GSTR 2019/D2 - Goods and services tax: supply of anything other than goods or real property connected with the indirect tax zone (Australia)

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Draft Goods and Services Tax Ruling

Goods and services tax: supply of anything other than goods or real property connected with the indirect tax zone (Australia)

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Relying on this draft Ruling

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

Summary – what this draft Ruling is about

1. This draft Ruling[1] discusses when a supply of anything other than goods or real property (an intangible) is connected with the indirect tax zone under paragraphs 9-25(5)(a), (b) and (c) and Division 85 of *A New Tax System (Goods and Services Tax) Act 1999*.[2]

2. For a supplier to be liable for goods and services tax (GST) on a taxable supply, one of the requirements is that the supply must be connected with the 'indirect tax zone'.[3] In this Ruling, the indirect tax zone is referred to as 'Australia'.

3. This Ruling also explains exclusions to the 'connected with Australia' rules, where some supplies of intangibles made by non-residents are treated as being not connected with Australia. These supplies are referred to in this Ruling as 'disconnected' supplies.

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[1] All further references to 'this Ruling' refer to the Ruling as it will read when finalised. Note that this Ruling will not take effect until finalised.

[2] All legislative references in this Ruling are to *A New Tax System (Goods and Services Tax) Act 1999*unless otherwise indicated. A supply of an intangible is connected under paragraph 9-25(5)(d) if it is supplied to an Australian consumer. This is discussed in Goods and Services Tax Ruling GSTR 2017/1 *Goods and services tax: making cross-border supplies to Australian consumers*.

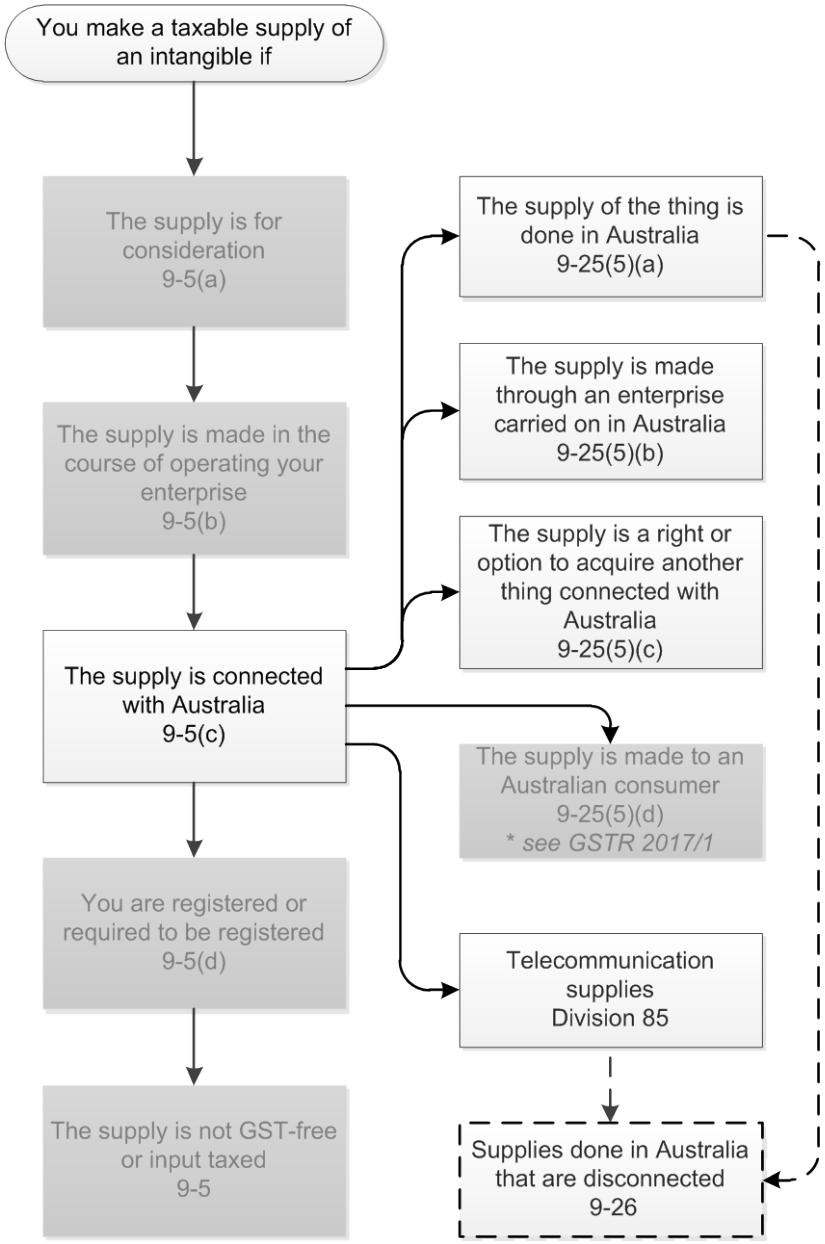
[3] However, for supplies connected with Australia under paragraph 9-25(5)(c), it is possible that the recipient is instead liable for GST on the supply under the reverse charge provisions in Division 84. See subsection 84-10(3).

