# *GSTR 2002/D8 - Goods and Services Tax: when is a non-resident 'not in Australia when the thing supplied is done' for the purposes of item 2 of the table in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999?*

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# Draft Goods and Services Tax Ruling

Goods and Services Tax: when is a non-resident 'not in Australia when the thing supplied is done' for the purposes of item 2 of the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*?


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*Preamble*

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxation officers, taxpayers and practitioners. When officially released as a final Ruling it will be a public ruling for the purposes of section 37 of the* ***Taxation Administration Act 1953*** *and may be relied upon by any entity to whom it applies.*

## What this Ruling is about

1. This Ruling examines when a non-resident is 'not in Australia when the thing supplied is done' for the purposes of item 2 of subsection 38-190(1) of the *A New Tax System (Goods and Services Tax Act) 1999* ('the GST Act'). Subsection 38-190(1) sets out supplies of things (other than goods or real property) that are GST-free.

2. Paragraph 68 of Goods and Services Tax Ruling GSTR 2000/31[1] explains that the requirement of 'not in Australia' for the purposes of items 2 and 3 of the table in subsection 38-190(1) means that neither the recipient, nor a representative acting on behalf of the recipient if the recipient is a company, *is in Australia in relation to the supply*.

3. 'Recipient' is defined in section 195-1 of the GST Act and means, in relation to a supply, the entity to which the supply is made. Where the term recipient is used in this Ruling it has its defined meaning.

[1] Goods and services tax: supplies connected with Australia.

4. Item 2 of the table in subsection 38-190(1) covers supplies made to non-residents. This Ruling expands upon paragraph 68 of GSTR 2000/31 by explaining when a recipient that is a non-resident is in Australia in relation to the supply when the thing supplied is done. In particular, the Ruling examines when a company or an individual (including a company or individual trustee of a trust estate) that is not a resident of Australia is in Australia in relation to the supply when the thing supplied is done.

5. In this Ruling the terms 'non-resident company' and 'non-resident individual' are used to refer to a company or an individual (including a company or individual trustee of a trust estate) that is not a resident of Australia respectively.

6. This Ruling does not otherwise address the operation of the provisions of subsection 38-190(1).

7. 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

8. This draft Ruling represents the preliminary, though considered, view of the Australian Taxation Office. This draft may not be relied on by taxation officers, taxpayers or practitioners. When the final Ruling is officially released, it will explain our view of the law as it applies from 1 July 2000.

9. The final Ruling will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to whom 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.

10. If the final public ruling conflicts with a previous private ruling that you have obtained, the public ruling prevails. However, if you have relied on a private ruling, you are protected in respect of what you have done up to the date of issue of the final public ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

# Legislative context

11. Section 9-5 provides that a taxable supply is made if:

(a) you make a supply for consideration;

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

(c) the supply is connected with Australia; 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.

12. A supply is GST-free if it is GST-free under Division 38 or under a provision of another Act.[2]

13. 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.

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

15. Subsection 38-190(1) comprises five items which set out supplies of things other than goods or real property that are GST-free. If the requirements of one of those items are met the supply is GST-free, provided subsections 38-190(2) and (3) do not operate to negate that GST-free status.

16. Subsection 38-190(2) provides that a supply covered by any of the items 1 to 5 in the table in subsection 38-190(1) 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.

[2] Paragraph 9-30(1)(a).

17. Subsection 38-190(3) provides that, without limiting subsection 38-190(2), a supply covered by item 2 in that table is not GST-free if:

(a) it is a supply under an agreement entered into, whether directly or indirectly, with a non-resident; and

(b) the supply is provided, or the agreement requires it to be provided, to another entity in Australia.

18. The expression 'not in Australia when the thing supplied is done' is used in item 2 as follows:

**Supplies of things, other than goods or real property, for consumption outside Australia**

| Item | Topic | These supplies are GST-free[3] |
|---|---|---|
| 2 | Supply to non-resident outside Australia | a supply that is made to a non-resident who is **not in Australia when the thing supplied is done**, and:<br>(a) the supply 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 situated in Australia; or<br>(b) the non-resident acquires the thing in carrying on the non-resident's enterprise, but is not registered or required to be registered. |

19. The expression 'not in Australia when the thing supplied is done' is not defined in the GST Act and it is necessary, therefore, to explain its meaning.

[3] Except to the extent that they are supplies of goods or real property.

# Ruling

20. You should refer to the section headed 'Explanations' for a more detailed examination of the issues covered in this part of the Ruling.

### Section 38-190

21. Section 38-190 treats supplies of things other than goods or real property for consumption outside Australia as GST-free. The underlying policy intention is to only tax supplies that are for consumption in Australia.

### Subsection 38-190(1)

22. The items in the table in subsection 38-190(1) set out GST-free supplies that are for consumption outside Australia.

23. The Australian GST law does not define what consumption is and where it occurs. Rather, subject to some exceptions, consumption is regarded as occurring, for the purposes of items 2 and 3, and paragraph (b) of item 4, where the recipient of the supply is located at the time when the thing supplied is done. This overcomes the difficulty of having to define what amounts to consumption for a broad range of supplies, such as, advertising, research and legal services.

#### *Item 2 of subsection 38-190(1)*

24. Item 2 covers supplies to non-residents outside Australia. To be GST-free, the supply must be made to a non-resident who is not in Australia in relation to the supply when the thing supplied is done.

25. A non-resident, as defined in section 195-1, is an individual or company that is *not* a resident of Australia for income tax purposes. Item 2, therefore, only applies to a supply that is made to a non-resident company[4] or individual.[5] This includes a supply made to a trustee that is a non-resident company or individual. Item 2 does not apply to supplies made to other entities such as partnerships. (This is discussed further at paragraphs 93 to 102 of the Explanations section of the Ruling). Supplies made to entities not covered by item 2 fall for consideration under item 3 or another item.

26. The tests applied in establishing the residency status of an individual or a company are those contained in the definition of 'resident of Australia' found in subsection 6(1) of the *Income Tax Assessment Act 1936* ('ITAA 1936')*.*[6]

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[4] A company that is not a resident of Australia for income tax purposes.
[5] An individual that is not a resident of Australia for income tax purposes.
[6] The definition in the ITAA 1936 is set out in paragraph 311.

27. A supply is *made* to a non-resident individual or company where that individual or company is the entity that has contracted (in written or oral form) with the supplier for the making of the supply.

### The meaning of 'not in Australia'

28. The requirement in items 2 and 3 that the recipient of a supply is 'not in Australia' when the thing supplied is done, requires, in our view, that the recipient is not *'in Australia in relation to the supply'* at the relevant time.

29. Items 2 and 3 are formulated in such a way that the location of the recipient is, in effect, a proxy test for determining where the supply made to that recipient is consumed. It follows, in our view, that the expression 'not in Australia' contemplates that there is a connection between the supply and the presence of the recipient.

30. In paragraphs 31 to 65 we consider when a non-resident company is 'in Australia'. In paragraphs 66 to 69 we discuss when a non-resident individual is 'in Australia.' The meaning of 'in relation to the supply' is discussed further at paragraphs 70 to 77.

### When is a non-resident company 'in Australia'?

31. A non-resident company is 'in Australia' when the thing supplied is done, if, at that time, the non-resident company:

(i) carries on business within Australia through a place of business of its own or through an agent acting on behalf of the company; and

(ii) that place of business or agent has a fixed and definite place within Australia; and

(iii) the business has continued[7] for a sufficiently substantial period of time.[8]

32. The criteria used to determine whether or not a non-resident company is 'in Australia' for the purposes of item 2, are based on common law indicia used by the courts to determine whether a foreign company[9] is 'present' in a foreign jurisdiction and, therefore, amenable to the jurisdiction of the foreign court.

33. Accordingly, guidance can be drawn from the line of jurisdiction cases on the application of these criteria to specific cases, as demonstrated in the Explanations section of the Ruling.

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[7] For GST purposes, this includes a business that intends to continue for a sufficiently substantial period of time.
[8] Refer to Halsburys Laws of Australia, 'Conflict of Laws', Chapter 85, paragraph [85-1880].
[9] A foreign company in a jurisdiction is a company that is incorporated outside that jurisdiction.

34. While similar indicia are used to identify the existence of a permanent establishment (PE) in a foreign jurisdiction for income tax law purposes, the indicia described in paragraph 31 are not drawn from PE case law. However, to the extent that common law PE indicia are the same as those used in paragraph 31, guidance can also be drawn from relevant PE case law.

35. Where the activities of a non-resident company do not amount to the carrying on of a business, the test for whether the non-resident company is in Australia turns on whether the company is carrying on its corporate activities through a place of its own in Australia, or through an agent in Australia acting on its behalf. The corporate activities must be carried on at a fixed and definite place in Australia for a sufficiently substantial period of time.

36. The subsequent discussion in this Ruling is in terms of a non-resident company that carries on a business. However, the references in this Ruling to the carrying on of a business by a non-resident company or through an agent acting on behalf of the non-resident company are to be substituted with references to the carrying on of corporate activities where that company does not carry on a business.[10]

### *Rule of thumb*

37. While the tests for determining whether a non-resident company is 'in Australia' are as outlined in paragraph 31, registration of that company with the Australian Securities and Investments Commission (ASIC) is a strong indicator that the non-resident company is in Australia for the purposes of item 2.

38. As a rule of thumb, we consider that a non-resident company that is registered with the ASIC is 'in Australia' for the purposes of item 2. A supplier can check whether a non-resident company is registered by conducting a search of the National Names Index on the ASIC website.[11]

39. However, a non-resident company may be able to demonstrate to the supplier on a specific application of the tests that are set out in paragraph 31 that this is not the case.

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[10] It was noted in *Adams and others v Cape Industries plc and another* [1991] 1 All ER 929 (a conflict of laws case) at 1009 per Slade LJ that 'All the authorities cited to us have been directed, and all the statements later in this judgment will be directed, to trading corporations. In the case of non-trading corporations, the same principles would presumably apply, with the substitution of references to the carrying on of the corporation's corporate activities for references to the carrying on of business.'

[11] The ASIC website address is: http://www.asic.gov.au/

### *Fixed and definite place*

40. A fixed and definite place is some sort of distinct place from which the non-resident company carries on business.

41. A fixed and definite place exists where a non-resident company, or an agent carrying on business on behalf of a non-resident company, for example, owns, leases or licences the business premises in Australia.

42. A non-resident company may have dependent personnel carrying on the business of the company in Australia, but not at a fixed and definite place. The presence in Australia of dependent personnel of a non-resident company does not of itself mean that the non-resident company has a fixed and definite place in Australia.

### *Sufficiently substantial period of time*

43. The business of the non-resident company must have continued, or be *intended* to continue, at a fixed and definite place for a sufficiently substantial period of time.

44. Whether a period of time is sufficiently substantial is relative to the facts in each individual case. A key factor in deciding whether a business has continued for a sufficiently substantial period of time is the length of time over which the business is carried on at a fixed and definite place. A period of six months is a general guide, regardless of the level of business transacted. If a business continues, or it is intended to continue, for a period of six months or more, the sufficiently substantial period of time test is met.

45. In some circumstances a period of less than six months suffices to meet this requirement. For example, where a business is prematurely liquidated or where a business returns to a particular location in Australia on an on-going and regular basis but for short periods each time.

46. Also, if a substantial amount of business is conducted within a period of less than six months, the sufficiently substantial period of time test is satisfied. For example, a substantial amount of business transacted at an exhibition or on a seasonal basis, means that the business is carried on for a sufficiently substantial period of time.

## Common forms of company presence 'in Australia'

47. A non-resident company may carry on a business in Australia through one of a number of different forms of presence. Common forms of presence are a branch, representative office or agent, or through a less formal setting such as a stand at an exhibition.

