GSTD 2007/D2 - Goods and services tax: if a non-resident individual owns residential rental property in Australia and an Australian accountant makes a supply to that individual that consists of advice about that property and tax return preparation services, is that supply wholly or partly GST-free if made on or after 1 April 2005?

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Draft Goods and Services Tax Determination

Goods and services tax: if a non-resident individual owns residential rental property in Australia and an Australian accountant makes a supply to that individual that consists of advice about that property and tax return preparation services, is that supply wholly or partly GST-free if made on or after 1 April 2005?

Preamble

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way the law applies. It is not a ruling or advice for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*. You can rely on this publication to provide you with protection from interest and penalties as follows. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

1. No, the supply is not GST-free. Even if the supply made by the Australian accountant to the non-resident individual is GST-free under item 2 or item 3 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), subsection 38-190(2A) of the GST Act negates the GST-free status of that supply. This is because the acquisition of that supply by the non-resident individual relates (directly or indirectly, or wholly or partly) to the making of a supply of real property situated in Australia that would be input taxed under Subdivision 40-B (lease, hire or licence of residential premises) or Subdivision 40-C (sale or long-term lease of residential premises) of the GST Act.

2. If the tax return preparation services include services that do not relate to the making of a supply of real property that would be input taxed, for example, income from other sources is returned, or even if the advice includes other matters such as share investments, the supply of services to the non-resident individual is not partly GST-free. There is no apportionment under subsection 38-190(2A) of the GST Act. Therefore, if the requirements of section 9-5 of the GST Act are met, the supply by the Australian accountant to the non-resident individual is a taxable supply.

3. In practice the Australian accountant may make a single supply of services comprising advice and tax return preparation services or two separate supplies being a supply of advice and a supply of tax return preparation services. Whether there is a single supply of services or two separate supplies in any given case is determined according to the facts of the particular case and is not discussed in this draft Determination.

4. Unless otherwise stated, all legislative references in this draft Determination are to the GST Act and all references to an item number are to an item in the table in subsection 38-190(1).

Background

5. An individual that owns residential rental property in Australia (the property owner) commonly acquires a wide range of supplies in the course of renting or selling that property. For example, the property owner may acquire real estate services, conveyancing services, repair services and accounting services.

6. Prior to 1 April 2005, supplies of such services made to a non-resident property owner were often GST-free under item 2 or 3 if the non-resident property owner was not in Australia in relation to the supply[1] when the services were performed. By comparison, the same services were not GST-free if supplied to a resident property owner, or a non-resident property owner, who was in Australia in relation to the supply when the services were performed.

7. Subsection 38-190(2A) removes this anomaly by negating the GST-free status of a supply to a non-resident property owner if the acquisition of that supply relates, directly or indirectly, or wholly or partly, to the making of a supply of real property in Australia that would be wholly or partly input taxed under Subdivision 40-B or 40-C.
Subsection 38-190(2A) ensures the same GST treatment applies to both non-resident and resident owners who supply residential property situated in Australia.

Explanation

8. Section 38-190 provides that in certain circumstances supplies of things, other than goods or real property, for consumption outside Australia are GST-free. A supply is GST-free if it meets the requirements of items 1 to 5. However, the GST-free status of the supply is negated where subsection 38-190(2),[2] 38-190(2A) or 38-190(3)[3] applies to the supply.

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[1] See GSTR 2004/7 Goods and services tax: in the application of items 2 and 3 and paragraph (b) of item 4 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*: when is a 'non-resident' or other 'recipient' of a supply 'not in Australia when the thing supplied is done'?; when is 'an entity that is not an Australian resident' 'outside Australia when the thing supplied is done'?

[2] See 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).

[3] See GSTR 2005/6 Goods and services tax: the scope of subsection 38-190(3) and its application to supplies of things (other than goods or real property) made to non-residents that are GST-free under item 2 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*.

9. If a supply made by an Australian accountant consists of advice and tax return preparation services and that supply is made to a non-resident property owner who is not in Australia when the services are performed, the supply of the services is GST-free under paragraph (a) of item 2. The supply of advice and tax return preparation services is neither a supply of work physically performed on goods situated in Australia when the work is done, nor a supply directly connected with real property in Australia.[4] Under paragraph (b) of item 2, a supply that is acquired by a non-resident who is carrying on an enterprise and who is not registered or required to be registered is GST-free even if the supply is directly connected with real property in Australia.

10. However, under subsection 38-190(2A), a supply made on or after 1 April 2005 that is covered by any of items 2 to 4 is not GST-free if:

- the acquisition of the supply relates (whether directly or indirectly, or wholly or partly) to the making of a supply of real property situated in Australia; and
- the supply of that property would be, wholly or partly, input taxed under Subdivision 40-B or 40-C.

11. It is therefore necessary for a supplier to determine whether the supply is an acquisition by the non-resident property owner that relates, (whether directly or indirectly or wholly or partly), to the making of a supply that would be input taxed under Subdivisions 40-B or 40-C.