Relevant provisions

4. The diagram in paragraph 5 of this Ruling shows how the legislative provisions dealt with in this Ruling fit, in the context of the other legislative provisions, that are required to be met for a supply to be a taxable supply under section 9-5.[4]

5. Supplies connected with Australia may still be GST-free under another section of the GST Act, for example, under section 38-190.

[4] For supplies connected with Australia under paragraph 9-25(5)(c), it is also possible that the supply could be a taxable supply under section 84-5. In the event the supply is a taxable supply under both section 9-5 and section 84-5, see subsection 84-10(3).



Previous rulings

6. This Ruling updates and replaces the Commissioner's interpretation of subsection 9-25(5) in Goods and Services Tax Ruling GSTR 2000/31 *Goods and services tax: supplies connected with Australia*.

Ruling

7. In this Ruling, supplies of intangibles that are connected with Australia under paragraph 9-25(5)(b) are addressed first before

paragraph 9-25(5)(a). This is because a non-resident entity with an Australian GST presence will be treated in the same way as a domestic entity. Where a non-resident entity does not have an Australian GST presence, they will generally only be subject to GST on supplies of intangibles to unregistered entities in Australia.

Supplies connected under paragraph 9-25(5)(b) – when the supply is made through an enterprise carried on in Australia (Australian GST presence)

8. A supply of an intangible is connected with Australia under paragraph 9-25(5)(b) if the supplier:

- carries on an enterprise in Australia within the meaning given by section 9-27, and
- makes the supply through that enterprise.

9. The term 'enterprise' is defined in section 9-20. Broadly speaking, an enterprise is an activity, or series of activities, done in a particular manner. An enterprise includes an activity, or series of activities, done in the form of a business.

10. Law Companion Ruling LCR 2016/1 *GST and carrying on an enterprise in the indirect tax zone (Australia)* explains when a supplier carries on an enterprise in Australia, within the meaning of section 9-27. In this Ruling, the concept of 'an enterprise of an entity that is carried on in Australia' is referred to as the entity's 'Australian GST presence'.[5]

11. Under section 9-27, an enterprise of an entity has an Australian GST presence if that enterprise is carried on by one or more specified individuals who are in Australia, and:

- the enterprise is carried on through a fixed place in Australia
- the enterprise has been carried on through one or more places in Australia for more than 183 days in a 12-month period, or
- the entity intends to carry on the enterprise through one or more places in Australia for more than 183 days in a 12-month period.

12. To satisfy section 9-27, the enterprise of an entity must be carried on by one or more individuals identified in subsection 9-27(3) (relevant individuals). These are:

- if the entity is an individual – that individual
- an employee or officer of the entity, or

[5] In parts of LCR 2016/1, this concept is referred to as 'GST enterprise presence' or 'enterprise presence'.

