GSTD 2012/D3 - Goods and services tax: is the supply of a right to capacity in an international telecommunication network made by an Australian resident telecommunication supplier GST-free under item 4 in the table in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999?

Draft Goods and Services Tax Determination

Goods and services tax: is the supply of a right to capacity in an international telecommunication network made by an Australian resident telecommunication supplier GST-free under item 4 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*?

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Background

1. This question was considered amongst others in issue 3 of the Telecommunications Industry Liaison Group – Issues Register (issues register). Issue 3 deals with the GST treatment of specific telecommunications supplies.[1]

2. The issues register was a public ruling for the purposes of former section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* before 1 July 2010. The Commissioner's view in this draft Determination is consistent with those expressed in the issues register.

3. The telecommunication supply covered by this draft Determination is the supply of capacity in an international telecommunication network. The network can include international leased lines, international private circuits, indefeasible rights of use and global networks. These may comprise of a fixed line between two or more points, a global circuit or capacity that may be made available through a satellite network.

[1] Other issues dealt with in the issues register are addressed in GSTD 2012/D1; GSTD 2012/D2 and GSTD 2012/D4.

4. In this draft Determination, a 'telecommunication supplier' means a carrier or a carriage service provider as defined in the *Telecommunications Act 1997* or an Internet service provider as defined in Schedule 5 to the *Broadcasting Services Act 1992.*

Ruling

5. A supply of capacity in an international telecommunication network made by an Australian resident telecommunication supplier is a supply in relation to rights which is GST-free under item 4 in the table in subsection 38-190(1) (item 4) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)[2] provided that:

(a) the rights are for use outside Australia; or

(b) the supply is to an entity that is not an Australian resident and is outside Australia when the thing supplied is done.

6. Item 4 deals with 'a supply that is made in relation to rights'. This term is explained in Goods and Services Tax Ruling GSTR 2003/8.[3] Consistent with the views expressed at paragraph 64 of GSTR 2003/8, the Commissioner considers that 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.

7. A supply of capacity in an international telecommunication network is discussed at paragraphs 98 to 100 of GSTR 2003/8. Consistent with the views expressed there, the Commissioner considers that the supply of capacity in an international telecommunication network is a supply of a right.

8. The supply by an Australian operator of a right to capacity in a network is GST-free under paragraph (b) of item 4 when it is supplied to a non-resident provided that they are not in Australia when the right is granted.[4]

9. As the supply is covered by paragraph (b) of item 4 it is not necessary to consider whether the supply is a right which is for use outside Australia under paragraph (a). Rights for use outside Australia are not discussed in this Determination.

10. Subsection 38-190(2) negates the GST-free status of a supply covered by item 4 if it is a supply of a right or option to acquire something the supply of which would be connected with Australia. As the supply of capacity is not a right or option to acquire something that would be connected to Australia, subsection 38-190(2) will not negate the GST-free status of the supply.

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[2] All legislative references are to the GST Act unless otherwise indicated.

[3] Goods and Services Tax Ruling 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).*

[4] The meaning of 'when the thing supplied is done' is explained in paragraph 199 of Goods and Services Tax Ruling 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'?*

The meaning of 'not in Australia' is explained in paragraph 31 to 33 of GSTR 2004/7.

Example – Supply of capacity in an international telecommunication network

11. *A New Zealand company (NZ Co) enters into an arrangement with a New Zealand resident telecommunications supplier (NZ Telco) for the provision of network capacity to transmit voice and data information between sites for a fixed monthly rent. To establish the network for its customer, NZ Telco acquires the right to access network capacity in Aus Telco's cables (an Australian resident telecommunications supplier).*

12. *The network capacity includes international leased lines, international private circuits, indefeasible rights of use and global networks, for example:*

- *a fixed line between two or more points (for example, from a place in Auckland to a place in Sydney);*
- *a global circuit, such as Sydney to Auckland to New York to London to Sydney; or*
- *capacity that may be made available through a satellite network rather than a fixed line.*

Item 4

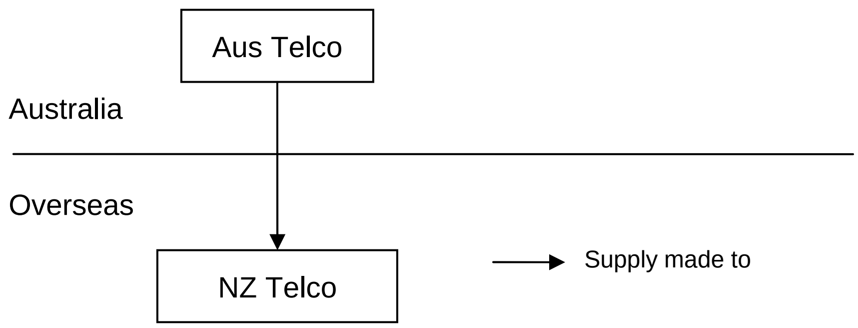
13. *The agreement between NZ Telco and Aus Telco is for a supply of capacity. The Commissioner considers that the supply of capacity in an international network is a supply of rights. Therefore, the supply by Aus Telco to NZ Telco falls for consideration under item 4.*

14. *The supply of capacity is made by Aus Telco to NZ Telco, a non-resident which is not in Australia when the right is granted. The supply of capacity by Aus Telco to NZ Telco meets the requirements of paragraph (b) of item 4.*

Subsection 38-190(2)

15. *The supply of capacity by Aus Telco to NZ Telco is not 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. Therefore, subsection 38-190(2) does not negate the GST-free status of the supply.*

16. *The supply of capacity by Aus Telco to NZ Telco is a GST-free supply under item 4.*



Date of effect

17. This Determination applies both before and after its date of issue. However, this Determination 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 Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
6 June 2012

Appendix 1 – Your comments

18. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

19. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**6 July 2012**
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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; GSTD 2012/D1; GSTD 2012/D2; GSTD 2012/D4; GSTR 2003/8; GSTR 2004/7

Subject references:

- goods and services tax
- GST-free
- rights for use outside Australia
- telecommunication supply

Legislative references:

- ANTS(GST)A 1999 38-190
- ANTS(GST)A 1999 38-190(1)
- ANTS(GST)A 1999 38-190(1) item 4
- ANTS(GST)A 1999 38-190(1) item 4(a)
- ANTS(GST)A 1999 38-190(1) item 4(b)
- ANTS(GST)A 1999 38-190(2)
- TAA 1953 Sch 1 105-60
- Broadcasting Services Act 1992 Sch 5
- Telecommunications Act 1997

Other references:

- The Telecommunications Industry Liaison Group – Issues Register

ATO references

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