

Ruling Compendium – GSTD 2015/2

This is a compendium of responses to the issues raised by external parties to GSTD 2014/D3 *Goods and services tax: what is a 'destination outside Australia'*^{*} for the transport of a passenger by sea under item 1(a) and item 4 of subsection 38-355(1)?

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	'Destination outside the indirect tax zone' is too narrow Each place where the ship stops, or lays anchor, is a 'destination' in the sense that the passenger would want to see the sights and undertake activities at that place. The ordinary meaning does not support the Commissioner's view that the mere fact a ship goes to, passes by, or travels through a region outside of the indirect tax zone is not sufficient to establish the transport of a passenger to a destination outside the indirect tax zone when that region or place is the place to which the vessel is travelling or is intended to travel. Subsection 38-355(1) of the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (GST Act) does not support the adoption of a restrictive definition of 'destination outside the indirect tax zone' because this term is used interchangeably with 'place in/outside Australia' subsection 38-355(1).	Agree. We have omitted the words 'goes to' from the former paragraphs 2 and 10. This updates the view to mean when a ship merely passes by, or travels through, a region outside the indirect tax zone this is not sufficient to establish the transport of a passenger is to a 'destination outside the indirect tax zone'. The ship is required to stop at the location to meet the meaning of 'destination outside the indirect tax zone'. This change is made in the new paragraphs 4 and 17.

^{*} From 1 July 2015, the term indirect tax zone has replaced the term 'Australia' in nearly all instances within the GST, Luxury Car Tax, and Wine Equalisation Tax legislation 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 The scope of the new term, however, remains the same as the now repealed definition of 'Australia' used in those Acts.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.

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2.	‘Destination outside the indirect tax zone’ is to a location without any express qualitative criteria The requirement that a ‘destination outside the indirect tax zone’ is a location that is significant to the passenger is not authorised under the statute and is not practical. Item 1(a) of subsection 38-355(1) of the GST Act provides that the transport of a passenger from a place in Australia to a destination outside the indirect tax zone is GST-free. The statute requires a location with no express <i>qualitative</i> criteria. A location is a specific position or point in physical space.	Under the statute it is the destination of the passenger that is relevant. This provides a basis for the Commissioner’s view that the destination must be a location that is significant to the passenger. The Commissioner has clarified what the objective nature of this test means for the supplier (refer to new paragraphs 3 and 8 to 11). The supplier can determine the significance to the passenger according to what the supplier agrees to supply to the passenger. The supplier should have regard to the facts and circumstances considered objectively when the transport is sold. The Commissioner accepts that the passenger does not need to participate in any particular activity at the location for the location to be a destination for the passenger. Examples of locations that would be significant to the passenger are given and include: • the passenger agrees to be transported to the location, • the location is on the passenger’s itinerary; • the passenger disembarks at the location. In terms of the other qualitative criteria used, the Commissioner has added a reference to a recent court case at footnote 4, which supports the view that the location needs to be a specific physical location - in cf <i>CPCF v. Minister for Immigration and Border Protection</i> [2015] HCA 1 (at [377]) ‘a destination’ must be a place that is ‘objectively identifiable’.

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3.	‘Destination outside the indirect tax zone’ should be consistent with GSTR 2003/4 The definition of ‘destination’ should be consistent with the term as defined in GSTR 2003/4. This means that the supply of a cruise that starts and ends at ports in Australia and involves the ship stopping or laying anchor at a predetermined location which is outside Australia or an external Territory is GST-free.	A new paragraph 5 is added to clarify that the ‘destination outside the indirect tax zone’ does not need to be a final destination or final place of disembarkation of the passenger.
4.	‘Destination outside the indirect tax zone’ should be the supplier’s decision The existence of a ‘destination outside the indirect tax zone’ should be made by the supplier. The Full Federal Court in <i>Federal Commissioner of Taxation v. Secretary to the Department of Transport</i> held that whether or not there is a taxable supply should be determined by the entity making the supply. What if, in Example 2, Jeff selected the diving option but Jeff’s partner did not? Does this mean the destination is significant to the diving passengers and not the non-diving passengers? The objective significant to the passenger test makes the law practically impossible for cruise companies and their agents to comply with. This makes the Commissioner’s administration more difficult. The sentence ‘The reefs are specifically identifiable locations which were significant to Jess when he purchased the ticket’ should be removed from Example 2. It infers a subjective test to determine whether the destination is outside the indirect tax zone.	The Commissioner agrees that it is the supplier who needs to determine if the supply is a taxable supply. As discussed at item 2 above, it is the destination of the passenger that is relevant, under item 1 of subsection 38-355(1) of the GST Act. The former Example 2, at paragraph 14, is clarified in the new paragraphs 15 and 16. All passengers have agreed to be transported to the reefs. It is clarified in the new paragraph 16 that all passengers meet the ‘significance to the passenger’ requirement. It is not relevant that Alan and Mary do not partake in activities at the reef.

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5.	‘Destination outside the indirect tax zone’ and the location being ‘significant to the passenger’ - can this be changed to ‘significant to a reasonable person’? If the significance of the destination is to remain, the Commissioner should reinforce this as an objective test by including in the final Determination an application of this test to a ‘reasonable passenger’. Guidance on the objective factors that should be considered to determine whether the ‘reasonable passenger’ would regard a physical location outside the indirect tax zone as being significant when the transport is purchased, such as itineraries and marketing materials, should be included. The Commissioner should also confirm whether a single cruise will have a common GST treatment, thus avoiding the need to consider complications arising from the significance of the destination being different for different passengers.	The Commissioner has clarified the significant to the passenger requirement as discussed at item 2 above.