- a dependent agent, or an employee of the dependent agent, of the entity.

13. The term 'officer' is defined to have the meaning contained in the *Corporations Act 2001* and includes the directors, secretaries and other decision makers of the company.[6] For example, a director acting in accordance with their directors' duties under the *Corporations Act 2001*, will satisfy the requirement of an individual carrying on an enterprise in Australia under section 9-27. Similarly, a person who is exercising the central management and control of an entity in Australia will be carrying on an enterprise in Australia.[7]

14. For a supply to satisfy paragraph 9-25(5)(b), the supply must also be made 'through' an Australian GST presence. There needs to be a connection between the Australian GST presence and the supply. A supply may be connected with an entity's enterprise carried on in more than one jurisdiction. This means that a supply that is connected with an entity's Australian GST presence can still satisfy paragraph 9-25(5)(b), even if the supply can also be said to be connected with the entity's place of business in another country.

15. Where an entity has an Australian GST presence and no place of business in another country, all intangible supplies are made through the Australian GST presence because that is the only presence the supply can be connected to.

Example 1 – supply made through an Australian GST presence

16. *Oz Research Pty Ltd, an Australian company, has an Australian GST presence and no employees based outside Australia. Oz Research Pty Ltd has patents registered globally.*

17. *The managing director attends a trade show in New Zealand, where he enters into a contract with an Australian customer to grant a licence to exploit one of its patents. Although the contract was entered into in New Zealand, the supply is connected with the Australian GST presence. Therefore, the supply is made through the Australian GST presence and satisfies paragraph 9-25(5)(b).*

18. There are no specific criteria which must be satisfied to determine whether a particular supply is connected with an Australian GST presence. Each case is to be determined on an overall assessment of the individual facts and circumstances of the supply. If one or more of the following factors are established in any particular case it would be a strong indicator that the supply is connected with an Australian GST presence:

- where the relevant individuals of the Australian GST presence

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[6] Section 9 of the *Corporations Act 2001*.
[7] Refer to Taxation Ruling TR 2018/5 *Income tax: central management and control test of residency*.

  - exercise an authority to sign, negotiate, conclude or accept contracts and purchase orders for the supply
  - make important decisions leading to the making of the supply or performance of the supply
  - perform the activities that facilitate the making of the supply
  - use equipment and/or infrastructure in performing or making the supply.
- if the supply is a service, the service is performed or delivered by the Australian GST presence
- if the supply is the grant, creation, assignment, transfer, surrender or licence of a right, that supply is facilitated by the relevant individuals of the Australian GST presence
- in relation to the supply, the Australian GST presence has its own accounts[8], and revenue for the supply is booked or recorded in those accounts.

Example 2 – supply made by Australian company through an offshore agent

19. *Friday Pty Ltd (Friday), an Australian company, sells software to Australian customers. Friday has a board of three directors in Australia who exercise the central management and control of the company. The directors make high-level strategic decisions about the company from Friday's Australian office. The directors are relevant individuals who carry on Friday's enterprise from a fixed place in Australia it therefore satisfies section 9-27.*

20. *Some of the decisions made by Friday's directors are important decisions about the supplies Friday makes to its Australian customers. This includes the appointment of Offshore Co, a non-resident company, as Friday's general agent. Offshore Co handles most aspects of the supplies made to Australian customers on behalf of Friday under delegated authority from the directors of the Australian GST presence. Amongst other things, Offshore Co enters into contracts with the customers and distributes software via offshore servers. These actions are imputed to Friday through their agency relationship.*

21. *Because Offshore Co is a service provider to Friday and the supplies to customers are made under agreements made pursuant to the delegated authority of the directors of the Australian GST presence, the supplies are connected with Australia under paragraph 9-25(5)(b).*

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[8] This reference to 'accounts' is not limited to statutory accounts, and could also include, for example, management accounts.