### *Branch*

48. Where a non-resident company carries on business in Australia through a branch, the non-resident company is 'in Australia.' In this circumstance, the business is carried on in Australia at some fixed place of business of the non-resident company for a sufficiently substantial period of time.

### *Representative office*

49. In the case of a representative office, it is a question of fact and degree as to whether the representative office carries on the business of the non-resident company in Australia. If the representative office carries on business activities that are substantial to the main objects of the company, the non-resident company is carrying on business in Australia through a representative office.[12]

50. Sometimes a representative office of a non-resident company may take the form of a subsidiary in Australia that is carrying on the business of the parent company.[13]

### *Other place of business*

51. A non-resident company may carry on business in Australia through a less formal setting such as a stand at an exhibition hall. In this case the criteria of a fixed and definite place and a substantial period of time take on more significance in establishing whether the non-resident company is 'in Australia'. These criteria are discussed at paragraphs 173 to 192 of the Explanations section of this Ruling.

### *Agents*

52. A non-resident company is also 'in Australia' where that company carries on business in Australia through an agent. The agent must be carrying on the business of the non-resident company at a fixed and definite place of the agent for a substantial period of time.

53. A broker, general commission agent or any other agent of independent status is not carrying on the business of the non-resident company, where that person is acting in the ordinary course of his or her own business. For example, an insurance broker may arrange an insurance contract on behalf of a non-resident company, but, in doing so, is acting in the course of its own business.

54. There are a number of factors relevant to assessing whether an agent is carrying on the business of the non-resident company in Australia. We have listed those factors which we consider important

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[12] See, for example, *South India Shipping Corporation v Bank of Korea* [1985] 1 WLR 585 and paragraph 133 of the Explanations section of this Ruling.
[13] See, for example, *Commonwealth of Australia v White* [1999] 2 VR 681 and paragraph 134 of the Explanations section of this Ruling.

in this regard at paragraph 155 of the Explanations section of this Ruling.

55. However, a key indicator that the non-resident company carries on business in Australia through an agent is the fact that the agent has authority to enter into contracts with customers on behalf of the non-resident company without submitting them to the non-resident company for approval.

56. Sometimes an agent completes all tasks up to the point of execution of the relevant contract, but the principal merely requires the contract to be signed by the non-resident company. We consider, as a matter of commercial reality, that the agent in these circumstances carries on the business of the non-resident company.

57. If the business of the non-resident company is buying (or manufacturing) and selling, the fact that the agent does not have power to contract usually indicates that the agent is not carrying on the business of the non-resident company. However, in this situation, if the agent carries on activities that are part of, and a substantial part of, the business operations of the non-resident company, combined with factors of the kind listed at paragraph 155 of the Explanations section of this Ruling, we consider that this points to the non-resident company carrying on business in Australia.

58. If the business of the non-resident company does not extend to buying (or manufacturing) and selling, the fact that the agent does not have the power to contract is less significant. If the agent carries on activities that are part of, and a substantial part of, the business of the non-resident company, this points to the agent carrying on the business of the non-resident company in Australia.[14]

*Division 57 agents*

59. A non-resident company may make taxable supplies or creditable acquisitions through a resident agent. Division 57 effectively makes the resident agents responsible for the GST consequences of what the non-residents do through their resident agents.

60. The existence of a Division 57 agent does not automatically mean that the non-resident company is in Australia. It is only where the Division 57 agent is carrying on the business of the non-resident company that the non-resident company is in Australia. This is assessed by examining the same kinds of factors referred to in paragraphs 140 to 163 of the Explanations section of this Ruling

[14] See *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725; *Commonwealth of Australia v White* [1999] 2 VR 681. See paragraphs 147 to 152 of the Explanations section of this Ruling.

*Agency service fees*

61. Where an agent carries on the business of a non-resident company in Australia, the fee charged for the agency service to the non-resident company may still be GST-free. While the non-resident company is 'in Australia', that presence is not *in relation to the supply* of agency services (refer paragraphs 70 to 74 below).

62. The presence of the agent in Australia is relevant to a supply made by another supplier to the non-resident company, not the supply made to the non-resident company by the agent itself in Australia. If the other requirements of item 2 are met, such an agency service supplied to a non-resident company is a GST-free supply.

***Subsidiary***

63. Where a non-resident company has a subsidiary in Australia, the mere presence of that subsidiary does not mean that the non-resident company is carrying on a business in Australia. The fact that the non-resident company owns or controls a majority shareholding in a subsidiary does not make that company present in Australia.[15]

64. However, if the subsidiary is acting as agent of the non-resident parent company and carrying on the business of the non-resident company in Australia at some fixed place of business of the subsidiary for a sufficiently substantial period of time, the non-resident company is 'in Australia'.

65. As noted at paragraph 50 above, a subsidiary may also be a representative office of the non-resident company in Australia. This is discussed further at paragraph 136 of the Explanations section of this Ruling.

**When is a non-resident individual 'in Australia'?**

66. Non-resident individuals are 'in Australia' if they are physically present in Australia. Where a supply is *made* to an individual and *that* individual is physically present in Australia when the thing supplied is done, then the individual is 'in Australia'.

67. In contrast to a supply made to a non-resident company, it is not necessary to look at the location of a representative of a non-resident individual recipient to ascertain whether that individual is 'in Australia' at the relevant time. The presence of a non-resident individual recipient of a supply in Australia is decided solely on the basis of the location of that individual.

68. Thus, while a representative, including an agent, may be in Australia on behalf of a non-resident individual physically located

[15] Nygh, P.E. 1995, *Conflict of Laws in Australia*, 6th edn, Butterworths, p. 540.

outside Australia, that representative does not make the non-resident individual 'in Australia'.

69. This remains the case even if the agent carries on business or investment activities on behalf of a non-resident individual who is not physically in Australia when the thing supplied is done. It is also the case where a supply is made to a non-resident sole trader and an employee of that sole trader is in Australia in relation to the supply.[16]

**The meaning of 'in relation to the supply'**

70. If, when the thing supplied is done, the non-resident is 'in Australia' and that presence is 'in relation to the supply', the supply is not GST-free under item 2. (In some circumstances, the supply may be partly GST-free. This is discussed in the section on apportionment below.)

71. In the context of items 2 and 3 the expression 'in relation to the supply' signifies a connection or association between the supply made to a non-resident company or individual and the presence of that company or individual in Australia. That is, there is a link between the supply and the presence of the non-resident company or individual in Australia. We consider that link must be more than just incidental.

***Non-resident company in Australia 'in relation to the supply'***

72. Where a non-resident company is in Australia by means of a branch, representative office or agent acting on behalf of the non-resident company, that presence is 'in relation to the supply' if the supply is for the purposes of the presence. There is a link between the supply and the presence in Australia that is more than just incidental.

73. Where the supply is not for the purposes of the Australian presence of the non-resident company but that presence is involved, other than in just an incidental way, in the obtaining or receiving of the supply by the non-resident company, the non-resident company is in Australia 'in relation to the supply'.

74. If the involvement of the Australian presence is limited to the carrying out of simple administrative tasks on behalf of the non-resident company, as a matter of administrative convenience, we consider that the involvement is incidental. Tasks of a simple administrative nature include:

- passing on an e-mail;
- being a point of phone contact to pass on messages;
- being a mailing address or delivery contact; and

[16] Subsection 38-190(3) may apply to the supply in this case.

- being a point of contact for a visiting representative of the non-resident company.

***Non-resident individual in Australia 'in relation to the supply'***

75. Where a supply is made to a non-resident individual, that individual may be physically present in Australia when the thing supplied is done, but that presence may not be 'in relation to the supply'.

76. For example, if the non-resident individual is in Australia on holidays and has no contact with the supplier, the presence of the non-resident individual in Australia when the thing supplied is done is not in relation to the supply.

77. Where a non-resident individual is physically in Australia and in contact with the supplier, we consider that presence is in relation to the supply where the contact is other than incidental. If the non-resident individual does no more than carry out simple administrative tasks as a matter of administrative convenience such as phoning to see if the supply is completed, the non-resident individual is not in Australia 'in relation to the supply'.

**The meaning of 'when the thing supplied is done'**

78. Under item 2 it has to be determined whether the non-resident company or individual is in Australia in relation to the supply when the thing supplied is done. 'When' in this context means 'at the time'. The phrase 'the thing supplied is done' has the same meaning as the expression 'the thing is done' in paragraph 9-25(5)(a). Under that paragraph, a supply is connected with Australia if the thing supplied is done in Australia.

79. Consistent with GSTR 2000/31,[17] if the thing supplied is a service, when the service is done refers to the period of time during which the service is performed.

80. If a supply is the provision of advice or information and the supply involves work to create, develop or produce that information or advice for the recipient, the supply is one of the performance of services. The advice or information is done during the period when the advice or information is prepared, produced or created, as the case may be.

81. If the provision of advice or information is an instantaneous supply of advice or information, when the supply of the advice or information is done is at the time the advice or information is provided.

[17] GSTR 2000/31, Goods and services tax: supplies connected with Australia

82. If the supply is the creation, grant, transfer, assignment or surrender of a right, when the creation, granting, transferring, assignment or surrendering of that right is done is at the time the right is created, granted, transferred, assigned or surrendered.

83. If the supply is the entry into, or release from, an obligation to do anything, or refrain from an act, or to tolerate an act or situation, when the entering into that obligation or the release from that obligation is done is at the time the obligation is entered into or the release is effected.

### Apportionment

84. A non-resident company or individual may only be 'in Australia in relation to the supply' for part of the time 'when the thing supplied is done'. For example, this is the case where the company or individual is:

(i) 'in Australia' and 'in relation to the supply' for only part of the time 'when the thing supplied is done'; or

(ii) 'in Australia' for all or part of the relevant time but only 'in relation to the supply' for part of the time 'when the thing supplied is done'.

85. In these circumstances, a supply is only GST-free to the extent that the non-resident company or individual is not 'in Australia in relation to the supply' at the relevant time and the other requirements of the item are met.

86. Where circumstances of this kind exist, a supplier needs to apportion the supply for the time the non-resident is in Australia in relation to the supply when the thing supplied is done and the time that the non-resident is not in Australia in relation to the supply when the thing supplied is done.

87. That part of the supply that is done when the non-resident company or individual is in Australia in relation to the supply is the taxable part of the supply. That part of the supply that is done when the non-resident company or individual is not in Australia in relation to the supply is the GST-free part of the supply, provided the other requirements of the item are met.

88. To work out the value of the taxable part of the supply, the consideration needs to be apportioned to each of the parts to find the consideration for the taxable part. The supplier can use any reasonable method to apportion the consideration. The method used must be supportable in the particular circumstances. The supplier should keep records that explain the method used to apportion a mixed

supply. The value of the taxable part of the supply is calculated as 10/11 of its price (or consideration).[18]

# Explanations

### Section 38-190

89. The heading to section 38-190 is 'Supplies of things, other than goods or real property, for consumption outside Australia'. The policy intention is to only tax supplies of services or things that are for consumption in Australia. Thus, the export of services and other things are GST-free in the same way that exports of goods are GST-free.[19]

### Subsection 38-190(1)

90. The items in the table in subsection 38-190(1) set out supplies that are for consumption outside Australia and which are, therefore, GST-free.

91. Items 2 and 3, and paragraph (b) of item 4 do not refer to the supply of a thing that is for consumption outside Australia. Instead, each item looks to where the recipient of the supply is located at the time when the thing supplied is done. The presumption is that if the recipient is not in Australia when the thing supplied is done, the supply of that thing is for consumption outside Australia and is GST-free, provided the other requirements of the item are met.

92. As the location of the recipient is effectively a proxy for determining the place of consumption of the relevant supply, we consider that the expression 'not in Australia' requires the presence in Australia to be 'in relation to that supply'. Hence if the recipient is in Australia when the thing supplied is done, *but that presence is not in relation to the supply*, the supply is GST-free under items 2 or 3, provided the other requirements of the relevant item are met.

