia, with the surrender of a right or option there can be no consumption of the underlying thing in Australia. Taking the approach that paragraph 9-25(5)(c) does not apply to the surrender of a right or option to acquire another thing ensures consistency with the policy intent of the amendment and ensures that paragraph 9-25(5)(c) does not apply inappropriately.

12. In summary, the supply of a right or option is connected with Australia, and therefore a taxable supply if the other requirements of section 9-5 are met, if:

- the creation, grant, transfer, assignment or surrender of the right or option is done in Australia (paragraph 9-25(5)(a)); or
- the creation, grant, transfer, assignment or surrender of the right is made by the supplier through an enterprise

be' input taxed. Hill J noted 'a need in framing a provision disentitling a taxpayer to input tax credits to use a word suggesting conditionality, to ensure that a credit would not be available if there would have been a relationship between the acquisition and a future supply, in the event that no future supply eventuated'.

[4B] See paragraphs 3.2 to 3.5 of the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 1) 2005 enacted as *Taxation Laws Amendment Act (No. 1) 2005*.

that the supplier carries on in Australia (paragraph 9-25(5)(b)); or

- the supply is the creation, grant, transfer or assignment of a right or option to acquire another thing and the supply of that other thing would be connected with Australia (paragraph 9-25(5)(c)).

A supply of a right or option that is not connected with Australia is not a taxable supply under section 9-5.[5]

## GST-free supplies

13. A supply is GST-free if it is GST-free under Division 38 or under a provision of another Act.[6] The supply of a right to receive a GST-free supply is also GST-free.[7]

13A. A supply that would be both GST-free and input taxed is GST-free unless the provision under which it is input taxed requires the supplier to have chosen for its supplies of that kind to be input taxed.[7A]

14. 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;
- 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.

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

16. The table in subsection 38-190(1) comprises five items which set out supplies of things other than goods or real property that are GST-free.

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[5] However, an intangible supply from offshore that is not connected with Australia may be a taxable supply under Division 84. Division 84 may also apply where the supply is connected with Australia because of paragraph 9-25(5)(c).
[6] Paragraph 9-30(1)(a).
[7] Paragraph 9-30(1)(b).
[7A] Subsection 9-30(3).

17. Item 4 appears in the table in subsection 38-190(1) as follows:

| **Supplies of things, other than goods or real property, for consumption outside Australia** | | |
|---|---|---|
| **Item** | **Topic** | **These supplies are GST-free**[8] |
| 4 | Rights | a supply that is made in relation to rights if:<br>(a) the rights are for use outside Australia; or<br>(b) the supply is to an entity that is not an Australian resident and is outside Australia when the thing supplied is done. |

18. Under subsection 38-190(2), a supply covered by any of items 1 to 5 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.

19. As supplies of rights are not dealt with exclusively under item 4, a supply of rights may be GST-free under one of the other items in the table in subsection 38-190(1) if the requirements of that item are satisfied.[9]

# Ruling

20. [Omitted.]

21. [Omitted.]

### Supplies that are capable of being covered by item 4

#### *A supply of goods*

22. A supply of goods, whether by sale or lease, is outside the scope of section 38-190 and therefore cannot be covered by item 4.

23. The distinction between a supply of goods and a supply of rights or other things, in the context of supplies of computer software, is discussed at paragraphs 30 to 33 below.

[8] Except to the extent that they are supplies of goods or real property.
[9] Provided subsection 38-190(2), subsection 38-190(2A) or subsection 38-190(3) does not operate to negate that GST-free status.
[10] [Omitted.]

### *A supply of real property*

24. A supply of rights which is also a supply of 'real property' as defined in section 195-1 is outside the scope of section 38-190 and therefore cannot be covered by item 4.[10A]

### *What is a right?*

25. The word 'right' is not defined for GST purposes and has a very broad meaning under the general law. A 'right' has been defined as 'Generally, a benefit or claim entitling a person to be treated in a certain way'.[10B]

26. However, it is not necessary for the right to be a proprietary right.

27. There is further discussion of the meaning of 'right' at paragraphs 50 to 53 below.

### *What is 'a supply that is made in relation to rights'?*

27A. A supply of a thing is a 'supply that is made in relation to rights' if it fits within one of the following three categories.

*Category 1 – Supplies identified in paragraph 9-10(2)(e)*

27B. The creation, grant, transfer, assignment or surrender of a right is a supply that is made in relation to rights for the purposes of item 4.

27C. While many transactions involve rights being supplied, a supply will only fit within Category 1 if the essential character or substance of the supply, or of a separately identifiable part of the supply, is one of rights. Category 1 does not cover a supply if the supply of rights is merely integral, ancillary or incidental to another dominant part of the supply where the supply is characterised by the dominant part.

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[10A] For example in *Saga Holidays Limited v. Commissioner of Taxation* [2006] FCAFC 191 it was held that the supply of the accommodation component of an Australian tour package by a United Kingdom tour operator (Saga) to non-residents was a contractual right exercisable over or in relation to land and thus a taxable supply of real property connected with Australia. Such a supply would not be covered by item 4.

[10B] *Australian Legal Dictionary*, Butterworths, 1997.

27D. Determining whether a supply is a single supply, a composite supply that is treated as a supply of a single thing, or a supply comprising separately identifiable parts that retain their own identity, is considered in more detail at paragraphs 66 to 72 of this Ruling and in Goods and Services Tax Ruling GSTR 2001/8.[10C]

*Category 2 – Supplies of things comprising a bundle of rights that derive their value exclusively, or almost exclusively, from those rights*

27E. A supply of a thing which comprises a bundle of rights is a supply that is made in relation to rights for the purposes of item 4 if:

- the thing supplied derives its value exclusively, or almost exclusively, from those rights; and
- through the supply, the supplier either supplies the rights to the recipient or surrenders the rights.

27F. In order to fit within category 2, a supply of a thing need not be properly characterised as a supply of rights for GST purposes, nor must it be a supply under paragraph 9-10(2)(e). The supply must, however, encompass rights and the value of the supply must be in the rights. 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 incidental worth.

*Category 3 – Supplies of services directly connected with rights*

28. A supply of services (including provision of advice or information)[10D] that is directly connected with rights is a supply that is made in relation to rights for the purposes of item 4. A supply of services has a direct connection with rights if for example:

- the service facilitates a dealing in or exercise of the rights; or
- the service affects (or its purpose is to affect) or protects the nature or value (including indemnity against loss) of the rights.

28A. Item 4 only applies to a service that facilitates a dealing in rights if the essential character or substance of the dealing is one of rights. Similarly, item 4 only applies to services that affect or protect the nature or value of a thing if the essential character or substance of that thing is rights.

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[10C] *GSTR 2001/8 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts.*

[10D] In listing the various types of supplies, subsection 9-10(2) refers to the 'provision of advice or information' separately from 'services', but in this section of the Ruling the term 'service' is, for simplicity, used to cover both.

29. Examples of supplies that fit within the three categories outlined at paragraphs 27B to 28 of this Ruling include supplies of intellectual property rights (category 1), supplies of shares (category 2) and supplies of brokerage services in relation to shares (category 3).