Example 3 – supply made through an enterprise in and outside Australia

22. *Aus Co Pty Ltd, an Australian company, has a branch in Taiwan. Aus Co Pty Ltd provides immigration consultancy services and its management is based in Australia. The Taiwanese branch does not account separately to the head office, and there is regular collaboration between employees in Taiwan and those in Australia. All administrative functions of Aus Co Pty Ltd are performed centrally in Australia. Senior management of Aus Co Pty Ltd are also based in Australia. At times, employees in the Australian office refer work to the Taiwanese branch and vice versa.*

23. *Although one entity may be capable of carrying on more than one enterprise, the Taiwanese branch does not operate with sufficient autonomy from the Australian GST presence, and therefore forms part of the same enterprise carried on by Aus Co Pty Ltd.*

24. *Individuals working in the Taiwanese branch agree to prepare and provide an immigration report to a client in Australia. The supply made by Aus Co Pty Ltd is connected with Australia under paragraph 9-25(5)(b) because there is a sufficient connection between the enterprise carried on by Aus Co Pty Ltd in Australia and the supply of immigration services.*

Example 4 – supply made through an enterprise outside Australia

25. *Foreign Co, a non-resident bank, operates branches in a number of countries, including Australia and Singapore. Each of its branches is separately registered as a branch with local regulators, maintains separate accounts, operates from its own premises, and has its own employees and on-site management. Each branch carries on a separate enterprise in its own right.*

26. *Michelle, an Australian resident, opens an account with the Singaporean branch of Foreign Co. The supplies that Foreign Co makes to Michelle in relation to this account are not connected with Australia under paragraph 9-25(5)(b). This is because, even though Foreign Co is carrying on an enterprise in Australia, the enterprise carried on through the Australian branch is sufficiently distinct from the enterprise carried on by Foreign Co through its Singaporean enterprise. There is no relevant connection between the supply made to Michelle and the activities of the Australian branch.*

Example 5 – supply made through an enterprise outside Australia

27. *Millie is employed by Ace Stockbroking in the United Kingdom (UK) when she decides to move to Australia to live with her partner in a house they bought together. Because Ace Stockbroking only has*

offices in the UK, it is agreed that Millie can continue her employment while living in Australia, where she works online from home during normal UK business hours.

28. *Millie's house in Australia is not recognised as a place of business of Ace Stockbroking, nor is it accessible by Ace Stockbroking. Ace Stockbroking does not have an Australian GST presence. The transactions that Millie performs during her employment with Ace Stockbroking are made through Ace Stockbroking's enterprise in the UK.*

Supplies connected under paragraph 9-25(5)(a) – when a 'thing is done' in Australia

29. A supply of an intangible may be connected with Australia under paragraph 9-25(5)(a) if the 'thing' being supplied is 'done' in Australia.

30. However, it is not necessary to determine if paragraph 9-25(5)(a) is satisfied if other provisions are easier to consider. This is likely to be the case where the recipient is either:

- an Australian consumer – this is because if the recipient is an Australian consumer the supplies are connected under paragraph 9-25(5)(d), or
- an Australian-based business recipient – this is because if the recipient is an Australian-based business recipient the supply is disconnected under section 9-26 items 1 and 2.[9]

31. If there is a need to determine whether paragraph 9-25(5)(a) is satisfied, then consider:

- what the 'thing' being supplied is, and
- where that 'thing' is 'done'.

The 'thing' being supplied

32. 'Thing' is defined to mean anything that can be supplied or imported. 'Thing' includes but is not limited to a service, advice, information, a right or a digital product. It does not matter if the supply is provided electronically.

33. It is the 'thing' supplied which is the subject of the supply and which must be characterised for GST purposes. A supply may be comprised of various component parts, just as a range of activities, actions, means, processes or systems may be involved in delivering the supply of the 'thing'. When determining what is supplied, it is the subject of the supply or its component parts which must be

[9] See Paragraphs 66 to 78 of this Ruling.

characterised, rather than the activities, actions, means, processes or systems involved.