#### *Item 2 of subsection 38-190(1)*

93. For item 2 to apply to a supply, the supply must be made to a non-resident. A supply is *made* to a non-resident where that non-resident is the entity that has contracted (in written or oral form) with the supplier for the making of the supply. Where a supply is made to a non-resident but the supply is actually provided to another

[18] Refer sections 9-70, 9-75 and 9-80 and GSTR 2001/8 Goods and Services Tax Ruling: Apportioning the consideration for a supply that includes taxable and non-taxable parts at paragraphs 25 to 30 (Rulings section) and paragraphs 116-117 (Explanation section).

[19] Refer to the explanatory memorandum (EM) relating to the Income Tax Laws Amendment Bill 2000 at paragraph 3.30.

entity in Australia, for example an employee of the non-resident, subsection 38-190(3) applies.

94. The term 'non-resident' is defined in section 195-1 and means an entity that is not an Australian resident. 'Entity' is defined in subsection 184-1(1) and includes a variety of entities such as a partnership, a trust and a superannuation fund.[20] 'Australian resident' is also defined in section 195-1 and means a person who is a resident of Australia for the purposes of the ITAA 1936.[21] A resident of Australia is defined in subsection 6(1) of the ITAA 1936 and covers persons that are either individuals or companies.

95. The term non-resident in item 2 means, therefore, either, an individual who, or a company that, is not a resident of Australia as defined in the ITAA 1936. It does not extend to other entities listed in paragraph 184-1(1)(g) such as a trust or partnership.

96. Thus item 2 applies to supplies made to individuals that are not residents of Australia (i.e., non-resident individuals) and companies that are not residents of Australia (i.e, non-resident companies). This includes an individual or a company that is a trustee of a trust estate.

97. A trust is not a separate legal entity. The trustee is the entity that makes supplies and acquisitions on behalf of the trust. Subsection 184-1(2) provides that the trustee of a trust (or of a superannuation fund) is taken to be an entity consisting of the person who is the trustee. That person is either a company or an individual. Other definitions of resident specific to resident trust estates and superannuation funds contained in the ITAA 1936 are not relevant for the purposes of item 2. This is because these other definitions are not imported into the section 195-1 definition of 'Australian resident'.

98. A partnership is not a separate legal entity and is not an individual. Additionally, the definition of partnership in section 195-1, which refers to subsection 6(1) of the ITAA 1936, excludes a company. A partner can be an individual or a company, and, therefore, meets the definition of a non-resident. However, under section 184-5, an acquisition made by a partner of a partnership in his or her capacity as a partner is taken to be an acquisition made by the partnership itself. As a partnership is not an individual or company, it is not a non-resident for the purposes of item 2. Item 2, therefore, does not apply to a supply made to a partnership. Supplies made to a partnership are covered by item 3 or another item.

99. However, item 2 may apply if the partner acquires a supply in a different capacity to that of a partner in a partnership, for example, as a private individual.

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[20] The definition of 'entity' is set out at paragraph 311 of this Ruling.
[21] The definition of 'resident of Australia' is set out at paragraph 313 of this Ruling.

100. In summary, a supply covered by item 2 is a supply made to a non-resident being a:

- company;
- individual (in a private or business capacity);
- individual trustee (in the capacity as trustee for a trust estate); and
- company that is a trustee (in the capacity of trustee for a trust estate).

***Alternative view***

101. On one view, a strict literal interpretation of the definition of non-resident, may mean that a non-resident is any entity that is not an Australian resident company or individual. This would mean that all entities listed in section 184-1, other than Australian resident individuals or companies, are covered by the term 'non-resident', even if that entity is a domestic entity. For example, it would mean that all partnerships are non-residents, including domestic partnerships.

102. We consider that taking into account the context of item 2 in subsection 38-190(1), the role of item 3 and the object underlying the subsection, this interpretation leads to an irrational result.

**The meaning of 'not in Australia'**

103. The requirement in items 2 and 3 that the recipient of a supply is 'not in Australia when the thing supplied is done', requires, in our view, that the recipient is not *'in Australia in relation to the supply'* at the relevant time.

104. The location of the recipient is, in effect, a proxy test for determining where the supply to that recipient is consumed. It follows, in our view, that the expression 'not in Australia' contemplates that there is a connection between the supply and the presence of the recipient.

**When is a non-resident company 'in Australia'?**

105. A company is an artificial legal entity that is separate and distinct from its members. Unlike an individual, it does not have a precise physical location. A company is only present in a country through its representatives.

106. As stated at paragraph 68 of GSTR 2000/31, whether or not a non-resident company is in Australia at the relevant time depends on whether a 'representative' of the company is in Australia at the relevant time.

107. Representative is a term of wide meaning. It refers to one who, or that which, represents another or others. The representative stands or acts for another or others.

108. The representative of a company may take on a variety of forms and capacities. For example, a company may be represented by anyone from a single employee to a branch of the company. It is necessary, therefore, to establish what kind of representation in Australia means that a non-resident company is 'in Australia'.

109. Any representation by an employee or officer of the company in Australia is too wide. On this basis the non-resident company is in Australia even where the presence of the non-resident company is only a minor presence in Australia. This is illustrated by the following example.

*Example 1 – employee representative 'in Australia when the thing supplied is done' (a wide view of representative)*

110. *A United Kingdom company (UK Co) engages an Australian legal firm to provide legal advice for the business of the company in the UK. The non-resident company sends an employee to Australia to give instructions to, and obtain written advice from, the Australian legal firm. The employee departs Australia with the advice. UK Co has no other presence in Australia.*

111. *On a wide meaning of representative, the presence of the employee in Australia means that the non-resident company is 'in Australia' for the purposes of item 2.*

112. An alternative is to construe the meaning of representative more narrowly, limiting it to persons who are the directing or controlling mind of the company, such as a director or a senior manager. However, determining who is the very essence of the non-resident company for a particular supply is a difficult test to apply, raising a number of practical problems.[22]

113. This approach can also result in the non-resident company being in Australia where that presence is only a minor presence in Australia. This is illustrated in the following example.

[22] Other issues may arise such as: whether the acts of the individual are contrary to the will of the company, whether the individual has gone outside given authority and the difficulty of determining on the facts as to whether someone is the controlling mind of the company, for example, an employee has been held to be a controlling mind. See *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153.

*Example 2 – presence of a director 'in Australia when the thing supplied is done' (a narrower view of representative)*

114. *If, in example 1, UK Co sent, instead of an employee, a director of the company to Australia, the presence of the director in Australia would mean that the non-resident company is 'in Australia' for the purposes of item 2.*

115. The issue is to determine presence in Australia on a basis that does not capture presences of a minor nature which are not sufficient presences upon which to attribute consumption of a supply to Australia.

116. Determining presence of a foreign company in a foreign jurisdiction (the foreign company being incorporated outside the foreign jurisdiction) is an issue that has been faced by the courts[23] in determining whether jurisdiction exists over a foreign company, for the purposes of serving originating process[24] or enforcing a judgment. These jurisdictional cases recognise that a company is not a natural person who can be physically present. Therefore, the courts have established indicia to assist in determining whether a company is 'present' in a jurisdiction.

117. At common law, a foreign company is amenable to the jurisdiction of an Australian court if the company *carries on business* within the court's jurisdiction *through a place of business of its own* or *through an agent acting on behalf* of the company and:

(i) that place of business or agent has a *fixed and definite place* within the jurisdiction; and

(ii) the business has continued[25] for a *sufficiently substantial period of time*.[26]

### *The preferred view*

118. As demonstrated above, presence in Australia based on any form of representation or the directing mind approach results in supplies being subject to GST in Australia on the basis of a minor presence. To give effect to the underlying policy intent, the presence must be a more substantial presence.

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[23] See for example, *Littauer Glove Corporation v F.W. Millington* (1928) 44 TLR 746; *Sfeir v National Insurance Co. of New Zealand Ltd* [1964] 1 Ll R 330 and *Vogel v R.A Kohnstamm Ltd* [1973] 2 QB 133.

[24] For example, service of a writ.

[25] For GST purposes, this includes a business that is intended to continue for a sufficiently substantial period of time. See paragraphs 181 to 190 of this Ruling for further explanation.

[26] As stated in Halsburys Laws of Australia, 'Conflict of Laws', Chapter 85, paragraph [85-1880].

119. A presence of the kind established under the common law indicia for jurisdiction purposes is a substantial presence. Presence identified on this basis would produce an outcome more aligned with the intention to tax supplies only consumed in Australia.

120. An approach consistent with the jurisdiction tests for presence is also compatible with the broader framework of section 38-190. If a supply is made to a non-resident company that is not in Australia in relation to the supply, but is provided to another entity in Australia (for example an employee), then that supply is subject to GST by virtue of subsection 38-190(3).

121. We consider, therefore, that a non-resident company is 'in Australia' if:

(i) it carries on a business through a place of its own or through an agent acting on its behalf;

(ii) that place of business or agent has a fixed and definite place in Australia; and

(iii) the business has continued for a sufficiently substantial period of time.

122. Where the activities of a non-resident company do not amount to the carrying on of a business, the test for whether the non-resident company is in Australia turns on whether the company is carrying on its corporate activities through a place of its own in Australia, or through an agent in Australia acting on its behalf. The corporate activities must be carried on at a fixed and definite place in Australia for a sufficiently substantial period of time.

123. The tests in paragraph 121 should be used to determine whether a non-resident company is 'in Australia'. Each of these tests are examined below. However, a rule of thumb approach can be adopted. This is explained next.

### *Registered under the Corporations Law*

124. A foreign company[27] is not to carry on a business in Australia unless it is registered as a foreign company with the ASIC or an application for registration is pending.[28] It must have a registered office within the jurisdiction[29] and lodge a memorandum of appointment or a power of attorney of a person resident in the

[27] Under section 9 of the *Corporations Act 2001* a foreign company, in so far as is relevant, means a body corporate incorporated in an external Territory or outside Australia and the external Territories.
[28] Section 601CD of the *Corporations Act 2001*.
[29] Subsections 601CT(1), (2A) of the *Corporations Act 2001*.

jurisdiction who is authorised to accept notices on behalf of the company.[30]

125. While the tests for determining whether or not a non-resident company is 'in Australia' are as outlined above in paragraph 121, registration with the ASIC is a strong indicator that the non-resident company is 'in Australia'.

126. As a rule of thumb, we consider that a non-resident company that is registered with the ASIC is 'in Australia'. A supplier can check whether a non-resident company is registered by conducting a search of the National Names Index on the ASIC website.[31].

127. However, a non-resident company that is registered may be able to demonstrate to a supplier on a specific application of the tests that are set out in paragraph 121 that this is not the case.

### *Carries on business through a place of its own*

128. The non-resident company must be carrying on business in Australia through a place of business of its own (or through an agent acting on behalf of the non-resident company – see paragraphs 140 to 169 below).

129. The non-resident company may be carrying on business through a place of business of its own by means of its dependent personnel, for example, a director, employee or dependent agent.

130. A non-resident company typically carries on business through a branch of the non-resident company where the personnel of the non-resident company conduct the business of the non-resident company. Where a non-resident company carries on business in Australia through a branch, the non-resident company is in Australia.

*Example 3 - branch of a non-resident company 'in Australia'*

131. *Japan Jumpers sells wool garments. The Head Office is in Japan. It also has a branch in Australia, staffed by personnel from Japan and Australia. The branch sells garments domestically. Japan Jumpers carries on business through a place of its own in Australia.*

132. However, a place of business is not limited to a branch operation. A non-resident company may carry on business in Australia through a representative office.