30. We take the view that a supply of 'off-the-shelf' computer software sold embodied in a disk is a supply of goods and therefore excluded from section 38-190. The fact that a sale of 'off-the-shelf' software on disk is accompanied by a 'shrinkwrap licence' - which may deny users the authority to make backup copies, modify, or resell the software or to decompile the code - does not in itself change the character of the supply to a supply that is made in relation to a right.

31. Similarly, where computer software is supplied in intangible form, for example by downloading it from the internet, the inclusion of a 'clickwrap licence' in similar terms to the common form of 'shrinkwrap licence' referred to above will not, in itself, mean that the supply is a supply that is made in relation to rights. Where the software downloaded is standard or 'off-the-shelf' software, what is supplied is the computer program, subject to restrictions on its use. Incidental copyright rights, such as the right to copy for downloading purposes, do not change the essential nature of the supply. Such a supply is not a supply of goods. Nor is it a supply that is made in relation to rights.

32. However, a supply of the right to use the copyright in the program itself for commercial purposes, which allows the licensee to modify, adapt or copy or otherwise do what would ordinarily be the exclusive right of the copyright owner,[11] is a supply that is made in relation to rights.

33. Where a one-off solution is developed by a computer programmer for a client, the correct analysis of the supply will depend on all of the facts and circumstances, including the terms of the contract between the programmer and the client.

34. Supplies of computer software are considered in more detail at paragraphs 83 to 94 below.

35. Supplies of insurance and capacity in a telecommunications network are also supplies that are made in relation to rights. Refer to paragraphs 95 to 107 below for further discussion of these and other supplies, such as membership subscriptions.

[11] See paragraphs 18 to 20 of Taxation Ruling TR 93/12 Income tax: computer software.

### Supply that is made in relation to rights 'for use outside Australia'

#### *Meaning of 'for use'*

36. The requirement that 'the rights are for use outside Australia' in paragraph (a) of item 4 is an intention test. That is, to be covered by this paragraph, it must be established that the intention is that the rights will be used outside Australia.

37. The actual use of the rights is not relevant, other than as evidence of the intended use.

38. There is further discussion of the meaning of 'for use' at paragraphs 108 to 123 below.

#### *Supply that is made in relation to rights that are partly for use outside Australia*

39. Where rights are for use in and outside Australia an apportionment will be required unless the requirements of paragraph (b) of item 4 are met.

40. Any reasonable method of apportionment may be used.

### Subsection 38-190(2)

41. If a supply would otherwise be GST-free under either item 4 or any other item in the table in subsection 38-190(1), but the supply is covered by subsection 38-190(2), the supply is not GST-free. Subsection 38-190(2) applies to a supply which would otherwise be covered by an item in the table where the supply is a supply of a right or option to acquire something the supply of which would be connected with Australia and would not be GST-free.

42. Subsection 38-190(2) does not apply to a surrender of a right or option to acquire something.

## Explanation (this forms part of the Ruling)

### Supplies that are capable of being covered by item 4

43. Subsection 38-190(1) applies only to supplies that are not supplies of goods or real property. Item 4 applies to supplies that are made in relation to rights. To determine whether a supply is capable of coming within the scope of item 4, it is necessary to determine the true character of the supply.

[12] [Omitted.]

44. A supply of goods is outside the scope of subsection 38-190(1) and therefore cannot be covered by item 4.

45. Section 195-1 defines 'goods' as 'any form of tangible personal property'. 'Tangible' connotes a physical existence. Thus, a supply of goods is a supply of any form of personal property that has a physical existence, but does not include a supply of intangible personal property, such as intellectual property rights (for example, copyright).

### *A supply of real property*

46. A supply of rights which is a supply of 'real property' for GST purposes is outside the scope of section 38-190 and therefore cannot be covered by item 4.

47. 'Real property' is defined in section 195-1 to include:

(a) any interest in or right over land;

(b) a personal right to call for or be granted any interest in or right over land; or

(c) a licence to occupy land or any other contractual right exercisable over or in relation to land.

48. This definition of real property for GST purposes has a broad ambit. It extends the meaning of what is real property under the general law. For example, under the general law, 'a licence to occupy land' is a personal right and not real property. However, a licence to occupy land is real property under the section 195-1 definition.

49. If a supply of rights is a supply of real property for GST purposes, the supply is outside the operation of section 38-190. Therefore, supplies such as leases and licences to occupy property are not capable of being GST-free under item 4.[14AA]

### *What is a right?*

50. The word 'right' is not defined for GST purposes and has a very broad meaning under the general law. A 'right' has been defined

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[13] [Omitted.]
[14] [Omitted.]
[14AA] For example in *Saga Holidays Limited v. Commissioner of Taxation* [2006] FCAFC 191 it was held that the supply of the accommodation component of an Australian tour package by a United Kingdom tour operation (Saga) to non-residents was a contractual right exercisable over or in relation to land and thus a taxable supply of real property connected with Australia. Such a supply would not be covered by item 4.

as 'Generally, a benefit or claim entitling a person to be treated in a certain way'.[14AB]

*Alternative view*

51. Some commentators have raised whether supplies of rights for GST purposes should be restricted to supplies of proprietary rights.[14AC] Reference has been made to cases decided in a stamp duty context where personal rights have been held not to be 'property' as defined under the relevant legislation.

52. In the Commissioner's view, there is no basis for limiting the operation of item 4 to supplies of proprietary rights. The stamp duty cases were decided in the context of provisions containing specific references to property and against the background of conveyance duty applying generally to instruments transferring interests in property.

53. For instance, under the general law certain licences (such as grocer, tavern and fishing licences) have been held to involve merely personal rights.[14AD] Supplies of these types of licences in the Commissioner's view would involve supplies of rights for the purposes of item 4.

***What is 'a supply that is made in relation to rights'?***

54. The meaning of the phrase 'in relation to' and similar phrases have been considered by the courts in a large number of cases across a wide range of legislation. While the courts have said that the words are of wide import, they have also made it clear that the context determines the scope of such phrases.

55. In *Hatfield v. Health Insurance Commission*[14AE] Davies J stated:

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[14AB] *Australian Legal Dictionary*, Butterworths, 1997

[14AC] See R Cordara QC and P Gallagher, "Supply of Rights and Rights to a Supply", VAT Monitor July/August 2001 pp161 – 175, and C James and P Stacey, "The Limits of Supply", (2002) 2 AGSTJ 41.

[14AD] For example, in *Jack v. Smail* (1905) 2 CLR 684 it was held that a grocer's licence conferred a personal right to carry on a business of a grocer at specified premises. In *Burns Philip Trustee Company Ltd v. Ironside Investments Pty Ltd* [1984] 2 Qd R 16 Shepherdson J held that a tavern licence was a personal right to the holder of such a licence. In *Pyke v. Duncan* [1989] VR Natham J held that licences under the Victorian *Fisheries Act* were personal in nature.

