GSTR 2019/1EC - Compendium

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Australian Government
Australian Taxation Office

Public advice and guidance compendium – GSTR 2019/1

Relying on this Compendium

This Compendium of comments provides responses to comments received on draft Goods and Services Tax Ruling GSTR 2019/D2 *Goods and services tax: supply of anything other than goods or real property connected with the indirect tax zone (Australia)*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	Some of the more common cross border structures are not sufficiently addressed in the draft ruling. In particular, we note the Commissioner has not addressed the following scenarios: (a) a non-resident entity making supplies to Australian companies and being provided with various marketing and sales support services from an Australian resident subsidiary, and (b) non-resident entity making supplies to Australian companies and having some presence in Australia which has little or no involvement in these supplies. In this respect, it would be helpful for the Commissioner to include some guidelines and examples for determining which presence has the relevant involvement in the supply.	No change made. At paragraph 8 of the Ruling we state[1]: A supply of an intangible is connected with Australia under paragraph 9-25(5)(b) if the supplier: • carries on an enterprise in Australia within the meaning given by section 9-27, and • makes the supply through that enterprise. It is first necessary to be satisfied that there is an Australian GST presence under section 9-27 before considering the 'through' test. The presence in Australia in example (a) is a separate legal entity and that entity, if it isn't an agent covered by section 9-27, is unlikely to be an Australian GST presence under section 9-27. Therefore whilst the marketing services are important activities in leading up to a supply there is no need to consider the 'through' test unless the enterprise is conducting those activities within an Australian GST presence under section 9-27. We consider that paragraph 9-25(5)(b) is a positive test therefore the focus is not finding the presence most closely linked to the supply it is about determining if the supply is connected with an Australian presence

[1] All legislative references in this compendium are to the *A New Tax System (Goods and Services Tax) Act 1999*.

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		under section 9-27. Also the supply may be connected with an overseas presence as well as the Australian GST presence and still satisfy paragraph 9-25(5)(b) (see paragraph 14 of the Ruling). For this reason we do not consider it necessary to provide examples for determining which presence has the relevant involvement in the supply. Paragraph 18 of the Ruling covers strong indicators that the supply is connected with an Australian GST presence. Examples 2 to 5 of the Ruling cover examples where the entity making the supply has an Australian GST presence and also has a presence outside Australia.
2	Example 2 of the draft Ruling relates to an Offshore Company making supplies to Australian customers under delegated authority (as agent for) an Australian company. It would be useful to include an example where there is no express delegated authority as this is a far more common scenario.	No change made**.** In this situation, Friday Pty Ltd has an Australian GST presence and the directors carry on the business from a fixed place in Australia. Whether or not the overseas based agent has delegated authority will not alter whether the supply is made through the Australian GST presence. The example is demonstrating that in order for paragraph 9-25(5)(b) to be satisfied it is only necessary to establish a connection with the Australian presence, and therefore even if there is an overseas based agent (with or without delegated authority) the supply can still be made through the Australian GST presence. For these reasons, we do not consider it necessary to make changes to the example or include an additional example to consider the situation where there is no delegated authority.
3	Paragraph 14 of the draft Ruling notes that a supply may be connected with an entity's presence in more than one jurisdiction. The Commissioner should note that the GST-free provisions in the Australian GST Act, and equivalent provisions in the non-resident supplier's country, should ensure GST, value-added tax (VAT) or similar taxes are not incurred in both countries in relation to the one transaction. We note that bringing a non-resident's activities in its home country within the scope of Australia's GST law increases the potential for a single supply being taxed in two different countries. In the case of the 'Netflix' amendments, we understand this has been managed through	No change made. This is beyond the scope of this Ruling. We note: • The flow chart at the beginning of the Ruling highlights that the scope of the Ruling is limited to considering when a supply is connected with the indirect tax zone under paragraphs 9-25(5)(a), (b) and (c). It does not consider whether a supply could be GST-free under another section of the Act, for example section 38-190. • The Ruling does include a number of references in examples to the fact that the supply may be GST-free under other provisions

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	international cooperation. Paragraph 14 of the Ruling makes a broad assertion that should be afforded a limiting context. Clearly an outcome that produces double taxation is inappropriate.	for example section 38-190.
4	Paragraph 18 of the draft Ruling, while noting that each case must be determined on its merits (not an easy matter for a transactional tax involving many daily transactions), lists a number of factors the Commissioner considers when determining whether a supply is connected with an Australian GST presence. One of these factors is (emphasis added): where the relevant individuals of the Australian GST presence…perform the activities that **facilitate** the making of the supply Another factor in paragraph 18 of the draft Ruling is (emphasis added): 'if the supply is the grant, creation, assignment, transfer, surrender or licence of a right, that supply is **facilitated** by the relevant individuals of the Australian GST presence'. This is contrasted with paragraph 86 of GSTR 2000/31 (now withdrawn) which stated: if the supply is the grant, creation, assignment, transfer or surrender of a right, the permanent establishment grants, creates, assigns, transfers or surrenders that right. The use of the term 'facilitated' gives the Commissioner a very broad and subjective criterion for connecting a supply to an Australian presence. Under subsection 9-25(5), the supplier must make the supply through an enterprise the supplier carries on in Australia. We submit that to 'facilitate' a supply is an action that is something significantly less than the activity of making a supply 'through' a particular presence. The outcome of the Commissioner's view in this regard is that non-resident suppliers supplying services and intangibles to Australian-based business recipients will be required to register for GST purposes if an entity(s) in Australia in some way facilitates the supply. Such an outcome would be inconsistent with the Board of Taxation's recommendations. Further, bringing such entities into the Australian GST system is completely unnecessary.	No change made. We do not agree with the comments made about facilitating a supply. If the presence in Australia is an intermediary (a separate legal entity) it is unlikely that the intermediary would satisfy the Australian presence test under section 9-27 if all they provide is facilitation services on behalf of the supplier. As such the 'through' test would not need to be considered (see paragraph 8 of the Ruling). Further, they will not be considered to be an agent for the purposes of Division 57. It is only if the supplier carries on an enterprise in Australia that the through test needs to be considered. For example, if employees based in Australia (as opposed to an agent) carry on many of the activities that lead up to the making of a supply (such as facilitating services) then the supply will be considered as being made through the enterprise carried on in Australia.

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	We further note that Division 57 would not be a potential mechanism for keeping the non-resident supplier out of the GST system as an entity facilitating (in some way) a supply by the non-resident is unlikely to be acting in an agency capacity.	