133. Whether a non-resident company carries on business through a representative office in Australia is a question of fact and degree. Each case has to be examined on its facts. The existence of a representative office has been considered in the following

[30] Subsections 601CF(2), 601CG(1) of the *Corporations Act 2001*.
[31] The ASIC website address is:http://www.asic.gov.au/

jurisdictional cases. These cases provide guidance for the purposes of establishing whether a non-resident company carries on business in Australia through a representative office.

134. In *Anglo Australian Foods Ltd v Credit Suisse* (1988) 1 ACSR 69 (*Anglo*) a Swiss Bank set up a representative office in Australia for the purpose of engaging in liaison activities. It was not registered as a foreign company in Victoria. The bank sought an order to set aside a summons that was served on the bank's representative office in Australia. However, the bank's case was dismissed as it was found that the Swiss bank was carrying on a business at its Melbourne office. This is because the office was set up to promote the bank's interest and a significant commercial activity was being carried on there.

135. In *South India Shipping Corporation v Bank of Korea* [1985] 1 WLR 585 (*South India*) the Korean bank rented offices in London for its purposes, including public relations. The question at issue was whether the rented offices were a place of business for the purposes of being duly served a writ. The court found that the London office was a place of business as business activities were carried on at those offices that were substantial to the main objects of the company. It was irrelevant that the London office did not conclude any bank transactions.

136. Sometimes a representative office of a non-resident company may take the form of a subsidiary in Australia. In *Commonwealth of Australia v White* [1999] 2 VR 681 (*White*), Lloyd's UK (who had power and authority to regulate and direct the business of insurance in the Lloyd's market) opened a representative office in Australia, Lloyd's Australia Ltd, a subsidiary of Lloyd's UK. The activities of Lloyd's Australia Ltd were not carried out for its own benefit, but for the benefit of Lloyd's UK. Lloyd's UK had a presence in Australia by means of the representative office.

137. On the same facts in *Anglo*, *South India* and *White*, a non-resident company is considered to be 'in Australia' for the purposes of item 2.

138. In addition to a branch or representative office, a non-resident company may carry on business in a less formal setting. For instance, a non-resident company may carry on a business at a place such as a stand in a market place or at an exhibition.

139. Once it is established that a non-resident company is carrying on a business in Australia it needs to be examined whether it is at a fixed place and for a substantial period of time. These criteria are easily identified and satisfied where it is the representative office or branch that carries on the business of the non-resident company in Australia. Closer scrutiny is required when the carrying on of the business is at a transitory place such as an exhibition hall or market

stand. These criteria are discussed in more detail at paragraphs 173 to 192.

### *Carries on business through an agent acting on its behalf*

140. Where a non-resident company has no place of business in Australia of its own, it may still be carrying on business in Australia through an independent agent from the place of business of the agent.

141. For a non-resident company to carry on business through an agent, the agent must be carrying on the business of the non-resident company. A broker, general commission agent or any other agent of independent status is not carrying on the business of the non-resident company where that person is acting in the ordinary course of their own business.

142. In *Adams and others v Cape Industries plc and another* [1991] 1 All ER 929 (*Adams*) at 1009-1010, Slade LJ observed:

> '[The cases] show that it may be permissible to treat a foreign corporation as resident in this country so as to be amenable to the jurisdiction of our court even if it has no fixed place of business here of its own, provided that an agent acting on its behalf carries on its business (as opposed to his own business) from some fixed place of business in this country.'

143. For jurisdictional purposes, whether a foreign company carries on business through an agent within a jurisdiction has typically turned on whether the agent has power to conclude contracts on behalf of the non-resident company.

144. The case of *Okura & Co Ltd v Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715 (*Okura*) involved a Swedish company that employed a firm in London to be its agent. This firm also acted as agents for other firms and also carried on their own business. The agent had no general authority to enter into contracts, but they obtained orders and submitted them to the Swedish company for approval. If the Swedish company accepted the orders the agent signed the contracts as agent for that company and the goods were shipped directly from the Swedish company to the purchaser.

145. The court held that obtaining orders and submitting them for approval was not enough, the agent had no general authority to enter contracts on behalf of its principal, so the Swedish company could not be found to be 'here' for the purpose of serving a writ.

146. In *National Commercial Bank v Wimborne* (1979) 11 NSWLR 156 (*Wimborne*), Holland J took into account the fact that the local bank did not make any contracts on behalf of the foreign bank in concluding that the foreign bank was not present in Australia.

147. In *Vogel v R & A Kohnstamm Ltd* [1973] 1QB 133 (*Vogel*) an English company had an agent in Israel to seek customers and act as a go-between for any proposed order. As the agent had no power to conclude contracts on behalf of the English company, he did not amount to a presence in Israel of the company itself.

148. More recent authority shows that where the business of the foreign company does not involve the making of contracts and the agent carries on a substantial part of the business of the company in Australia, the foreign company is present in Australia. The fact that the agent does not have the power to bind is less significant in this situation.[32]

149. In *BHP Petroleum Pty Ltd v Oil Basins Ltd* [1985] VR 725 (*BHP*) the principal business of the foreign company was to receive as trustee, and distribute to thirty-one persons, royalties arising from Bass Strait oil production. The directors of the foreign company gave instructions to a firm of solicitors in Melbourne as to the disposal of the royalties. A firm of accountants in Melbourne ascertained what the royalty would be and then allocated the royalties to the persons entitled and retained money to satisfy the non-resident's tax liabilities. Once a year the accountants submitted tax returns and paid assessments from this money. In a later dispute involving the foreign company, the solicitors and accountants were served with a writ on the foreign company.

150. Murray J stated the test at 733:

> The critical test in my opinion is…to examine what is done in Melbourne with a view to answering the question whether the defendant is merely employing solicitors and accountants to carry out certain work for reward or whether, in fact, the work carried out by the solicitors and accountants forms part and a material part of the defendant's business as a trustee.

151. It was held that the foreign company was present in Victoria through its solicitors and accountants as the work carried out in Victoria constituted the business of the foreign company. It was not to the point in this case that the solicitors and accountants had no authority to do anything but carry out the distribution of the royalties in accordance with instructions, as the foreign company itself did not have any such discretion.[33]

152. In *Adams* it was stated that, although power to contract was important, it was not the only factor to be taken into account.[34]

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[32] As commented in Nygh, P.E. 1995, *Conflict of Laws in Australia*, 6th edn, Butterworths, p. 540. See also Halsburys Laws of Australia, 'Conflict of Laws', Chapter 85, paragraph [85-1880].
[33] *BHP* at 773.
[34] *Adams* at 1012-1015 and Dicey and Morris, 2000, *Dicey and Morris on the Conflict of Laws*, 13th edn. Vol 1, London, Sweet & Maxwell, p. 299.

153. In *White*, the court was satisfied that Lloyd's UK had a sufficient presence in Australia through its agent Lloyd's Australia, a subsidiary of Lloyd's UK. Lloyd's Australia had authority to, amongst other things, handle inquiries and promote Lloyd's business of directing and regulating insurance in the Lloyd's market. The business of Lloyd's UK was not that of selling insurance and, therefore, the fact that the agent did not have power to bind Lloyd's UK by contracts was of less significance.

154. *White's* case illustrates that a non-resident company can be carrying on business in Australia where an Australian subsidiary acts as agent for the non-resident company and carries on the business of the non-resident parent company in Australia.[35]

155. In determining whether an agent is carrying on the business of the non-resident company that it represents, we consider the following factors described in *Adams* (but replacing references to overseas company with non-resident company) are relevant to consider.

- Whether or not the fixed place of business from which the representative operates was originally acquired for the purposes of enabling the representative to act on behalf of the non-resident company.
- Does the non-resident company directly reimburse the representative for:
  - (i) the cost of accommodation at the fixed place?
  - (ii) the cost of staff?
  - (iii) What other contributions, if any, does the non-resident company make to the financing of the business carried on by the representative?
- Is the representative remunerated by reference to transactions, for example, commission, by fixed regular payments or in some other way?
- What degree of control does the non-resident company exercise over the running of the business conducted by the representative?
- Whether or not the representative reserves part of
  - (i) his or her staff;

[35] See also *Customs and Excise v. DFDS A/S* (Case C-260/95) [1997] BVC 279 where a wholly owned UK subsidiary of a Danish company was held to be a mere auxiliary organ of its parent. An agreement between the two companies designated the subsidiary as a 'general sales and port agent' for the parent company. It was found that the Danish company had established its business in the UK by virtue of its agency arrangement with the subsidiary. The fact that the premises of the UK subsidiary belonged to the subsidiary and not to DFDS, was not sufficient in itself to establish that the subsidiary was independent from DFDS.

(ii) his or her accommodation for the conducting of business related to the non-resident company.

- Whether or not the representative displays the name of the non-resident company at his or her premises or on stationery and, if so, whether it indicates he or she is a representative of the non-resident company.
- What business, if any, does the representative transact as principal exclusively on his or her own behalf?
- Whether or not the representative makes contracts with customers or other third parties in the names of the non-resident company or otherwise in such a manner so as to bind it.
- If so, whether the representative requires specific authority in advance before binding that non-resident company to contractual obligations.[36]

*In summary*

156. A non-resident company carries on business in Australia through an agent acting on its behalf if the agent is carrying on the business of the non-resident company.

157. If the agent has the authority to make binding contracts on behalf of the non-resident company, this is a powerful indicator that the non-resident company is carrying on business through the agent.

158. If the agent completes all tasks up to the point of execution of the relevant contract, but the contract is merely required to be signed by the non-resident company, as a matter of commercial reality, the agent, in these circumstances, carries on the business of the non-resident company.

159. If the business of the non-resident company does not involve buying (or manufacturing) and selling, the fact that the agent does not have authority to make binding contracts is of less significance. If the activities of the agent form part of, and a substantial part of, the business of the non-resident company, this is also a powerful indicator that the non-resident company is carrying on a business through the agent.

160. If the business of the non-resident company does include buying (or manufacturing) and selling, the fact that the agent does not have power to contract usually indicates that the agent is not carrying on the business of the non-resident company. However, in this situation, if many of the factors listed at paragraph 155 above are found and the activities of the agent form part of, and a substantial part of, the business operations of the non-resident company, then we

[36] *Adams* at 1014.

consider that the non-resident company carries on business in Australia. Consider the following example.

*Example 4 - agent does not make contracts on behalf of the non-resident company but it carries on a substantial part of the business of the non-resident company in Australia*

161. *New Zealand Watch Company (NZ Co) sells vintage timepieces in Australia, through various, unrelated, retail outlets in Australia. The sales contracts are executed by NZ Co in New Zealand. However, NZ Co engages an agent in Australia to undertake various activities, such as:*

- *marketing and advertising services;*
- *refund services;*
- *inquiry services to customers in Australia;*
- *secure storage of stocks;*
- *money collection, accounting and reconciliation services.*

162. *In consideration of these services, NZ Co pays the Australian agent all of the operating costs incurred plus an extra 20%. Operating costs include office rental, depreciation and administration expenses. At no time does the Australian agent own the watches and nor is the agent able to enter into any contract on behalf of NZ Co.*

163. *While the buying and selling of the timepieces is not handled by the Australian agent, the other activities the agent performs are part of, and a substantial part of, the business of the non-resident. Together with consideration of the factors listed in paragraph 155, this points to NZ Co carrying on business in Australia through the agent.*

*Division 57 agents*

164. A non-resident company may operate through a resident agent under the special rule in Division 57. A non-resident entity may make taxable supplies and creditable acquisitions through a resident agent. Any GST liabilities or credit entitlements of the non-resident entity are treated as those of the resident agent.

165. If a non-resident company makes creditable acquisitions through a resident agent, the non-resident is 'in Australia' if the resident agent is carrying on the business of the non-resident company in Australia.