[14AE] (1987) 15 FCR 487

> Expressions such as 'relating to', 'in relation to', 'in connection with' and 'in respect of' are commonly found in legislation but invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute… The terms may have a very wide operation but do not usually carry the widest possible ambit, for they are subject to the context in which they are used, to the words with which they are associated and to the object or purpose of the statutory provision in which they appear.[14AF]

56. This passage was approved by the Full Federal Court in *Burswood Management Ltd v. Attorney-General*.[14A]

57. Prior to the High Court's decision in *Travelex Ltd v Commissioner of Taxation (Travelex)*,[15] the Commissioner considered that the expression 'a supply that is made in relation to rights' in item 4 encompassed only those supplies referred to in paragraph 9-10(2)(e). Paragraph 9-10(2)(e) lists various ways in which an entity can deal in rights.

58. The key question in *Travelex* was whether the supply of Fijian currency by the appellant (Travelex) on the departures side of the Customs barrier at Sydney International Airport to an individual travelling to Fiji was a 'supply made in relation to rights' for the purposes of item 4. It was common ground that the currency was for use outside Australia and that the supply was not a supply of goods.

59. The High Court, by majority (French CJ and Hayne and Heydon JJ, with Crennan and Bell JJ dissenting), found that the supply of Fijian currency was a supply made in relation to rights for the purposes of item 4. It followed that the supply was GST-free under subsection 38-190(1).

60. In their joint judgement, French CJ and Hayne J found that the supply was a supply that is made in relation to rights because:

- the currency derived its value solely from the rights that attach to it;[17A] and
- through the supply of the currency, the acquirer obtained those rights.[17B]

61. Heydon J found that the supply of the foreign currency should be characterised as a supply of rights and that, as such, the supply fell

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[14AF] (1987) 15 FCR 487 at 491
[14A] (1990) 23 FCR 144.
[15] [2010] HCA 33 at 31 and 45
[16] [Omitted.]
[17] [Omitted.]
[17A] [2010] HCA 33 at 26
[17B] [2010] HCA 33 at 27.

within the wider expression 'supply that is made in relation to rights'.

62. Following *Travelex*, the Commissioner considers that the term 'supply that is made in relation to rights' in item 4 is capable of covering the following three categories of supplies (each of which is discussed in more detail at paragraphs 64 to 79C of this Ruling):

- supplies identified in paragraph 9 10(2)(e);
- supplies of things that derive their value exclusively, or almost exclusively, from rights; and
- supplies of services directly connected with rights.

63. The view that any supply that fits within one of these three categories is a supply that is made in relation to rights is reasonably open as a matter of textual analysis. The Commissioner considers that, once the view that item 4 *only* covers the supplies identified in paragraph 9-10(2)(e) is dismissed (as required by *Travelex*), there is little contextual support for reading item 4 in a way that would preclude it from covering a supply which fits within any of the three categories listed at paragraph 62.

*Category 1 – Supplies identified in paragraph 9-10(2)(e)*

64. The creation, grant, transfer, assignment or surrender of any right is a supply that is made in relation to rights for the purposes of item 4.

65. Where a transaction comprises a bundle of features and acts, you must consider all of the circumstances of the transaction to ascertain its essential character.[21A] While many transactions involve rights being supplied, Category 1 only covers a supply if:

- the essential character or substance of the supply, or the dominant part of a composite supply, is one of rights; or
- the essential character of a separately identifiable part of the supply is one of rights.

66. Where rights are merely integral, ancillary or incidental to another dominant part of the supply, the supply is characterised by the dominant part.

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[18] [Omitted.]
[19] [Omitted.]
[20] [Omitted.]
[21] [Omitted.]
[21A] See *GSTR 2001/8: apportioning the consideration for a supply that includes taxable and non-taxable parts.*

67. All the circumstances of a supply need to be considered to work out whether the supply is a supply that is made in relation to rights. As explained in GSTR 2001/8, a supply may comprise one or more parts. Where the parts are separately identifiable, distinct or recognisable or have an aim in themselves, you need to consider how the GST Act applies to each part. In GSTR 2001/8, a 'mixed supply' is regarded as a supply that has to be separated or unbundled, as it contains separately identifiable taxable and non-taxable parts that need to be individually recognised. Where a supply comprises parts that are separately identifiable, distinct or recognisable or have an aim in themselves, and one of those parts is a supply that is made in relation to rights, item 4 may apply. There may be other parts such as supplies of services to which other items in the table in subsection 38-190(1) apply.

68. If you make a supply that contains a dominant part and the supply includes something that is integral, ancillary or incidental to that part, the supply is a composite supply. A composite supply is a supply of a single thing. Where the dominant part of a supply is a supply that is made in relation to rights and the other parts are integral, ancillary or incidental to the supply of rights, the supply is a composite supply and can be treated as a supply of a single thing. Where the supply of rights is integral, ancillary or incidental to another dominant part of the supply, the supply is a composite supply. This composite supply is a supply of a single thing to which item 4 cannot apply (unless the supply is covered by category 2 outlined at paragraphs 73 and 74 of this Ruling or category 3 outlined at paragraphs 75 to 79 of this Ruling).

69. Paragraph 59 of GSTR 2001/8 states the following:

> No single factor (by itself) will provide the sole test you use to determine whether a part of a supply is integral, ancillary or incidental to the dominant part of the supply.[23A] Having regard to all the circumstances, indicators that a part may be integral, ancillary or incidental include where:
>
> - you would reasonably conclude that it is a means of better enjoying the dominant thing supplied, rather than constituting for customers an aim in itself; or
> - it represents a marginal proportion of the total value of the package compared to the dominant part; or
> - it is necessary or contributes to the supply as a whole, but cannot be identified as the dominant part of the supply; or

[22] [Omitted.]
[23] [Omitted.]
[23A] See Lord Hope of Craighead in *Customs and Excise Commissioners v. British Telecommunications plc* (1999) 3 All ER 961 at 970; [1999] BVC 306 at 314.

- it contributes to the proper performance of the contract to supply the dominant part.

That is, we consider that a part of a supply will be integral, ancillary or incidental where it is insignificant in value or function, or merely contributes to or complements the use or enjoyment of the dominant part of the supply. It is a question of fact and degree whether a supply is mixed or composite.

70. Rights are created under executory contracts and although the creation of such rights is supported by valuable consideration, the supply may not be characterised as a supply that is made in relation to rights if, for example, those rights contribute to the supply as a whole but cannot be identified as the dominant part of the supply.

71. For example, under an agreement for the sale of goods, a right to the title to the goods may be created in return for consideration. In determining whether this is treated as a single supply or as separate supplies of goods and rights, it is useful to apply the indicators set out in GSTR 2001/8. Applying paragraph 59 of GSTR 2001/8, the rights are regarded as integral, ancillary or incidental to the dominant part of the supply. The supply is a supply of goods.[23B]

72. There are cases where it is clear that the parties to a transaction intend to supply rights and other things, such as services, and each of those separately identifiable parts is significant on its own. For example, under a franchising arrangement there may be supplies of rights to use a name and to market certain products, as well as supplies of marketing and administrative services. In this case, the supply is a supply of separately identifiable parts. The rights may be covered by item 4 or other items in the table in subsection 38-190(1). The supply of the services is only covered by item 4 if it falls within Category 3 which is outlined at paragraphs 75 to 79 of this Ruling. If it is not covered by item 4, the supply may nevertheless be covered by another item in the table in subsection 38-190(1).