12. The phrase 'relates to', is not defined and takes its ordinary meaning. It has been held to be capable of wide meaning.[5] In any case, that the phrase is intended to have a wide meaning and application is put beyond doubt by the words 'whether directly or indirectly, or wholly or partly' in subsection 38-190(2A), which amplify its scope.

13. The Explanatory Memorandum (EM) accompanying the Bill[6] that inserted subsection 38-190(2A) further evidences Parliament's intention that the provision should have broad application. Example 9.2 illustrates that the acquisition of a supply of tax advice in the course of tax return preparation is not GST-free even though the acquisition of the advice only relates in part to the making of a supply of a rental property and the advice on the rental property only indirectly relates to the making of that supply. The EM also indicates (at paragraph 9.6) that the acquisition of architectural services for a particular property, real estate property management services, building insurance, legal services in preparing an instrument of mortgage over real property, public liability insurance and advertising services can relate (either directly or indirectly) to the making of supplies of real property.

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[4] See GSTR 2003/7 Goods and services tax: what do the expressions 'directly connected with goods or real property' and 'a supply of work physically performed on goods' mean for the purposes of subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*?

[5] See *HP Mercantile Pty Ltd v. Federal Commissioner of Taxation* 2005 ATC 4571, at 4578.

[6] Tax Laws Amendment (2004 Measures No. 6) Bill 2004 enacted as *Tax Laws Amendment (2004 Measures No. 6) Act 2005*.

14. The acquisition of tax return preparation services relates to the making of a supply of residential rental property situated in Australia that would be input taxed under Subdivision 40-B or 40-C, if the tax return preparation services are performed, whether in whole or in part, to return income, deductions or other matters in respect of that property. That an acquisition can relate to the making of input taxed supplies in an earlier period is consistent with the comments of Hill J in *HP Mercantile Pty Ltd v. FCT*[7] concerning the requirement in paragraph 11-15(2)(a) that the 'acquisition relates to making supplies that would be input taxed'.

15. The acquisition of advice by the non-resident property owner relates to the making of a supply of residential rental property situated in Australia that would be input taxed under Subdivision 40-B or 40-C, if the advice, whether in whole or in part, is about that residential property. One example is advice concerning the capital gains tax implications if the property were sold. Another is advice about the effectiveness of the property as an investment as compared to other investments that the non-resident individual could make.

16. Subsection 38-190(2A) negates the GST-free status of a supply where the acquisition of that supply relates to the making of supplies of real property situated in Australia that would be input taxed under Subdivision 40-B or 40-C. It is not a requirement that the input taxed supplies are actually made.[8]

17. Further, satisfaction of the requirement that the acquisition of the supply relates to the making of a supply that would be input taxed under Subdivision 40-B or 40-C, does not depend on whether or not the non-resident property owner first meets the requirements of paragraphs 9-5(a) to (d). This is illustrated by Example 9.3 in the EM as in that example subsection 38-190(2A) applied in circumstances where the non-resident property owner was not registered nor required to be registered for GST.

18. Example 9.3 also makes it clear that there is no apportionment under subsection 38-190(2A) even if the acquisition of the supply is only partly related to the making of a supply of the residential property that would be input taxed, or the property is only partly input taxed, under Subdivision 40-B or 40-C. However, even though subsection 38-190(2A) does not allow apportionment a non-resident property owner is entitled to an input tax credit to the extent that the acquisition of the supply is a creditable acquisition.[9]

19. The following examples illustrate the application of subsection 38-190(2A) to the supply of advice and tax return preparation services by an Australian accountant.

Example 1 – non-resident individual acquires advice that relates to shares and also a residential rental property situated in Australia

20. *Angela, a non-resident, owns investments that comprise a residential rental property in Australia and also some shares in Australian companies. Angela acquires written advice on the tax effectiveness of her current investments from an Australian accountant. Angela is not in Australia when the services are performed.*

[7] 2005 ATC 4571, at 4581.
[8] This is consistent with Hill J's comments in *HP Mercantile Pty Ltd v. FCT* 2005 ATC 4571 at 4579 and 4580 concerning the requirement in paragraph 11-15(2)(a) of the GST Act.
[9] Section 11-5.

21. *There is a single supply of advice. The acquisition of the advice is partly related to the input taxed supply of the Australian rental property and partly related to Angela's other investments in shares. Although the supply of advice is GST-free under item 2, subsection 38-190(2A) applies to the supply of advice by the Australian accountant and negates the GST-free status of the supply as the acquisition of the supply relates in part to the making of a supply of residential premises that is input taxed under Subdivision 40-B. Thus, the supply is not GST-free. The supply by the Australian accountant is a taxable supply where the other requirements of section 9-5 are met.*

22. *If Angela sought advice only about her investments in Australian shares, for example, whether she should sell some shares and acquire other shares, the acquisition of the advice does not relate (directly or indirectly) to the making of a supply of real property in Australia and subsection 38-190(2A) does not negate the GST-free status of the supply as established under item 2.*