*Example 5 – Division 57 resident agent not carrying on business of the non-resident company*

166. *A non-resident shipping company appoints an Australian resident agent to acquire stevedoring services from Australian stevedoring companies on its behalf. The resident agent has the power to enter into binding contracts for these services. Under Division 57, the input tax credit entitlements of the non-resident company in making those acquisitions are treated as those of the resident agent.*

167. *The place of business from which the agent conducts business is staffed and paid for by the agent. The agent receives a fee for making the creditable acquisitions on behalf of the non-resident. The non-resident has no influence over the running of the agency business. The agent provides agency services to a number of other clients.*

168. *The non-resident shipping business is about entering into contracts to transport goods to many destinations around the world. The resident agent does not carry on any part of this business. The resident agent does not have authority to conclude transport contracts on behalf of the non-resident. While the acquisition of stevedoring services is part of the business of the non-resident, it could not be said that in acquiring these services the agent is carrying on a substantial part of the non-resident's transport business. Consideration of the factors listed in paragraph 155 also support that this is the case. The non-resident company is not, therefore, 'in Australia'.*

169. If the resident agent under Division 57 is carrying on the business of the non-resident, at some fixed place for a substantial period of time, then the non-resident is 'in Australia'.

*Agency service fees*

170. An agent may carry on the business of a non-resident company in Australia, however the fee charged for the agency service to the non-resident company may still be GST-free. While the non-resident company is 'in Australia', that presence is *not in relation to the supply* of agency services (refer paragraphs 216 to 236 below).

171. The presence of the agent in Australia is relevant to a supply made by another supplier to the non-resident company, not the supply made to the non-resident company by the agent itself in Australia. If the other requirements of the item are met, such an agency service supplied to a non-resident company is a GST-free supply.

*Example 6 - fee for provision of agency services*

172. *Continuing example 4, the Australian agent arranges with Aus Store, an Australian resident storage company, to provide storage services to NZ Co. NZ Co is 'in Australia in relation to the supply' of storage services, by virtue of the Australian agent. That supply is not*

*GST-free. However, the supply of agency services from the Australian agent to NZ Co is GST-free, provided the other requirements of item 2 are met. The non-resident company is 'in Australia' but not 'in relation to the supply' of agency services.*

### *Fixed and definite place*

173. A non-resident company must carry on business at a place of business that is a fixed and definite place within Australia. The non-resident company owning, leasing or licensing premises in Australia typically evidences such a fixed and definite place. Similarly, in the case of an agent, the agent would own, lease or license such a place through which the agent carries on the business of the non-resident company.

174. In the case of a market place, it is the actual market place that is the distinct business premises rather than the location of the stand. A stand may be set up at different locations within a market place at different times, but the premises is still a fixed and definite place.

175. Non-resident companies must have a fixed and definite place of business, even in the extreme case where the business is established for a very short period of time. Dependent personnel of a non-resident company may carry on the business of the non-resident company in Australia but if that business is not conducted at a fixed or definite place in Australia, the non-resident company is not 'in Australia' for the purposes of item 2.

176. The jurisdictional case of *Littauer Glove Corporation v Millington* (1928) 44 TLR 746 illustrates this point. In that case a managing director of a UK clothiers' merchant company was in New York for 4 or 5 nights, staying at a hotel. He did business for his company in New York and at various other places that he visited, inspecting clothing samples and making purchases. He was served with a writ in the New York sales office of the principal United States supplier of the UK company. The court held that there was no residence or definite place within the jurisdiction on the part of the UK company. Therefore, the UK company was not subject to the jurisdiction of the New York court.

*Example 7 – non-resident company employees in Australia - no fixed place of business*[37]

177. *A non-resident company as part of its business operations engages in various training programs for its employees. The employees of the non-resident company come to Australia for training*

[37] It is noted that although the supply is made to the non-resident company, the supply is provided to another entity, the employees, in Australia. Therefore, subsection 38-190(3) is relevant.

*at the premises of the Australian trainer. These premises are not a fixed and definite place of business of the non-resident employer.*

*Example 8 – non-resident company employees in Australia - no fixed place of business*

178. *Employees of a non-resident company visit Australia for a week to obtain legal advice about a proposed Australian business venture. They stay in a hotel and attend meetings at the premises of the law firm. Neither the hotel nor the law firm office is a fixed and definite place of business of the non-resident company in Australia.*

*Example 9 – ship of a non-resident company in Australia - no fixed place of business exists*

179. *A non-resident company has a ship in Australia to be loaded with goods for export. A resident Australian company contracts to supply various stevedoring services to the non-resident company. The ship is not a fixed and definite place of business of the non-resident company.*

180. Guidance can also be drawn from the judicial interpretation of UK Value Added Tax (VAT) legislation. The meaning of 'has an established place of business' under section 29(3A) of the *Value Added Tax Act* 1983 (UK) was considered in *Newey and Eyre Group Ltd* [1996] BVC 2329 94/630 13,311 (*Newey*). This case involved a non-resident company based in Dublin, HFC, that wished to be included as a member of a VAT group but had its application for membership refused. HFC purchased the trade debts of Newey, a UK company, and appointed Newey as sole collection agent for the debts. The managing director of HFC visited the UK premises of Newey from time to time to check records and monitor the activities of the collection agent.

181. The tribunal found that HFC had not established a place of business in the UK. The visits of the managing director did not result in HFC having 'a local habitation of its own' in the UK. The collection agent activities of Newey were considered part of the business of Newey rather than that of HFC.

182. If on the facts of *Newey* it had been found that the agent was actually carrying on the business of the non-resident company, a different outcome would result. The non-resident company would be seen as carrying on business at the fixed and definite place of business of the agent.

### *Sufficiently substantial period of time*

183. The business of the non-resident company must have continued, or be intended to continue, at a fixed and definite place for a sufficiently substantial period of time.

*Example 10 - intention to continue business*

184. *A non-resident company has a newly opened branch carrying on business in Australia. It is the intention of the non-resident company that the business is to be carried on indefinitely. The business meets the test of being carried on for a sufficiently substantial period of time.*

185. Whether a period of time is sufficiently substantial is relative to the facts of each individual case. This has to be judged in the context of the particular business and is a question of fact and degree.

186. A key factor influencing whether a business has continued for a sufficiently substantial period of time is the length of time over which the business is carried on at a fixed and definite place. As a guide, a business that operates for a period of six months or more, is considered to be carried on for a sufficiently substantial period of time, regardless of the level of business transacted over that time.

*Example 11- length of time is sufficiently substantial*

187. *A non-resident company starts up a branch of its operations in Australia. For the first six months business is slow. However, the period of time over which the business is carried on is sufficiently substantial.*

188. Other factors may indicate that a period of less than six months is sufficient to lead to the conclusion that business is carried on in Australia for a sufficiently substantial period of time. One example is where the business returns to a particular location in Australia on an on-going and regular basis but for short periods each time. Another example is where a business is set up in Australia with the intention of being carried on for a substantial period of time but the business ceases after a short period of time. One instance of this would be where the business is prematurely liquidated because of, for example, death of key personnel or investment failure.

189. A business may also be carried on at a fixed and definite place for a limited period of time, much less than six months, but in that time a significant amount of business is transacted. In these circumstances we consider that, if a substantial amount of business of the non-resident company is transacted at a fixed and definite place, even though for a limited period of time, the non-resident company satisfies the sufficiently substantial period of time test.

190. This is illustrated by the jurisdictional case of *Dunlop Pneumatic Tyre Co Ltd v Actien-Gesellschaft Fur Motor Und Motorfahrzeugbau Vorm Cudell & Co* [1902] 1 KB 342 *(Dunlop)*. In that case the foreign company hired a stand at a trade exhibition in England for nine days in order to exhibit its wares. It was held that the foreign company was carrying on its business in a place within a

jurisdiction for the nine days by means of its representative. The period of nine days in this case was considered to be a substantial period because 'as much business in the kind of goods exhibited might probably be done in nine days as in as many months in an ordinary town'.38

191. Additionally, a business may operate on a seasonal basis. A substantial amount of the business may be transacted over a short period of time, with a reduction in business activity between the seasonal peaks.

*Example 12 - shorter length of time but still sufficiently substantial*

192. *A non-resident manufacturing company hires a stand for a week at a trade show in Sydney to secure orders for a new range of goods that the manufacturer is producing. The amount of business transacted over the week is as substantial as that done over a longer period at its usual premises. The sufficiently substantial period of time test is met in this case.*

***Permanent establishment***

193. In Taxation Ruling TR 2002/5 the Commissioner sets out the ATO view of the meaning of the phrase 'a place at or through which [a] person carries on any business' in the definition of 'permanent establishment' (PE) in subsection 6(1) of the ITAA 1936.

194. TR 2002/5 discusses the concepts of permanence in the context of subsection 6(1) of the ITAA 1936 and subsection 9-25(6) of the GST Act. However, these concepts of permanence are different to the concepts of fixed and definite place and substantial period of time used for determining presence under subsection 38-190(1). The tests adopted from jurisdictional cases for determining when a non-resident company is 'in Australia' are broader in application and capture situations that would not amount to a PE.

195. For example, for PE purposes a stall in a market may have geographic permanence,[39] but would lack the required temporal permanence[40] where the business operates (as a rule) for less than six months. Contrast this with the situation in *Dunlop* where a business operated from a stand at an exhibition for a substantial period of time although the representative was present for only nine days.

**When is a non-resident individual 'in Australia'?**

196. Where the recipient of a supply is a non-resident individual, it is, in comparison to a non-resident company, a straightforward matter

[38] *Dunlop* at 348.
[39] See paragraph 29, geographic permanence in TR 2002/5.
[40] See paragraph 30, temporal permanence in TR 2002/5.

to determine whether that individual is 'in Australia' at the relevant time. An individual, unlike a company, always has a precise physical location. The non-resident individual recipient is either physically in Australia or not in Australia.

197. Where a supply is made to a non-resident individual and *that* individual is physically present in Australia when the thing supplied is done, the individual is 'in Australia'. However, the individual must still be 'here' in relation to the supply.

198. There is no distinction made between supplies made to a non-resident individual acting in a private capacity and supplies made to a non-resident individual carrying on a business. In each case presence in Australia is established by identifying where the non-resident individual recipient is located at the relevant time.

199. Thus, where a supply of a thing other than goods or real property is made to a non-resident sole trader for use in an overseas business, the supply is not GST-free under item 2 if the non-resident sole trader recipient is physically in Australia in relation to the supply when the thing supplied is done. To the extent that the sole trader is 'in Australia in relation to the supply' for only part of the time when the thing supplied is done, the supply may be partly GST-free (see further at paragraphs 255 to 267).

200. While this result may seem at odds with the underlying policy intention, subsection 38-190(1) is formulated on the basis of identifying the location of the recipient of the supply and not the place of actual consumption.

201. As the focus is on the whereabouts of the non-resident individual to whom the supply is made, the location of a representative (including an agent) of that non-resident individual is not relevant. The presence of a representative in Australia does not alter the fact that the non-resident individual is not physically present in Australia. In this regard, item 2 uses the words 'the non-resident *who*' indicating that it is only the whereabouts of the individual non-resident that is in question.

*Example 13 – representative 'in Australia' on behalf of non-resident individual*

202. *A non-resident tourist is injured while visiting Australia and initiates a claim for damages after returning home. The presence of a solicitor in Australia acting on behalf of the injured individual does not mean that the individual is 'in Australia' for the purposes of item 2.*

*Example 14 – employee of a non-resident individual 'in Australia'*

203. *A sole trader is receiving legal advice in relation to a possible business opportunity in Australia. An employee is in Australia on behalf of that sole trader to provide information relating to that advice. The non-resident sole trader is not 'in Australia' for the purposes of item 2.*

*Example 15 – an agent of a non-resident individual 'in Australia'*

204. *A non-resident sole trader engages a Melbourne solicitor to represent him in an action arising out of a patent infringement in Australia. The solicitor, as agent for the non-resident sole trader, briefs a barrister to litigate the matter in an Australian court. The non-resident sole trader is not physically in Australia when the legal services of the barrister are performed. The non-resident individual is not 'in Australia' for the purposes of item 2. .*

205. Also, if a non-resident sole trader carries on business or investment activities in Australia through an agent and a supply is made to that agent on behalf of the non-resident individual who is not physically in Australia when the thing supplied is done, the non-resident sole trader is not in Australia. The supply is GST-free provided the other requirements of item 2 are met.