*Category 2 – Supplies of things comprising a bundle of rights that derive their value exclusively, or almost exclusively, from those rights*

73. A supply of a thing comprising a bundle of rights is a 'supply that is made in relation to rights' for the purposes of item 4 if:

- the thing supplied derives its value exclusively, or almost exclusively, from those rights; and

[23B] This approach to rights under executory contracts is consistent with the analysis of a supply of real property under a standard land contract in Goods and Services Tax Ruling GSTR 2000/28. The supply of an equitable interest in the land upon entry into the contract is ancillary to what is the substance of the transaction – the transfer of title and delivery of possession at settlement.

- through the supply, the supplier either supplies the rights to the recipient or surrenders the rights.[24]

74. In order to fit within category 2, a supply of a thing need not be properly characterised as a supply of rights for GST purposes, nor must it be a supply under paragraph 9-10(2)(e). The supply must, however, encompass rights and the value of the supply must be in the rights. 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 incidental worth.

*Category 3 – Supplies of services directly connected with rights*

75. A supply of services (including the provision of advice or information)[25] that has a direct connection with rights is a supply that is made in relation to rights for the purposes of item 4.

76. The Commissioner considers 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 rendered GST-free. Additionally, if a more remote connection were sufficient, there would be a disparity between services that are connected with tangible property (which would only be GST-free if they are directly connected with that property)[25A] and services connected with intangible property (which may be GST-free on the basis of the more remote connection).

77. With this in mind, the Commissioner considers that a supply of services is a 'supply that is made in relation to rights' for the purposes of item 4 if the services are directly connected with rights. A service will be directly connected with rights if for example:

- the service facilitates a dealing in or exercise of the rights; or
- the service affects (or its purpose is to affect) or protects the nature or value (including indemnity against loss) of the rights

78. Item 4 only applies to a service that facilitates a dealing in rights if the essential character or substance of the dealing is one of

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[24] [Omitted.]

[25] In listing the various types of supplies, subsection 9-10(2) refers to the 'provision of advice or information' separately from 'services', but in this section of the Ruling the term 'service' is, for simplicity, used to cover both.

[25A] By virtue of item 1 in the table in subsection 38-190(1)

rights. Similarly, item 4 only applies to a service that affects or protects the nature or value of a thing if the essential character or substance of that thing is rights.

79. While these services may be supplies that are 'made in relation to rights', they are only GST-free under item 4 if the rights are for use outside Australia (this is discussed at paragraphs 108 to 126 of this Ruling).

79A. Some examples of supplies of services that are considered to fit within Category 3 are included in the following table:

| **Service** | **Our view on why these services fall within item 4** |
|---|---|
| Legal services for the preparation for a contract for the sale of copyright. | The services facilitate a change in the ownership of the rights. |
| Legal service of preparing and lodging an application for registration of a trademark. | The services directly relate to the creation of a right. |
| Brokerage services in relation to the sale of shares. | The services facilitate a change in ownership of the shares. |

79B. The Commissioner considers that services which relate to an outcome of the exercise of rights, rather than to the exercise of the rights itself, are not relevantly connected with rights for the purposes of item 4. For example, if the exercise of rights produces assessable income, tax return preparation services which (in part) relate to the reporting of that income are not covered by item 4.

79C. The following table provides further examples of services that we consider are not covered by item 4 and the reasons for this. These services may, however, be covered by other items in the table in subsection 38-190(1):

| **Service** | **Our view on why these services do not fall within item 4** |
|---|---|
| Technical support services, in relation to the development of software. | The services are related to the creation of the software and are not directly connected to the rights associated with the software |
| Legal services to establish an entity that will subsequently hold the rights. | The services are related to the establishment of the entity and are not directly connected to the rights that the entity will hold. |

| | |
|---|---|
| Advice about the taxation implications of buying or selling particular rights. | The advice relates to an outcome of dealing with rights (and does not facilitate a dealing in the rights, nor is it otherwise directly connected with rights). |
| Demographic study or market research, for example, to determine the economic viability of exercising rights in a particular region or site. | The services are connected with the various proposals which are being contemplated (they do not themselves facilitate a dealing in or exercise of the rights, nor are they otherwise directly connected with rights). |
| Advice concerning foreign ownership requirements which may impact on the possible purchase of overseas shares. | The advice is connected with a proposal which is being contemplated (and does not itself facilitate a dealing in or exercise of the rights, nor is it otherwise directly connected with rights). |

*Alternative view*

79D. Under an alternative view, services that indirectly relate to rights (including, for example, the tax return preparation services discussed at paragraph 79B of this Ruling) are also supplies that are made in relation to rights for the purposes of item 4. Proponents of this view may argue that, had the direct relationship envisaged by the Commissioner been intended, item 4 would have used the term 'directly related' or 'directly connected' (as item 1 does).

79E. The Commissioner considers that the absence of the word 'directly' in item 4 does not, of itself, lead to the conclusion that the item must also cover indirect relationships. Item 4 is different from item 1 in that it covers not only services, but also supplies of rights themselves and supplies that fall within Category 2 outlined at paragraphs 73 and 74 of this Ruling. The phrase 'made in relation to rights' might have been adopted because a phrase such as 'directly connected with rights' would not have been suitable to describe these other supplies. We also consider that the broad objective to tax domestic consumption expenditure and the absence of any express indication in the law or extrinsic material which suggests item 4 is intended to cover indirect relationships (in contrast with subsection 38-190(2A)), point to a closer relationship between the supply and the right.

80. One of the consequences of the alternative view would be that issues of apportionment might arise where the service also relates to

other matters. For example, a taxation return being prepared for an Australian resident may include income from rights that were used overseas. If this part of the service is GST-free, the total fee will need to be apportioned between the taxable part and the GST-free part.

### *Some examples of characterising supplies that are made in relation to rights and other supplies*

*Intellectual property*

81. Intellectual property is a generic term describing a variety of rights to control or profit from ideas and information. Intellectual property can be divided into four main areas:

- forms of expression – these intellectual property rights prevent others from copying the forms in which ideas are expressed and are protected by the *Copyright Act 1968* (Cth), *Designs Act 1906* (Cth) or *Circuit Layouts Act 1989* (Cth);
- scientific advances – these are intellectual property rights to exploit inventions, protected by the *Patents Act 1990* (Cth), and to exploit new varieties of plants, protected by the *Plant Breeder's Rights Act 1994* (Cth);
- reputation – these intellectual property rights preserve and exploit the value of commercial and professional reputation, which can be protected by remedies for the tort of passing off, or by the *Trade Marks Act 1995* (Cth); and
- confidential information – these intellectual property rights prevent the publication or misuse of government, personal or trade secrets and can be protected by equitable remedies for breach of confidence.

82. Supplies of intellectual property rights are supplies that are made in relation to rights for the purposes of item 4.

*Computer software*

83. Computer software is a specific example of intellectual property. Computer software can be described as 'computer programs consisting of encoded instructions designed to cause a computer to perform a particular task or to produce a particular result'.[27] A computer program is, in substance, knowledge or information, that is,

[26] [Omitted.]
[27] See paragraph 10 of Taxation Ruling TR 93/12.

it is intellectual property. However, the carrying medium for a computer program, for example, a disk, is tangible property.[28]

84. A supply of computer software may involve only a grant of rights (for example, rights to copy programs) or an assignment of rights (for example, assignment of the copyright in a program) or it may also include a supply of goods, such as a disk.