Example 2 – tax return preparation services – residential and commercial rental property

23. *John, a non-resident, owns a two storey rental property in Australia. The ground floor is leased as a shop (commercial premises) and the top floor is leased as residential premises. John engages an Australian accountant to prepare his tax return and is not in Australia when the services are performed. The supply is therefore GST-free under item 2.*

24. *The acquisition of the tax return preparation services relates to the making of a supply of real property situated in Australia as the services are performed to return income, deductions or other matters in respect of that property. Although the supply of the tax return preparation services is GST-free under item 2, the acquisition of the tax return preparation services relates to the making of a supply of real property that is partly input taxed under Subdivision 40-B (that is, the top floor residential premises) and thus subsection 38-190(2A) negates the GST-free status of the entire supply. The supply of the tax return preparation services by the Australian accountant is a taxable supply if the other requirements of section 9-5 are met.*

25. *However, John may be entitled to an input tax credit to the extent that the acquisition of the tax return preparation services relates to the leasing of the commercial premises and is a creditable acquisition.*[10]

Example 3 – non-resident individual acquires tax return preparation services and tax advice

26. *Erica, a non-resident, owns a residential rental property in Australia. Erica has an Australian accountant who prepares and lodges her tax return that includes her rental income and deductions in respect of that property and also income from some other investments in shares. When speaking on the phone to her accountant about the preparation of her tax return she also seeks tax advice about her plans to invest in some Australian managed funds. In the same conversation her accountant gives her a detailed understanding of the tax issues in relation to managed funds. Erica is not in Australia when the services are performed.*

[10] Section 11-5.

27. *The facts indicate that there is a single supply of services which includes tax return preparation and advice. Although the supply of the tax return preparation services and advice is GST-free under item 2, the acquisition of the tax return preparation services relate, in part, to the making of a supply of real property that would be input taxed under Subdivision 40-B. Subsection 38-190(2A) therefore negates the GST-free status of the entire supply. The supply of the tax return preparation services and advice by the Australian accountant is a taxable supply where the other requirements of section 9-5 are met.*

Example 4 – non-resident individual acquires advice about shareholdings in an Australian company the only assets of which are residential rental properties

28. *Mary, a non-resident, has shares in an Australian company the only assets of which are residential rental apartments in Australia. Mary acquires advice from an Australian accountant about her share investment and withholding tax. The acquisition of advice by Mary does not relate to the making of supplies of real property but relates to the holding of shares by Mary. If the supply of advice by the accountant to Mary is GST-free under item 2, subsection 38-190(2A) does not negate the GST-free status of that supply.*

Date of effect

29. This draft Determination represents the preliminary, though considered view of the Australian Taxation Office. When the final Determination is officially released, it will explain our view of the law as it applies both before and after its date of issue.

30. The final Determination will be a public ruling for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to which it applies. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

Your comments

31. We invite you to comment on this draft Goods and Service Tax Determination. Please forward your comments to the contact officer by the due date. (Note: the Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel or relevant Tax officers. The Tax Office may use a version (names and identifying information removed) of the compendium in providing responses to persons providing comments. Please advise if you do not want your comments included in the latter version of the compendium.)

Due date:	**26 October 2007**
Contact officer:	**Josephine Drum**
Email address:	**Jo.Drum@ato.gov.au**
Telephone:	**(02) 621 62659**
Facsimile:	**(02) 621 62738**
Address:	**26 Narellan Street Canberra City ACT 2601**

Commissioner of Taxation
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Related Rulings/Determinations:

GSTR 1999/1; GSTR 2003/7; GSTR 2003/8; GSTR 2004/7; GSTR 2005/6

Subject references:

- acquisition
- GST-free
- input taxed
- non-resident
- real property
- rental property
- residential premises
- recipient
- supply

Legislative references:

- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-5(a)
- ANTS(GST)A 1999 9-5(b)
- ANTS(GST)A 1999 9-5(c)
- ANTS(GST)A 1999 9-5(d)
- ANTS(GST)A 1999 11-5
- ANTS(GST)A 1999 11-15(2)(a)
- ANTS(GST)A 1999 38-190
- ANTS(GST)A 1999 38-190(1)
- ANTS(GST)A 1999 38-190(2)
- ANTS(GST)A 1999 38-190(2A)
- ANTS(GST)A 1999 38-190(3)
- ANTS(GST)A 1999 Subdiv 40-B
- ANTS(GST)A 1999 Subdiv 40-C
- Tax Laws Amendment (2004 Measures No. 6) Act 2005
- TAA 1953 Sch 1 105-60

Case references:

- HP Mercantile Pty Ltd v. Federal Commissioner of Taxation 2005 ATC 4571; 60 ATR 106

Other references:

- Explanatory Memorandum to Tax Laws Amendment (2004 Measures No. 6) Bill 2004
- Tax Laws Amendment (2004 Measures No. 6) Bill 2004

ATO references

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