*Example 16 – supply to a managing agent on behalf of a non-resident individual property owner*

206. *A non-resident individual owns a residential rental property in Middle Park, Victoria. As he lives in the United Kingdom the property is managed by a resident agent. The agent, on behalf of the non-resident, enters into a contract with a painting contractor for the house to be painted. The non-resident is not physically present 'in Australia' when the thing supplied is done.*

207. Testing for 'presence' of an individual by reference to the physical presence of a person is consistent with the common law rules for jurisdiction in private international law. Jurisdiction over an individual in an action *in personam*[41] depends on the physical presence of the defendant within the jurisdiction at the time of service of the writ. It was noted in *Laurie v Carroll* (1958) 98 CLR 310 at 323, that:

> The defendant must be amenable or answerable to the command of the writ. His amenability depended and still primarily depends on nothing but presence within the jurisdiction.

208. In the case *Perrett v Robinson*[42] the Court stated:

[41] For example, common law actions in tort and contract.
[42] (1985) 1 Qd R 83 at 84.

> It is unquestionably the general rule that the Court has jurisdiction in action *in personam* if the originating process is served on the defendant within the jurisdiction.

209. For jurisdictional purposes, neither ordinary residence nor domicile is required and the length of time the defendant remains within the jurisdiction is immaterial.[43] This rule is subject to limited exceptions such as where the defendant has been induced by fraud to come into the jurisdiction.

210. In some jurisdictions, an order may be sought under court rules to obtain leave from the court to serve a writ on an agent on behalf of a principal who is outside the jurisdiction.[44] A solicitor can be instructed by the defendant to accept service on behalf of the defendant.[45] Without these exclusions to the general rule, it would not be possible to serve originating process on anyone other than the defendant personally.

211. The approach of the court to individuals in relation to jurisdiction supports the view that for an individual to be 'in Australia' at the relevant time, the individual is required to be physically present here. It also means that we are applying the jurisdictional common law principles to both non-resident companies and individuals.

### *Alternative view*

212. An alternative view is that the individual is 'in Australia' if a representative is in Australia on behalf of that individual. The representative could be an agent or in the case of a sole trader, an employee of that individual.

213. It has been observed that "[i]t is unclear whether an ordinary person, as distinct from a corporate body, can be present within a foreign jurisdiction through the presence of an agent. The question whether 'a person may be constructively present in another country although his physical presence is elsewhere' was left open in *Vogel v R & A Kohnstamm Ltd* [1973] QB 133 at 141; [1971] 2 ALL ER 1428 at 1435."[46]

214. While the matter may not be not entirely free from doubt, we consider that in the case of non-resident individuals, presence determined on the basis of actual physical presence is the better view. Item 2 does not seem, on the plain words of the section, to contemplate presence of a non-resident individual through a

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[43] *Carrick v Hancock* (1895) 12 TLR 59
[44] NT r 12; Qld O 10 r 8; Tas O 9 r 8; Vic r 6.13; WA O 9 r 3.
[45] See various court rules, for example FCR, O 7 r 8. General instructions to conduct the litigation are not sufficient; *Re Crimdon* [1900] P 171
[46] Davies, M. Ricketson, S & Lindell, G. 1997, *Conflict of Laws: Commentary and Materials*, Butterworths, p. 331.

representative. This is to be contrasted with non-resident companies where the whereabouts of its representatives is the only way that presence in Australia can be established. That representative, including an agent, must carry on the business of the non-resident company in Australia.

215. In the case of the employees of a non-resident sole trader, subsection 38-190(3) applies to supplies that are made to the sole trader but provided to another entity, including an employee of the sole trader, in Australia.

### The meaning of 'in relation to the supply'

216. Whilst the intention is not to tax supplies that are consumed offshore, the method used in the GST Act, by virtue of subsection 38-190(1), is solely based on the location of the recipient. That is, whether or not the recipient is in Australia.

217. As the location of the recipient is, in effect, a proxy test for determining where the supply to that recipient is consumed, we consider that the expression 'not in Australia' contemplates that there is a connection between the supply and the presence of the recipient.

218. Hence at paragraph 68 of GSTR 2000/31 we state that for the purposes of items 2 and 3 'the pre-condition that the recipient is not in Australia at the relevant time requires that neither the recipient, nor a representative acting on behalf of the recipient if the recipient is a company, is in Australia *in relation to the supply*.'

219. In the context of items 2 and 3 the words 'in relation to the supply' signify some connection or association between the supply being made to the recipient and the presence of the recipient in Australia. As the circumstance is one of, in effect, identification of the place of consumption, we consider that the connection or association needs to be more than just incidental

220. Once it is established under item 2 that the non-resident is 'in Australia', it is necessary to determine whether that presence in Australia is *in relation to the supply*.

#### *Non-resident company in Australia 'in relation to the supply'*

221. Clearly if the supply to a non-resident company is for the purposes of the Australian branch, representative office or agent of the non-resident company, that Australian presence is in relation to the supply. There is a connection between the supply and the presence in Australia that is more than just incidental.

222. Where the supply is not for the purposes of the Australian branch, representative office or agent of the non-resident company, but that Australian presence is involved in the obtaining or receiving

of the supply by the non-resident company, the non-resident company is 'in Australia in relation to the supply', except where that involvement is just incidental.

223. If the involvement of the Australian presence is limited to the carrying out of simple administrative tasks on behalf of the non-resident, as a matter of administrative convenience, that involvement is just incidental. The connection between the supply and presence is so minor in nature that it is reasonable to conclude that the presence of the non-resident in Australia is not in relation to the supply.

224. Tasks of a simple administrative nature include:

- passing on an e-mail;
- being a point of phone contact to pass on messages;
- being a mailing address or delivery contact;
- being a point of contact for a visiting representative of the non-resident company;.
- on-forwarding information supplied by the parent company for the supplier and vice versa.

225. It is recognised that this approach may not always deliver a GST-free outcome for supplies that are clearly for consumption outside Australia. However, items 2 and 3 are formulated in a way that only requires the location of the recipient to be identified at the relevant time. It does not require identification of the place of 'actual consumption'. Within the legislative framework, the only limitation that is put on the location of the recipient in Australia is that any presence in Australia must be in relation to the supply.

*Example 17 – branch office in Australia but not 'in relation to the supply'*

226. *Europe Airways is a non-resident passenger and cargo carrier. It has a number of sales branch offices in Australia. Europe Airways contracts with Aussie Line, an Australian airline company, to carry goods from Sydney to Melbourne. These freight arrangements are not made through the branch offices in Australia, and are undertaken solely for the purposes of the overseas Head Office, not for any purposes of the branch offices.*

227. Europe Airways is 'in Australia'. The non-resident company carries on business in Australia through a number of branch offices. However that presence in Australia is not 'in relation to the supply'. The supply of freight *services* is not for the purpose of any Australian

branch and there is no involvement of any branch in the obtaining or receiving of that supply.

*Example 18 - branch office in Australia 'in relation to the supply'*

228. *A Singapore company (Sing Co) is not a resident of Australia. It has a branch in Australia. Sing Co is considering setting up a joint venture company in Australia with a Malaysian company. Sing Co engages an Australian legal firm, Aus legal, to provide, in writing, legal advice.*

229. *The Australian branch of Sing Co is provided with the written advice for on-forwarding to Sing Co. Sing Co is 'in Australia' but not 'in relation to the supply' of legal services. The involvement of the Australian branch is limited to carrying out an administrative task on behalf of Sing Co, as a matter of administrative convenience. However, if Sing Co requested the Australian branch to translate the advice into Malay before on-forwarding the legal advice, the branch ceases to have a role in relation to the supply that is only of a minor administrative nature.*

*Example 19 - branch office in Australia 'in relation to the supply'*

230. *A United States company (US Co) has a branch in Australia. US Co engages a legal firm in Australia (Aus Legal) to represent it in legal action against an Australian company. US Co sends a director to Australia to provide information to Aus Legal. The director uses an office at the Australian branch, and uses employees of the branch to liase with Aus Legal and to supervise the legal proceedings generally.*

231. *The involvement of the branch in Australia in relation to the supply is not limited to administrative tasks of a minor mature. US Co is in Australia 'in relation to the supply'.*

*Example 20 – representative office in Australia 'in relation to the supply'*

232. *A United Kingdom company (UK Co) has a representative office in Australia that carries on the business of the non-resident company. UK Co engages Aus Finance, a resident Australia company, to provide advice on the possible acquisition of shares in an Australian company. UK Co instructs its representative office in Australia to provide responses to the questions posed by Aus Finance and provide any other information that may be of assistance to Aus Finance on behalf of UK Co. Some information is supplied in writing, and at other times the information is supplied at meetings held between Aus Finance and the Australian representative office of UK Co.*

233. *The role of representative office in Australia is not limited to administrative tasks of a minor nature. UK Co is in Australia 'in relation to the supply'.*

234. *However, if on the other hand, the representative office only passed on to Aus Finance information prepared by UK Co, or provided, on behalf of UK Co as a matter of administrative convenience, company profile details readily available to the representative office, UK Co is 'in Australia' but not 'in relation to the supply'.*

*Example 21 – supply for the purposes of the branch office in Australia*

235. *Asia Co, a non-resident company, contracts with Program Aus, a resident Australian company that designs customer-specific computer programs. Asia Co has a branch in Australia. The branch in Australia has no involvement with the supply.*

236. *When the computer program is developed, Asia Co supplies that program to the branch for branch implementation. Even though the branch has no involvement with the supply to Asia Co, the supply is for the purposes of the branch in Australia. Therefore, Asia Co is in Australia in relation to the supply. It makes no difference whether Program Aus sends the program to the branch directly or whether Program Aus sends the program to Asia Co and then Asia Co sends it on to the branch. It is not relevant whether the program is also for use by the parent company or other branch operations outside Australia. The issue is whether the presence in Australia is in relation to the supply. As the supply is for the purposes of the Australian branch, Asia Co is in Australia 'in relation to the supply'.*

***Non-resident individual in Australia 'in relation to the supply'***

237. A non-resident individual may be physically present in Australia when the thing supplied is done, but that presence may be unrelated to the supply. If that individual is in Australia on matters unrelated to the supply, the individual recipient is 'in Australia' but not 'in relation to the supply'.

238. For example, if the non-resident is in Australia on holidays and has no contact with the supplier, the presence of the non-resident individual in Australia when the thing supplied is done is not in relation to the supply.

*Example 22 – individual presence in Australia but not 'in relation to the supply'*

239. *A supply of legal services is made to a non-resident sole trader where the non-resident individual is in Australia on holiday when the thing supplied is done. The non-resident individual has no contact*

*with the supplier while in Australia. The presence of the individual in Australia is not 'in relation to the supply'.*

240. Like non-resident company recipients, where a non-resident individual recipient of a supply is physically in Australia and in contact with the supplier, we consider that presence is in relation to the supply. However, if that contact is limited to contact of a simple administrative nature, such as checking on the progress of the supply, we consider the presence of the non-resident individual is not 'in relation to the supply'.