85. The nature of computer software and various transactions involving computer software is examined in some depth for income tax purposes in Taxation Ruling TR 93/12.

86. The approach taken in TR 93/12 is consistent with the decision of the United Kingdom (UK) Court of Appeal in *St Albans City and District Council v. International Computers Ltd*.[29] In that case Sir Iain Glidewell referred to a decision of the Supreme Court of New South Wales, *Toby Constructions Products Pty Ltd v. Computa Bar (Sales) Pty Ltd*.[30] In that case, Rogers J held that hardware and software sold as a package were goods for the purposes of the New South Wales *Sale of Goods Act 1923*. Rogers J said[31]:

> At the end of the day what weighs with me is that the system, software included, whilst representing the fruits of much research and work, was in the current jargon off the shelf, in a sense mass produced.

87. Where 'off-the-shelf' computer software is supplied embodied in a carrying medium such as a disk, this is a supply of goods. The whole of the purchase price of the disk is treated as proceeds from the sale of goods, notwithstanding that there may be an ancillary supply of a licence to use the program.[32]

88. A sale of 'off-the-shelf' software on disk will commonly be accompanied by a 'shrinkwrap licence'. The licence commonly denies users the authority to make backup copies, modify, or resell the software or to decompile the code. The essential nature of the transaction is a supply of the computer program, on disk, albeit subject to restrictions and disclaimers, rather than a supply of a *right to use* the article. It is no more a supply of a right to use the program than the supply of a book is a supply of a right to use the material in the book. The inclusion of a shrinkwrap licence of this kind does not change the character of the supply to a supply of a right; it remains a supply of goods.

89. However, computer software supplied in intangible form, for example by downloading it from the internet, is not a supply of goods

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[28] See paragraph 11 of TR 93/12.
[29] [1996] 4 All ER 481.
[30] [1983] 2 NSWLR 48.
[31] [1983] 2 NSWLR 48, at 51.
[32] See paragraphs 33 and 34 of TR 93/12.

as there is no tangible property supplied. The inclusion of a 'clickwrap licence' in similar terms to the common form of 'shrinkwrap licence' referred to above will not, in itself, mean that the supply is a supply of rights. Where the software downloaded is standard or 'off-the-shelf' software, what is supplied is the computer program, subject to restrictions on its use. If the essential nature of the transaction is the supply of the computer program, subject to restrictions on its use, the fact that a 'licence' relating to the supply of the software is couched in terms of a licence 'to use' the software will not in itself mean that the substance of the supply is a supply of a right to use the software. Similarly, incidental copyright rights, such as the right to copy for downloading purposes, do not change the essential nature of the supply

90. A supply of rights in relation to the copyright in the program itself, which allows the licensee to modify, adapt or copy or otherwise do, for commercial purposes, what would ordinarily be the exclusive right of the copyright owner[33], is a supply that is made in relation to rights.

91. Where a one-off solution is developed by a computer programmer for a client, the correct analysis of the supply will depend on all the facts and circumstances, including the terms of the contract between programmer and client. For example, a one-off program may be developed as a solution to a particular information technology problem at great expense over a period of months.

92. Where, under the terms of the agreement, copyright in the program will vest upon its creation in the client, whether the program is delivered to the client electronically or on disk, the supply is a supply of services. There is no right supplied in these circumstances.

93. If the programmer contracts to develop a solution and make it available for the client, on terms that copyright in the program, once developed and accepted by the client, will be assigned to the client, the supply will be a mixed supply, comprising the development and a supply of the program and assignment of copyright in the program. Assignment of the copyright is the supply of a right, but supply of the program is not. The supply of the program is not a supply of goods even if it is delivered in tangible form on a disk.

94. Apportionment of the consideration between the development and supply of the program, and the assignment of the copyright, may be required in such cases. The program may be highly customised to the client's requirements, such that it is unlikely to be suitable for other commercial exploitation. It may therefore be unlikely that the client will wish to do things which would otherwise breach copyright, or that there would be significant commercial value to the programmer

[33] See paragraphs 18 to 20 of TR 93/12.

in retaining copyright. In that case, it is to be expected that little or no consideration would be apportioned to the assignment of the copyright.

*Insurance*

95. The general law recognises that what an insured obtains under a contract of insurance is a chose in action.[34] Where, under the contract of insurance, the insurer agrees to compensate the insured for a loss that the insured may sustain through the happening of an event, this chose in action is a right to be indemnified if the insured event occurs. There is a supply by way of a creation of a right when the contract of insurance is entered into.

96. A contract of life insurance and many contracts of accident insurance are not contracts of indemnity as they provide for the payment of a specified sum upon the occurrence of an event such as death or accident. What the insured obtains is a chose in action that is a right to receive a certain sum upon the occurrence of the event. There is a supply by way of a creation of a right when the contract of insurance is entered into.

97. There is an example of a supply of insurance at paragraphs 119 to 121 below.

*Supply of capacity in an international telecommunication network*

98. Telecommunication carriers (telcos) arrange telecommunication networks for clients' exclusive use. These networks have various names such as leased lines, international private circuits, indefeasible rights to use (IRUs), and global networks. To establish these networks, telcos acquire the right to access capacity in various telecommunication cables throughout the world and supply capacity to their clients.

99. In *Overseas Telecommunications Commission (Australia) v. FCT*[35] Lockhart J had to decide whether, under the relevant IRU agreement, Overseas Telecommunications Commission (OTC) granted a right to use a cable to another party (STA) or whether there was an undertaking by OTC to provide telecommunication services to STA. This question would determine whether OTC was entitled to income tax deductions for investment allowance purposes. Lockhart J held the effect of the relevant IRU agreement was that OTC granted a right to STA. This was the substance of the transaction.

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[34] See *Re Moore* (1878) 8 Ch. D. 519 at 520.
[35] 89 ATC 5200; (1989) 20 ATR 1482.

100. This case supports our view that the supply of this type of capacity in an international telecommunication network is a supply of a right.

*Membership subscriptions*

101. Supplies of membership subscriptions can be difficult to characterise as there may be elements of services, rights or goods provided by the supplier. The principles outlined in GSTR 2001/8 are relevant in analysing a supply to determine whether it comprises separately identifiable parts that should be treated as supplies in their own right.

102. In characterising supplies of membership subscriptions it is necessary to determine what in substance and reality is supplied in return for the subscription payment. The characterisation of the supply does not depend on what an individual member subjectively paid the subscription for.[36]

***Example 1 – a professional membership subscription supplied to a non-resident***

103. *An Australian organisation supplies a professional membership subscription to a non-resident. The entity provides its members with:*

- *promotion of the interests of the profession or its members to the general public;*
- *advancing the knowledge of its members by sponsoring seminars or conferences;*
- *access to members-only information;*
- *library service including technical references or information;*
- *periodic journals or magazines;*
- *discounts on registration fees for conferences or seminars in Australia; and*
- *the right to use post-nominals demonstrating membership of the entity.*

104. *The supply is characterised as a supply of services and not a supply that is made in relation to rights. Although there are*

[36] See *Commissioners of Customs and Excise v. The Automobile Association* (1974) 1 BVC 8 and *British Railways Board v. Customs and Excise Commissioners* (1977) 1 BVC 116.