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6.	‘Destination outside the indirect tax zone’ and the location being ‘significant to the passenger’ – can this be by reference to the itinerary and marketing? The ordinary meaning does not support that the significance to the passenger should be taken into consideration in determining the existence of a ‘destination outside the indirect tax zone’. A ‘destination outside the indirect tax zone’ should be determined with reference to the proposed itinerary of the ship. This will then satisfy the interpretation of ‘destination outside the indirect tax zone’ in the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 [at 5.112] which states: ‘Supplies of transport specified in section 38-355 are GST-free, including supplies of transport into and out of Australia for passengers and goods. Any transport that is wholly outside Australia is also GST-free. Such supplies are consumed outside Australia’. The intent of the law is that supplies that transport passengers out of the indirect tax zone should be GST-free because the supplies are consumed outside the indirect tax zone. This will then be consistent with GSTR 2003/4 and ATO ID 2007/115. ATO ID 2007/115 states that for the <i>Excise Act 1901</i>, where ships stores are intended for an international voyage, the fact that the itinerary changes after commencement of the journey and becomes a domestic voyage does not alter the fact that the ships stores are exported for Excise Act purposes. The intent/scheduled itinerary at the start of a voyage determines the classification of the ship’s stores. Similarly, for ‘destination outside the indirect tax zone’, the intended/scheduled itinerary should be the deciding factor in determining whether a passenger has been transported to a ‘destination outside the indirect tax zone’.	The Commissioner has clarified the significant to the passenger requirement as discussed at item 2 above. This clarification includes stating, at the new paragraph 3, that the requirement is satisfied when the location appears on the passenger’s itinerary.

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7.	GST-free under subsection 38-190(1) Item 3 – why the restrictive interpretation? The transport of passengers is a provision of services that is GST-free under Item 3 of subsection 38-190(1) of the GST Act when the supply is to a recipient who is not in the indirect tax zone and the services are supplied and the effective use or enjoyment of the services takes place outside the indirect tax zone. Given this, the Commissioner's restrictive interpretation of a 'destination outside the indirect tax zone' creates an administrative burden for industry participants and will result in only a minimal increase in GST revenue for the ATO.	The Commissioner has clarified the meaning of 'destination outside the indirect tax zone' with a more sufficient explanation of the meaning of 'a location being significant to the passenger having regard to the facts and circumstances considered objectively when the transport is purchased'. Refer to item 2 above.
8.	Willis Island cruise clarification Cruise packages depart from the indirect tax zone to Willis Island, 450 kilometres off Cairns, and return to the indirect tax zone. The itinerary includes this stop and the stop is marketed as an opportunity to view birdlife. It is uncertain whether this location is considered to be significant to a passenger or all passengers. This may lead to a partly-taxable classification which is contrary to the intent of the law that voyages to destinations outside the indirect tax zone should be GST-free. The additional GST apportionment and administration (to price transportation and goods and services aboard within the 12 nautical mile limit) would make this cruise unviable. Can the ATO please confirm whether this cruise will be affected and whether this is the intention of the change in treatment?	The Commissioner agrees and has added a new Example 1, at the new paragraphs 13 and 14.

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9.	Expand on section 38-190 and 38-355 This ruling has broad application to not only the passenger shipping industry but to sightseeing, deep sea fishing, research and other vessel operations. The focus on section 38-355 of the GST Act although appropriate, does not provide a comprehensive GST solution for operators. An operator, such as described in Example 1, may conclude that fares for its whale watching excursion are fully taxable due to the absence of a 'destination outside the indirect tax zone'. However, the fares are only partially taxable because the supply is made to a recipient who is not in the indirect tax zone when the thing is supplied and the effective use or enjoyment takes place outside the indirect tax zone under subsection 38-190(1) of the GST Act. The draft Determination needs to be expanded, or a companion ruling needs to be issued under section 38-190 for the various operators and advisers to have a comprehensive solution.	Acknowledged. However, other ruling products do consider the application of section 38-190 of the GST Act, which can be considered in the few situations that section 38-355 of the GST Act will not apply. The Commissioner does refer to these other rulings in Note 1 at the end of this Determination.
10.	Refuel stop The Determination should include an example to illustrate how the ruling applies to a refuel stop. A refuel stop is not likely to be significant to the passengers.	A refuel stop requires the ship to stop. The Commissioner has clarified the meaning of the 'significant to the passenger' requirement, at the new paragraph 3. The requirement is satisfied when a passenger agrees to be transported to a location or a location appears on a passenger's itinerary.

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11.	Willis Island – reinsurance changes will not adversely affect cruise industry growth in Queensland The cruise sector is the fastest growing sector of Australia’s tourism industry. The impact on cruise shipping with particular regard to the interpretation of Willis Island as a ‘destination outside the indirect tax zone’ needs careful consideration. Cruise companies often include Willis Island as a destination on Australian domestic cruises to take advantage of duty free provisions. Cruise ships anchor offshore of Willis Island for a few hours before continuing with their voyage. Passengers do not generally disembark which may mean that Willis Island will not be considered a ‘port of call’ in future. According to key cruise industry stakeholders, if the ATO was to change the status of Willis Island, this could impact on the viability of some cruise voyages and represent a significant loss of domestic visitation and revenue to Queensland.	Refer to item 8 above.