*Example 23 – individual presence in Australia 'in relation to the supply'*

241. *A non-resident individual falls over while shopping in a store in Australia. While in Australia the individual seeks legal advice from an Australian legal firm. The legal firm on behalf of the individual writes to the shopping centre seeking out of pocket expenses and a small amount for pain and suffering. The individual extends the stay in Australia while the legal firm performs this service. The non-resident individual is in Australia 'in relation to the supply' as the presence in Australia relates to the supply of the legal advice.*

*Example 24 – individual presence in Australia 'in relation to the supply'*

242. *Aus Entertain Co is an Australian resident company. Aus Entertain Co enters into a contract to provide services to an individual performer who is not a resident of Australia. Aus Entertain Co seeks out work in nightclubs for the non-resident performer in Australia and New Zealand. When Aus Entertain Co supplies this service, the non-resident performer may be outside Australia, or already in Australia.*

243. *The non-resident performer is in Australia to work in the nightclubs, when the service is performed by Aus Entertain Co. There is an association between the supply and the presence of the performer in Australia that is more than just incidental. The presence of the performer in Australia is 'in relation to the supply'.*

**The meaning of 'when the thing supplied is done'**

244. 'When' the thing supplied is done means at the time the thing supplied is done. The phrase 'the thing supplied is done' has the same meaning as the expression 'the thing is done' in paragraph 9-25(5)(a). Under that paragraph, a supply is connected with Australia if the thing supplied is done in Australia.

245. Consistent with GSTR 2000/31,[47] if the thing supplied is a service, when the service is done, refers to the period of time during which the service is performed.

*Example 25 – supply of a service done when it is performed*

246. *Darren is a self-employed marine biologist and he is providing research assistance to Phillip, a New Caledonian resident who is conducting research in marine biology. The research assistance is in the form of collating and providing details of sources of information and finding and providing available papers on specific areas.*

247. *The research work is done by Darren in Australia. The performance of the service occurs in Australia. When the service is done refers to that period of time during which the service is performed in Australia.*

248. If a supply is the provision of advice or information and the supply involves work to create, develop or produce that information or advice for the recipient, the supply is one of the performance of services. When the supply of advice or information is done refers to that period of time during which the advice is prepared, produced or created, as the case may be.

*Example 26 – supply of advice done when it is prepared*

249. *Lidis QA in Adelaide provides legal advice in the form of a written opinion to Hong Kong Co. The preparation of the advice occurs in Australia. The advice is done over that period of time during which the advice is prepared in Australia.*

250. If the provision of advice or information is an instantaneous supply of advice or information, when the supply of the advice or information is done is at the time the advice or information is provided.

251. If the supply is the creation, grant, transfer, assignment or surrender of a right, the creation, granting, transferring, assignment or surrendering of that right is done at the time the right is created, granted, transferred, assigned or surrendered.

*Example 27 – supply of rights granted in Australia*

252. *Boffin Co (a US resident) granted Cyber Co (an Australian resident) the right to use Boffin II software in Australia for three years. The right to use the intellectual property is granted under a written agreement. That agreement is made in Australia. The right is done at the time the right is granted in Australia.*

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[47] GSTR 2000/31, Goods and services tax: supplies connected with Australia

253. If the supply is the entry into, or release from, an obligation to do anything, or refrain from an act, or to tolerate an act or situation, when the entering into that obligation or the release from that obligation is done is at the time the obligation is entered into or the release is effected.

*Example 28 - supply of obligation to refrain from an act done in Australia*

254. *T Co Aust (an Australian resident) enters into a restrictive covenant with UK Co (a UK resident) requiring T Co Aust not to compete in Melbourne with a subsidiary of UK Co based in Melbourne. The supply of the obligation to refrain from an act by T Co Aust is done in Australia if that obligation is entered into in Australia. If, for example, the obligation arises under a contract that is made in Australia, the thing supplied is done in Australia when the agreement is made.*

**Apportionment**

255. The non-resident company or individual may only be 'in Australia' and 'in relation to the supply' for part of the time 'when the thing supplied is done'. Providing all the criteria of item 2 are met, the supply is GST-free to the extent that the non-resident company or individual is not 'in Australia in relation to the supply'.

256. For example, this is the case where a non-resident company or individual is 'in Australia in relation to the supply' but for only part of the time 'when the thing supplied is done.'

*Example 29 – 'in Australia in relation to the supply' for part of the time 'when the thing supplied is done'*

257. *A non-resident individual engages a legal firm in Australia to provide legal services for a three month period. The non-resident individual is not in Australia for most of this time, but visits Australia for a two week period at the beginning of the service period to provide the Australian legal firm with detailed instructions. The non-resident is 'in Australia in relation to the supply' for only part of the time when the legal service is performed.*

258. Alternatively, a non-resident may have a presence 'in Australia' for part of or all the relevant time, but that presence is only 'in relation to the supply' for part of the time 'when the thing supplied is done'.

*Example 30 – non-resident individual 'in Australia' but only 'in relation to the supply' for part of the time 'when the thing supplied is done'*

259. *A non-resident individual is in Australia for two weeks while a service by an Australian supplier is done. However, the non-resident spends one week visiting the supplier in relation to the supply and one week is spent on holidays, with no contact with the supplier. The non-resident individual is 'in Australia' for the whole of the time when the service is done, but 'in relation to the supply' for only part of the time when the service is done.*

*Example 31 – non-resident individual 'in Australia' for part of the time and 'in relation to the supply' for part of the time 'when the thing supplied is done'*

260. *A non-resident individual is supplied with services that take 4 weeks to complete. The individual is 'in Australia' for 2 weeks of the 4 week supply period. For 1 week the individual is in Australia on holidays. There is no contact with the supplier. For that week the individual is in Australia but not in relation to the supply. For the other week the individual has extensive contact with the supplier. For that week, the individual is 'in Australia in relation to the supply'. The non-resident then flies back overseas for the other two weeks when the service is done. The non-resident is 'in Australia' for part of the time and that presence is 'in relation to the supply' for only part of the time when the service is done.*

*Example 32 – non-resident company 'in Australia' but only 'in relation to the supply' for part of the time 'when the thing supplied is done'*

261. *A non-resident company has a branch in Australia. For part of the time when the thing supplied is done, the branch has no involvement with the supply made by the Australian supplier to the non-resident parent company (and the supply is not for the purpose of the branch). For the rest of the time (when the thing supplied is done) the branch becomes the principal point of contact and now has more than just incidental involvement with obtaining or receiving the supply. The non-resident company is 'in Australia' for the whole of the relevant time and 'in relation to the supply' for only part of the time when the thing supplied is done.*

262. Where circumstances of this kind exist a supplier needs to apportion a supply for the time the non-resident is in Australia in relation to the supply when the thing supplied is done and the time that the non-resident is not in Australia in relation to supply when the thing supplied is done.

263. That part of the supply that is done when the non-resident company or individual is in Australia in relation to the supply is the taxable part of the supply. That part of the supply that is done when the non-resident company or individual is not in Australia in relation to the supply is the GST-free part of the supply, provided the other requirements of the item are met.

264. For example, a non-resident individual who has contracted with an Australian supplier for six months of services, but visits the supplier in Australia, in person, for one week to provide detailed instructions, is in Australia in relation to the supply for part of the time when the thing supplied is done. The supply must be apportioned on a time basis to determine the GST-free and taxable parts of the actual supply.

265. Another example is where a non-resident individual is in Australia for two weeks while a service by an Australian supplier is done. However, the non-resident spends one week visiting the supplier in relation to the supply and one week is spent on holidays, with no contact with the supplier. The supply must be apportioned on a time basis to determine the GST-free and taxable parts of the actual supply.

266. Similarly, where a non-resident company has a branch in Australia that is only involved in the supply made to the non-resident for part of the time when the thing supplied is done, the supply needs to be apportioned on a time basis to determine the GST-free and taxable parts of the actual supply.

267. To work out the value of the taxable part of the supply, the consideration needs to be apportioned to each of the parts to find the consideration for the taxable part. The supplier can use any reasonable method to apportion the consideration. The method used must be supportable in the particular circumstances. The supplier should keep records that explain the method used to apportion a mixed supply. The value of the taxable part of the supply is calculated as 10/11 of its price (or consideration).[48]

# Further examples

268. Further examples illustrating the application of the requirement in item 2 that the non-resident company or individual is not 'in Australia in relation to the supply' at the relevant time are provided at paragraphs 274 to 310 below.

[48] Refer to sections 9-70, 9-75 and 9-80 and GSTR 2001/8 Goods and Services Tax Ruling: Apportioning the consideration for a supply that includes taxable and non-taxable parts at paragraphs 25 to 30 (Rulings section) and paragraphs 116-117 (Explanation section).

269. Examples 33 to 35 illustrate situations where a non-resident company with a branch office or an Australia subsidiary or an Australian agent is 'in Australia in relation to the supply'.

270. Example 36 illustrates the situation where a non-resident company with an Australian branch is 'in Australia' but not 'in relation to the supply'.

271. Examples 37 to 43 illustrate situations where a non-resident company is not 'in Australia' even though it has:

- an Australian representative office; or
- an Australian subsidiary; or
- an Australian agent; or
- employees being trained in Australia; or
- an executive visiting Australia; or
- a subsidiary in Australia established immediately after obtaining advice on formation; or
- an independent agent selling the goods.

272. Example 44 illustrates the situation where a non-resident individual is 'in Australia' for part of the time.

273. Example 45 illustrates the situation where the non-resident individual is not 'in Australia in relation to the supply'.

**Non-resident company in Australia in relation to the supply**

***Example 33 – supply to non-resident company with an Australian branch office***

274. *A non-resident company, NZ Photo Co, is expanding its overseas business of selling framed photographic images. NZ Photo Co sends two employees to Australia to establish a branch office in Melbourne. Premises are leased for 2 years with an option for a further 2 years. It is considered that the leased premises will serve the business needs for at least 4 years. The Melbourne office promotes and sells a wide range of photographic products. The business has been running smoothly for 3 months.*

275. *The non-resident company is carrying on business in Australia at a fixed and definite place and intends to continue that business for a sufficiently substantial period of time. NZ Photo Co is 'in Australia'.*

276. *Aus Transport, an Australian resident company, contracts with NZ Photo Co to supply the Australian branch with freight services to various destinations in Australia. As the supply is for the purposes of the Australian branch, NZ Photo Co is 'in Australia in relation to the supply'. The supply is not GST-free under item 2.*

***Example 34 – non-resident company with an Australian subsidiary***

277. *Aus Co is a resident Australia company. A non-resident company, Hong Kong (HK) Co, holds a majority share holding in Aus Co. Aus Co and HK Co enter into an agency agreement for the next three years. The agreement provides that Aus Co is to enter into contracts on behalf of HK Co for the supply of goods to various customers of HK Co in Australia.*

278. *HK Co directly reimburses Aus Co for the cost of accommodation, administration expenses and staff that are attributable to the sale of goods by Aus Co on behalf of HK Coy. Aus Co signs the contracts as agent for HK Co, and is able to negotiate the price paid for the goods.*

279. *The business of HK Co is about buying and selling goods and Aus Co enters into contracts on behalf of HK Coy. The above facts point to Aus Co, carrying on the business of HK Co as its agent, even though Aus Co is a subsidiary of HK Co. The business of HK Co is carried on in Australia through an agent at a fixed and definite place and it is intended that the business is carried on for a sufficiently substantial period of time. HK Co is 'in Australia'.*

280. *Aus Co enters into an advertising agreement with an Australian advertising agency on behalf of HK Co to promote the Australian business of HK Co. The supply made by the advertising agency to HK Co is not GST-free under item 2. HK Co is 'in Australia in relation to the supply', when the advertising services are performed. .*

***Example 35 – non-resident company with an Australian agent***

281. *Whiz Tech Aus, an Australian resident company, is engaged by NZ Computers, a non-resident New Zealand company, to undertake a range of activities that make up a material and significant part of the business of NZ Computers. NZ Computers sells by way of licence agreement tailor-made software products around the world.*

282. *NZ Software engages Whiz Tech Aus to:*

- provide marketing services for NZ Computer products in Australia;
- review and provide input on marketing plans in Australia;
- advise on market and legal conditions;
- perform product demonstrations to major stores;
- liaise between NZ Computers and potential distributors and customers in Australia; and
- provide telephone support to local distributors.