*incidental components of goods and rights, the dominant part of the composite supply is the supply of services. This is the supply for consideration.*[37]

105. There may be situations where the supply for consideration in respect of membership subscriptions is the supply of a right, or a combination of a supply of a right and a supply of services that are to be treated as separately identifiable parts of the supply. It will be a case of weighing up what is supplied in each case to determine the supply for which the subscription amount is consideration.

***Example 2 – a museum membership subscription for use outside Australia***

106. *A museum in Australia sells a membership subscription to an Australian resident. The membership subscription only entitles the Australian resident to a discount on the entry fee for specified affiliated museums in Europe.*

107. *The supply is characterised as a supply of rights. The Australian resident is supplied with the right to a discount for use outside Australia. The supply is GST-free under paragraph (a) of item 4.*

## Supply that is made in relation to rights 'for use outside Australia'

### *Meaning of 'for use'*

108. A supply that is made in relation to rights is GST-free under paragraph (a) of item 4 'if the rights are for use outside Australia'.[38]

108A. A supply does not fall within item 4 simply on the basis that the essential characteristics of the rights demonstrate that they may be used outside Australia. It is the intended use of those rights that determines if the supply that is made in relation to the rights falls within item 4. The extent to which the supply is taxable or GST-free is not affected by the actual use of the rights, other than as potential evidence of the intended use.

109. Support for the view that a test of whether something is for use in a particular way is about the intended use can be found in sales tax cases including the High Court decision in *Deputy Commissioner of*

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[37] Although item 4 does not apply in this situation, item 2 or item 3 may apply if the non-resident is not in Australia when the thing supplied is done and the other conditions of item 2 or item 3 are met.

[38] Provided subsection 38-190(2) or subsection 38-190(2A) does not operate to negate the GST-free status of the supply.

*Taxation v. Stewart and Another* (*Stewart's* case).[39] One of the questions the High Court had to decide was whether machines were 'goods for use…, and not for sale…by…a benevolent institution'[40] when they were supplied to public benevolent institutions.

110. Deane J's explanation of the requirement that the goods be 'for use' by a public benevolent institution makes it clear that what is relevant is projected use. His Honour explained that[41]:

> …the question whether particular goods satisfy the description of being goods for use by a public benevolent institution will ordinarily fall to be answered by identifying the relevant projected use of the goods and by ascertaining whether that use answers the description of a use of the goods by a public benevolent institution.[42]

111. [Omitted.]

112. Support is also found in the United Kingdom VAT Tribunal decision, *IDS Aircraft Ltd*.[44] The Tribunal had to decide whether the lease of an aircraft was 'for use' in a place outside any European Union ('EU') country throughout the period of the lease and therefore zero-rated.[45]

113. In deciding whether the dry leasing of the aircraft was made 'for use' in a place outside any country of the EU 'throughout the period' of the dry leasing, the Tribunal stated:

> What I have to determine in this case is whether the company let the Cessna on hire under the dry lease for use outside the EU throughout the period of the hiring. This in my judgment means that I am required to consider the intended purpose of the hiring. That dry lease was agreed by telephone without documentation and without any express agreement or term as to where it should be used or not used. The Cessna has a range well beyond the Channel Islands. On any objective basis it must have appeared likely to people in the aircraft chartering business that the Cessna would be used by Beauport for a significant period of the hiring in flights to and from, or over, countries of the EU. It is for the company to satisfy me that its appeal is justified. It has not satisfied me that on the balance of probabilities the charter was entered into for use only in the Channel Islands or elsewhere outside the EU.[46]

114. [Omitted.]

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[39] (1984) 154 CLR 385; (1984) 84 ATC 4146; (1984) 15 ATR 387.
[40] Item 81(1) in the First Schedule to the *Sales Tax (Exemptions and Classifications)* Act *1935*.
[41] *Stewart's* case (1984) 154 CLR 385 at 401-2; (1984) 84 ATC 4146 at 4155; (1984) 15 ATR 387 at 398.
[42] Taxation Ruling TR 2002/1 is also consistent with this analysis.
[43] *Stewart's* case (1984) 154 CLR 385 at 397-8; (1984) 84 ATC 4146 at 4153; (1984) 15 ATR 387 at 395-6.
[44] [1995] BVC 1126.
[45] Item 2 Grp 9 of Schedule 5, *Value Added Tax Act 1983* (UK).
[46] [1995] BVC 1126 at 1132.

115. There is authority to the effect that the intended use of a thing can encompass the intended on-supply of that thing. In *Shell-Mex and BP Ltd v. Clayton*[47] it was held by the UK Court of Appeal that oil was 'intended for the use of' the appellant notwithstanding that the appellant received the oil for the purpose of sale and distribution.

116. This case was cited with approval by the High Court in *Max Factor & Co v. FC of T*[48] (*Max Factor*) where it was held that the word 'use' is to be understood in its ordinary meaning of purpose served or object or end and is not restricted to any notion of actual physical use. In *Max Factor* a manufacturer of cosmetics was held to be applying goods to its own use (for the purposes of the relevant sales tax provision) in giving goods away in the course of its business.

116A. In *Travelex* French CJ and Hayne J noted that 'where it is evident that the currency is to be used overseas, the rights that attach to the currency are for use outside Australia.'[48A] Heydon J pointed to the intention of the purchaser of the currency being relevant in determining if the rights were for use outside Australia. Specifically, his Honour noted that 'Mr Urquhart acquired the currency with the intention of spending it in Fiji, and that intention was confirmed by the fact that he did spend it there.'[48B] The Commissioner considers that the intention of the purchaser of currency is relevant in determining if the rights attached to that currency are for use outside Australia. A supply in Australia of foreign currency from a foreign currency exchange company to a bank in Australia is not a supply made in relation to rights that are 'for use outside Australia' where the bank intends to sell the currency in Australia. The supply by the bank may satisfy the test of 'for use outside Australia' if it is the purchaser's intention to use the currency outside Australia.

117. The intended use of a right also encompasses the situation where the recipient does not actually exploit the right. For example, a patent may be acquired by an entity in the course of its enterprise to prevent other entities from exploiting that right. In these circumstances, the right is for use where it prevents other entities from exploiting the right.

118. A supply of insurance is for use where coverage of the risk is located. The insured has a right to be indemnified or a right to payment of a specified sum if the insured event occurs. The fact that a claim may be made in a particular place following the occurrence of an event, or that a claim must be made on the insurer in a particular place, does not mean that the right is for use in that place. In addition,

[47] [1955] 3 All ER 102.
[48] (1971) 124 CLR 353.
[48A] [2010] HCA 33 at 35
[48B] [2010] HCA33 at 56

the fact that no claim may be made on an insurance policy does not affect where the rights under the insurance policy are for use.

### *Example 3 – supply of public liability insurance to a resident company whose employees are working overseas*

119. *An insurance company in Australia supplies public liability insurance to an Australian resident company to protect it against liability claims arising as a result of any negligence by its employees while they are working overseas. The relevant contract is made by the parties in Australia.*

120. *The contract of insurance gives the insured party a right to be indemnified if the insured event occurs. The right to be indemnified is for use where the insured event or coverage of the risk is located.*

121. *As the risk that is covered by the insurance policy is outside Australia, the right is for use outside Australia. The supply is GST-free under paragraph (a) of item 4.*

122. The extent to which rights are actually used outside Australia may prove to be different from the intended use. This may happen if there is a change in circumstances which was not foreseen when the judgment about the intended use was made, that is, when the rights were created, granted, transferred, assigned or surrendered. As noted at paragraph 114, the difference between the intended and actual use does not affect the extent to which the supply is taxable or GST-free.

123. However, a large variation that is not explicable by an unforeseen change in circumstances may be evidence that the assessment of the intended use was not reasonable. This is an example of where actual use may be relevant as evidence of the intention when the supply was made.[49]

### *Supplies of services made in relation to rights that a recipient already owns*

123A If a supply of services is made to a recipient in relation to rights that the recipient already owns, we consider that it is the intended use of the rights at the time the services are provided that is relevant. The previous use of the rights is not relevant, other than as potential evidence of the intended use. Accordingly, a supply of a service is not GST-free if it is made in relation to rights that, before the supply of the service, were used offshore, but following the supply are intended to be used in Australia.

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[49] *Stewart's* case (1984) 154 CLR 385; (1984) 84 ATC 4146; (1984) 15 ATR 387, per Brennan J at 397-8; 4153; 395-6.

### *Supply that is made in relation to rights that are partly for use outside Australia*

124. Section 9-5 provides that a supply is not a taxable supply to the extent that it is GST-free or input taxed. Accordingly, a supply that is made in relation to rights is GST-free under paragraph (a) of item 4 to the extent that the rights were intended, at the time they were created, granted, transferred, assigned or surrendered, to be used outside Australia.

125. You work out the GST payable on a supply that is made in relation to rights that are partly for use outside Australia by apportioning the consideration between the part of the supply that is made in relation to rights for use in Australia and the part that is made in relation to rights for use outside Australia. Apportionment of the consideration for a supply that includes taxable and non-taxable parts[50] is discussed in Goods and Services Tax Ruling GSTR 2001/8.[51]

126. You may use any reasonable method of apportioning the consideration between the part of the supply that is made in relation to rights for use in Australia and the part that is made in relation to rights for use outside Australia.

### *Reasonable method of apportionment*

127. What is a reasonable method of apportioning the consideration for a supply to reflect the extent to which rights are for use outside Australia depends on the nature of the supply and all the surrounding circumstances. In some cases, this may be evident to the supplier of the rights from the contract that the supplier has entered into.

128. However, in many cases it is the recipient of the supply who will have the best information available to it to determine the extent to which the rights are for use outside Australia. It is expected that, in these circumstances, the supplier will consult with the recipient to obtain that information or to be satisfied that the recipient has made a genuine attempt to determine the extent to which the rights are for use outside Australia.

129. Factors that may be relevant to forming a judgment as to the extent of intended use of rights for the purposes of paragraph (a) of item 4 include:

- expectations of the recipient, based on reasonable grounds, as to the likely use of the right over the period for which the right is granted, or if the right has been

[50] A part of a supply that is GST-free is a 'non-taxable part' for the purposes of GSTR 2001/8 (see paragraph 32).
[51] See paragraph 25 of GSTR 2001/8.

granted for an unspecified period, the expectations of the recipient as to the likely use over the anticipated period of use;

- economic, social, cultural and political conditions - the nature of the right itself, for example, the language of a written work or its relevance to a particular culture, may influence where the right will be used;
- past revenue, royalty or profitability patterns evident from the use of similar rights - this may come from industry statistics or from past experience in the recipient's business; and
- projected use of the right in and outside Australia based on market research.

***Example 4 – supply of worldwide copyright***

130. *An Australian resident musician assigns worldwide copyright in music to an Australian resident record company. The relevant contract is signed by the parties in Australia.*

131. *The supply of copyright is not a supply of goods or real property for GST purposes.*

132. *The supply of copyright will be GST-free under paragraph (a) of item 4 to the extent that the supply of rights is for use outside Australia. A reasonable basis of apportionment should be used. A reasonable basis may be the proportion of total projected sales or profits that is expected to be generated outside Australia.*

*Alternative View*

133. There is an alternative view that apportionment is not required by paragraph (a) of item 4. Under this view, a supply is wholly GST-free under paragraph (a) of item 4 if, having regard to the essential and substantive character of the supply, it is properly characterised as a supply made in relation to rights for use outside Australia, notwithstanding that there may also be intended use of the right in Australia. It would follow that a supply may be fully taxable, notwithstanding that there may be some intended use of the right outside Australia, if its essential and substantive character is as a supply made in relation to rights for use in Australia.

134. However, this alternative view does not, in the Commissioner's view, give effect to the requirement in section 9-5 that a supply is not taxable to the extent that it is GST-free.

### *Attribution of GST*

135. The basic attribution rules are set out in Division 29. If you account for GST on a cash basis you attribute GST on a taxable supply to the tax period in which you receive consideration for the supply to the extent that the consideration is received in that tax period.[52] If you do not account for GST on a cash basis, you attribute all the GST payable on a taxable supply to the earlier of the tax period in which:

- any of the consideration for the supply is received; or
- an invoice for the supply is issued.[53]

*Where there is a periodic or progressive supply or acquisition, can Division 156 be used to attribute based on actual use?*

136. Division 156 provides a special rule where you do not account for GST on a cash basis and a supply is made for a period or on a progressive basis. Under Division 156, where a supply is made for a period or on a progressive basis and the consideration is provided on a progressive or periodic basis, the GST payable and input tax credits are attributed as if each periodic component were a separate supply/acquisition. An example is where rights are granted for a period in return for the payment of periodic royalties.

137. Division 156 does not treat the supply as if it were a series of separate supplies. Rather, it simply allows the GST on the supply to be attributed as if there were separate supplies. Where a right is supplied for a period and is partly for use outside Australia, you apportion the consideration for the supply to its GST-free part, based on the extent to which the right is intended, when the supply is made, to be used outside Australia. This means that the apportionment will be the same for each component of a progressive or periodic supply covered by Division 156.

138. Similarly, under Division 29, if you account for GST on a cash basis, you attribute GST progressively as you receive the consideration. This means that the apportionment will be the same for each tax period to which you attribute the GST payable as you receive the consideration.

139. An example of a supply that is partly taxable is the supply of a right assigned in Australia to another Australian entity to exploit copyright on a worldwide basis for 10 years. Based on the expected use of the copyright in Australia and outside Australia, the royalty payments are for a partly taxable and partly GST-free supply. The

[52] Section 29-5(2).
[53] Section 29-5(1).

supplier needs to determine, at the time of making the assignment, where the right is to be used to determine the taxable portion of the supply. As the royalty payments are for a supply for a period, the amount of GST to be remitted by the supplier in each tax period is based on the intended use at the time the supply is made. Division 156 cannot be used to apportion based on the actual use in each tax period.