*The service agreement is for an initial period of 2 years.*

283. *Whiz Tech Aus does not have authority to accept orders, complete agreements or make any binding contracts on behalf of NZ Computers.*

284. *NZ Computers directly reimburses the cost of accommodation, staff and all expenses for the work carried out on behalf of NZ Computers. Whiz Tech Aus allocates half of its staff to doing the work for NZ Computers.*

285. *The above facts point to NZ Computers carrying on business in Australia through an agent. Even though Whiz Tech Aus does not have the power to conclude contracts, it does carry on a substantial and material part of the business of NZ Computers in Australia. NZ Computers carries on business in Australia through an agent acting on its behalf; the agent has a fixed and definite place in Australia; and it is intended that the business be continued for a sufficiently substantial period of time. NZ Computers is 'in Australia'.*

286. *Whiz Tech Aus seeks legal advice on behalf of NZ Computers as to changes in the Australian copyright law. Whiz Tech Aus engages an Australian lawyer on behalf of NZ Computers and is involved in the obtaining and receiving of the advice. NZ Computers leaves the request in the hands of Whiz Tech to pursue, provide necessary details and to ensure prompt receipt of the advice. The involvement of Whiz Tech is not just incidental. NZ Computers is 'in Australia' and that presence is 'in relation to the supply'. The supply of legal advice to NZ Computers is not GST-free under item 2.*

### Non-resident company in Australia but not in relation to the supply

#### *Example 36 – supply to a non-resident company with an Australian branch*

287. *Interpret Aus, is an Australian resident company. Interpret Aus has a contract with UK Chemicals, a non-resident company, to analyse data and provide a written report for the purposes of the UK operations. Interpret Aus has never dealt with UK Chemicals before and asks UK Chemicals if it has any business presence in Australia. UK Chemicals advises that it has a branch in Western Australia, Aus Chemicals, which supplies agricultural chemicals in that State. Interpret Aus checks the ASIC website and notes that UK Chemicals is registered as a foreign company. UK Chemicals is 'in Australia'.*

288. *However, Aus Chemicals has no involvement in obtaining or receiving the supply from Interpret Aus. Aus Chemicals does not negotiate, discuss, give information, or have any other involvement in the supply. Also the supply is not for the purposes of the Australian*

*branch. Accordingly, the presence of UK Chemicals in Australia is not 'in relation to the supply' and the supply is GST-free under item 2 provided the other requirements of that item are met.*

**Non-resident company not in Australia**

***Example 37 – non-resident company with an Australian representative office***

289. *Aus Co, an Australian resident company, operates an Australia-wide retail chain. It also acts as a representative for an overseas manufacturer, Foreign Co. Under the agreed terms of the arrangement with Foreign Co:*

- *Aus Co has the right to sell the products of Foreign Co in Australia;*
- *For items above a certain value, the customer purchases directly from Foreign Co; and*
- *Aus Co is not authorised to bind Foreign Co to any agreement with another party or accept purchase orders on behalf of the manufacturer.*

290. *Aus Co displays a sign on the entrance to its Head Office that it is the Australian representative for Foreign Co. Various promotional materials also advertise that Aus Co is the Australian representative for Foreign Co. The fixed place of business from which Aus Co operates was not originally acquired for the purposes of enabling Aus Co to act on behalf of Foreign Co. Foreign Co does not directly reimburse Aus Co for the cost of accommodation, staff or make any other contributions to the running of the representative office. Apart from Foreign Co requiring Aus Co to act at all times in a fit and proper manner so as not to bring the name of Foreign Co into disrepute, Foreign Co does not exercise any control over the running of the business conducted by Aus Co as representative for Foreign Co.*

291. *Aus Co receives a commission when it sells the products of Foreign Co. It does not exclusively sell Foreign Co products, but also sells the products of other manufacturers. Foreign Co has control over all high priced items.*

292. *On these facts, Foreign Co does not carry on business in Australia through an agent. Foreign Co is not 'in Australia'.*

***Example 38 – non-resident company with an Australian subsidiary***

293. *Recruit Australia, an Australian resident company, provides recruitment and consulting services to non-resident companies. NZ Co is a non-resident management consultant firm which engages Recruit Australia to recruit a new manager for its Pacific operations based in New Zealand. NZ Co has a subsidiary in Australia. The*

*subsidiary conducts its own consulting business in Australia. It does not do any consulting business on behalf of NZ Co.*

294. *A director of the Australian subsidiary undertakes various activities in the selection process on behalf of the NZ Co. Recruit Australia e-mails and telephones the director of the Australian subsidiary to discuss the requirements of NZ Co. The director also interviews some prospective candidates for the position in New Zealand, and then advises the results of the interviews to Recruit Australia and provides recommendations.*

295. *These activities of the subsidiary form part of the business of NZ Co but not a substantial part of the business of NZ Co. NZ Co is not carrying on business in Australia. The fact that the director of the Australian subsidiary is available to answer questions and undertake some of the interviewing does not make NZ Co 'in Australia'.*

***Example 39 – non-resident company with an Australian agent***

296. *NZ Co, a non-resident NZ company, conducts a business of selling farm equipment. It engages Jack Smith, a marketing agent, who specialises in acting for agricultural companies. Mr. Smith undertakes to:*

- *promote NZ Co and its activities in Australia;*
- *introduce potential purchase and sales opportunities to NZ Co from within Australia; and*
- *provide a liaison role in contract negotiations when required and resolve the administration of any contract difficulties.*

297. *Jack acts on behalf of fifteen companies, leases an office in Sydney and is an employer of six staff. He receives 10% of any sales that he arranges for NZ Co. Jack has no authority to determine pricing, contractual terms, negotiate or administer contracts on behalf of NZ Co. NZ Co maintains control over all aspects of any business that the agent introduces to it.*

298. *These facts point to the agent having independent status acting in the ordinary course of his business. The agent is not carrying on the business of the non-resident in Australia. NZ Co is not 'in Australia'.*

***Example 40 –employees of a non-resident company trained in Australia***

299. *Training Oz Style is a resident Australian company. Asia Tech is a Singapore based company. Asia Tech contracts with Training Oz Style to provide computer training in Australia for five employees of*

*Asia Tech. Aside from these employees, Asia Tech does not have a presence in Australia; it has no branch, office, subsidiary or agent.*

300. *Asia Tech is not 'in Australia'. The fact that five employees visit Australia to receive training does not mean that Asia Tech is in Australia. Asia Tech does not carry on business in Australia through a place of its own.*

301. *However, it is noted that the supply of training made to Asia Tech is provided to another entity in Australia, the employees, and subsection 38-190(3) applies to that supply.*

***Example 41 – executive of a non-resident company visiting Australia***

302. *A United States company, US Finance, is a non-resident US company with no branch, office or agent in Australia. An executive from a US investment bank, acting for US Finance, comes to Australia to investigate the possibility of acquiring shares in an Australian company. While in Australia, the executive meets with an Australian legal firm and issues instructions on behalf of US Finance. The Australian legal firm provides a letter of advice to the executive prior to his departure from Australia.*

303. *US Finance is not 'in Australia'. The presence of the executive, whether he has the authority to issue instructions on behalf of the non-resident company or not, does not mean that US Finance is in Australia. This is because US Finance does not carry on business within Australia through a place of its own or through an agent acting on behalf of US Finance.*

***Example 42 – subsidiary established in Australia after advice is obtained on formation in Australia***

304. *Foreign Co engages Aust Co to research and advise Foreign Co on the practicalities of establishing an Australian subsidiary. Foreign Co subsequently establishes an Australian subsidiary.*

305. *Foreign Co is not 'in Australia' at the time of the supply of research and advice. The fact that, as a result of that advice, Foreign Co sets up a subsidiary in Australia does not make the non-resident company 'in Australia' when the service is performed.*

***Example 43 – Australian company selling goods for a non-resident company***

306. *Clean Co, an Australian resident company, sells a wide range of domestic and commercial vacuum cleaners. Japan Co, a resident of Japan, contracts with Clean Co to sell a high quality commercial line of vacuum cleaners on a commission basis. As part of the arrangement, Clean Co is required to maintain a high level of product*

*knowledge – undertaking annual visits to Japan funded by Japan Co, and adhere to guidelines Japan Co distributes regarding the sale of its product. The commission payable to Clean Co factors in these requirements. Clean Co receives a commission based on the number of vacuum cleaners sold.*

307. *Based on these facts, Japan Co does not carry on business in Australia through a place of its own or through an agent acting on behalf of Japan Co. Clean Co is an independent agent operating solely on a commission basis. There is no other connection between the business of Clean Co and that of Japan Co. Clean Co conducts its own business of selling vacuum cleaners. It does not carry on that business on behalf of Japan Co. Japan Co is not 'in Australia'.*

**Non-resident individual 'in Australia' for part of the time**

***Example 44 – Australian barrister supplies legal services to an individual non-resident***

308. *Jan, a non-resident individual engages a solicitor at Aus firm to represent her in legal proceedings in Australia. The solicitor, as agent for the non-resident, engages the services of an Australian barrister. Jan is not physically in Australia at any time when the services of the solicitor or the barrister are performed. Jan, therefore, not 'in Australia'. The fact that Jan has an agent in Australia does not mean that she is in Australia in relation to the supply when the services are performed.*

309. *If, on the other hand, Jan is required to give evidence in Australia, she is 'in Australia' for part of the time, in relation to the supply of the barrister's services. The supply is to be apportioned on a time basis to arrive at the GST-free and taxable parts of the actual supply.*

**Non-resident individual not 'in Australia in relation to the supply'**

***Example 45 - written assessment for non-resident individual seeking to emigrate to Australia***

310. *Aus Skills, an Australian resident company, is contracted by non-resident individuals who want to emigrate to Australia. Aus Skills provides a written assessment as to the particular skills of the non-resident. Sometimes the non-resident comes to Australia on a temporary visitor's visa, to discuss various immigration issues with Aus Skills. To the extent that the non-resident is not 'in Australia in relation to the supply', the supply is GST-free under item 2, where the other requirements of that item are met.*

## Definitions

311. The term ***entity*** is defined in subsection 184-1(1) of the GST Act to mean any of the following:

(a) an *individual;

(b) a body corporate;

(c) a corporation sole;

(d) a body politic;

(e) a *partnership;

(f) any other unincorporated association or body of persons;

(g) a trust;

(h) a *superannuation fund.

Note: The term 'entity' is used in a number of different but related senses. It covers all kinds of legal persons. It also covers groups of legal persons, and other things, that in practice are treated as having a separate identity in the same way as a legal person does.

312. The asterisk terms (*) are defined in section 195-1.

313. ***A resident of Australia*** is defined in subsection 6(1) of the ITAA 1936 and means

(a) a person, other than a company, who resides in Australia and includes a person -

(i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia;

(ii) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia; or

(iii) who is:

(A) a member of the superannuation scheme established by deed under the Superannuation Act 1990; or

(B) an eligible employee for the purposes of the Superannuation Act 1976; or

(C) the spouse, or a child under 16, of a person covered by subsubparagraph (A) or (B); and

(b) a company which is incorporated in Australia, or which, not being incorporated in Australia, carries on business in Australia, and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia;

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# Your comments

315. If you wish to comment on this draft Ruling, please send your comments promptly by **11 December 2002** to:

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- agency services
- agent
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- Australian branches and subsidiaries of non-resident companies
- Australian resident
- Australian Securities and Investments Corporation
- carrying on a business
- common law
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