### *No adjustment where actual use differs from intended use*

140. Division 19 outlines how adjustments arise through adjustment events. Subsection 19-10(1) states:

> An adjustment event is any event which has the effect of:
>
> (a) cancelling a supply or acquisition; or
>
> (b) changing the consideration for a supply or acquisition; or
>
> (c) causing a supply or acquisition to become, or stop being, a taxable supply or creditable acquisition.

141. The extent to which a supply of a right is GST-free under paragraph (a) of item 4 is a question of apportionment based on the extent of intended use of the right outside Australia. There is no adjustment event under paragraph 19-10(1)(c), where the actual use differs from the intended use, as nothing has occurred to cause the supply to become or stop being a taxable supply. A change in use of a supply of rights does not cause the supply to become or stop being a taxable supply for the purposes of Division 19.

142. Adjustments to input tax credits for changes in use are accounted for under Division 129. However, there are no adjustments, under Division 129 or any other provision, to the input tax credit entitlement of the recipient of a supply made in relation to rights, as a consequence of a variation between the intended use of the rights outside Australia and their actual use.

## Subsection 38-190(2)

143. Subsection 38-190(2) is designed to ensure that the supply of a right or option is not GST-free if the right or option can be redeemed for the supply of something else, the supply of which would be a taxable supply. A supply to which subsection 38-190(2) applies is not GST-free even if item 4 or another item in the table in subsection 38-190(1) would otherwise apply.

144. Without subsection 38-190(2), the supply of a thing that is connected with Australia, and not otherwise GST-free, could occur

without GST being payable, if all of the consideration were to be provided for the granting of a right or option to acquire the thing, notwithstanding that when the thing itself is supplied it may be consumed in Australia.

145. If there is a supply of a right or option to acquire *a supply that would be GST-free*, subsection 38-190(2) does not negate the GST-free status of the supply of the right or option accorded by one of the items in the table in subsection 38-190(1). This includes a case where the underlying supply is itself GST-free under one of the items in the table in subsection 38-190(1).

146. Subsection 38-190(2) was amended by the *Indirect Tax Legislation Amendment Act 2000* to make it clear that the subsection does not apply where the supply underlying the right would be GST-free. That is, where the right is redeemed for a GST-free supply.

147. The example given in the Explanatory Memorandum to the Bill[54] for that Act is of a supply of a right where the underlying supply is a financial supply to a non-resident that is GST-free. It was recognised that to treat the supply of the right as not being GST-free, when the underlying supply would be GST-free, would have been inconsistent.

148. Where a transaction involves a supply of a right or option to acquire something, the supplier will usually enter into an obligation to supply the thing if the right or option is exercised. The fact that the transaction also involves an entry into an obligation does not in itself preclude the operation of subsection 38-190(2) if there is a relevant supply of a right or option to acquire something.

***Example 5 – right or option to acquire equipment***

149. *An Australian company grants an option to acquire equipment in Australia to a non-resident company that is not in Australia when the grant occurs. There are within the one contract both the creation of the contractual right to acquire the equipment and the entry into the contractual obligation to supply the equipment (if the option is exercised). The supply of the option is the substance of the supply. Subsection 38-190(2) ensures that the supply of the right to acquire the equipment is excluded from GST-free status under any of the items in the table in subsection 38-190(1), as the supply of the equipment would be connected with Australia and would not be GST-free.*

150. Subsection 38-190(2) uses the composite expression 'supply of a right or option to acquire something'. If the drafter had intended that the expression should cover all of the ways that a right may be

[54] Indirect Tax Legislation Amendment Bill 2000 Explanatory Memorandum at paragraph 3.28.

supplied as contemplated by paragraph 9-10(2)(e), it is to be expected that the phrase 'supply that is made in relation to rights' used in item 4 would also have been used in subsection 38-190(2). Since it was not, we take the view that the expression takes its ordinary meaning. As such, it is apt to cover a supply of a right or option to acquire something by way of grant or creation of the right or option or transfer or assignment of the right or option, but does not extend to a surrender of a right or option to acquire something.

# Detailed contents list

151. Below is a detailed contents list for this draft Ruling:

| | Paragraph |
|---|---|
| **What this Ruling is about** | **1** |
| **Date of effect** | **7** |
| **Legislative context** | **9** |
| Connected with Australia | 10 |
| GST-free supplies | 13 |
| **Ruling** | **20** |
| Supplies that are capable of being covered by item 4 | 22 |
| *A supply of goods* | 22 |
| *A supply of real property* | 24 |
| *What is a right?* | 25 |
| *What is 'a supply that is made in relation to rights'?* | 27A |
| *Category 1 – Supplies identified in paragraph 9-10(2)(e)* | 27B |
| *Category 2 – supplies of things that comprises a bundle of rights that derive their value exclusively, or almost exclusivelyfrom those rights* | 27E |
| *Category 3 – supplies of services directly connected with rights* | 28 |
| Supply that is made in relation to rights 'for use outside Australia' | 36 |
| *Meaning of 'for use'* | 36 |
| *Supply that is made in relation to rights that are partly for use outside Australia* | 39 |
| Subsection 38-190(2) | 41 |
| **Explanation (this forms part of the Ruling)** | **43** |

Supplies that are capable of being covered by item 4 43

*A supply of real property* 46

*What is a right?* 50

*Alternative view* 51

*What is 'a supply that is made in relation to rights'?* 54

*Category 1 – supplies identified in paragraph 9-10(2)(e)* 64

*Category 2 – supplies of things comprising a bundle of rights that derive their value exclusively, or almost exclusively, from those rights* 73

*Category 3 – supplies of services directly connected with rights* 75

*Alternative view* 79D

*Some examples of characterising supplies that are made in relation to rights and other supplies* 81

*Intellectual property* 81

*Computer software* 83

*Insurance* 95

*Supply of capacity in an international telecommunication network* 98

*Membership subscriptions* 101

*Example 1 – a professional membership subscription supplied to a non-resident* 103

*Example 2 – a museum membership subscription for use outside Australia* 106

Supply that is made in relation to rights 'for use outside Australia' 108

*Meaning of 'for use'* 108

*Example 3 – supply of public liability insurance to a resident company whose employees are working overseas* 119

*Supplies of services made in relation to rights that a recipient already owns* 123A

*Supply that is made in relation to rights that are partly for use outside Australia* 124

*Reasonable method of apportionment* 127

*Example 4 – supply of worldwide copyright* 130

*Alternative view* 133

*Attribution of GST* 135

*Where there is a periodic or progressive supply or acquisition, can Division 156 be used to attribute based on actual use?* 136

*No adjustment where actual use differs from intended use* 140

Subsection 38-190(2) 143

*Example 5 – right or option to acquire equipment* 149

**Detailed contents list** **151**

**Commissioner of Taxation**
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*Previous draft:*

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TR 93/12; TR 2002/1; TR 2006/10; GSTR 2000/28; GSTR 2000/31; GSTR 2001/4; GSTR 2001/8; GSTR 2002/2; GSTR 2012/2

*Subject references:*

- adjustment
- apportionment
- attribution
- copyright
- for use
- goods
- GST-free
- insurance
- intellectual property
- international telecommunications network
- membership subscriptions
- non-resident
- not in Australia
- outside Australia
- real property
- rights
- software
- supply that is made in relation to rights

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