Where the thing is 'done'

34. Once the relevant supply is identified, the next step is to determine where the thing that is supplied is 'done'.

35. The term 'done' is not defined in the GST Act and takes its ordinary meaning. Where a thing is 'done' depends on the nature of the thing being supplied. Depending on what is supplied, 'done' can mean various things including performed, executed, completed or finished.

36. This Ruling explains when the thing is 'done' in Australia for supplies of services, advice, information and rights. For supplies of other intangibles, whether the thing is 'done' in Australia depends on the individual nature of the thing being supplied.

Supply of a service

37. If the 'thing' being supplied is a service, the service is typically done where it is performed. If the service is performed in Australia, the service is done in Australia and the supply of that service satisfies paragraph 9-25(5)(a) even if the recipient of the supply is outside Australia.[10]

38. Sometimes a service may involve both work being done and creating a product for the recipient. This does not alter that the 'thing' is the performance of a service.

39. For example, an architect is engaged to prepare and provide a plan for the recipient. The plan is the product resulting from the services provided by the architect. The service is done where the work is done – that is, where the plan is prepared or drawn. This is the case even if the contract is to deliver a completed plan. If the plan is prepared in Australia, the service is performed in Australia and the supply is connected with Australia. The delivery of the plan does not determine where the service is done. The product of that service, the plan, is not a separate supply from the supply of that service.

Example 6 – services done in Australia

40. *Account Pty Ltd, an accounting firm with offices in Melbourne, supplies accounting and taxation services. The supply of any accounting and taxation services, which are performed in Australia, satisfies paragraph 9-25(5)(a).*

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[10] A supply of a service to an offshore recipient may be GST-free under section 38-190.

Example 7 – services not done in Australia

41. *Continuing on from Example 6, an employee of Account Pty Ltd flies to London and performs taxation services in London. The supply of those services does not satisfy paragraph 9-25(5)(a) because there are no services performed in Australia. All of the services are performed in the UK.*[11]

Subcontracted services

42. In some situations, the performance of a service may be subcontracted. For the purposes of paragraph 9-25(5)(a), look to where the actual service is performed.

43. A subcontract arrangement does not alter what the 'thing' being supplied by the head contractor to its customer is. In particular, the character of the supply is not transformed from the supply of a service to the supply of a right, nor is the nature of the supply altered from the supply of an actual service to that of an arranging service.[12]

Example 8 – subcontracted maintenance services

44. *Gooseneck Machinery, a non-resident, subcontracts a maintenance service in Australia to an Australian company, Little Duck Repairs Pty Ltd. Little Duck Repairs Pty Ltd provides maintenance services in Australia to one of Gooseneck Machinery's customers. The supply of maintenance services by Gooseneck Machinery to its customer is a supply of services done in Australia, even though those services may be performed by Little Duck Repairs Pty Ltd.*

45. *After 1 October 2016 this supply may not be connected with Australia if the requirements of section 9-26 are met.*

Provision of advice or information

46. If a supply is the provision of advice, the subject of the supply is the information constituting the advice. The 'thing' which must be characterised for these purposes – that is, the information constituting the advice – is done where the work necessary to produce it takes place. This is where the advice is prepared, produced or created. The means, processes or systems by which that supply is delivered to the client are not component parts of the 'thing' supplied. The supply of

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[11] It would still be necessary to consider whether the supply of that service is connected with Australia under paragraphs 9-25(5)(b), (c) and (d).

[12] Refer to paragraphs 150 and 151 of Goods and Services Tax Ruling GSTR 2005/6 *Goods and services tax: the scope of subsection 38-190(3) and its application to supplies of things (other than goods or real property) made to non-residents that are GST-free under item 2 in the table in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999*.

that advice is connected with Australia if the advice or information is prepared, produced or created in Australia.

47. Providing advice or information in cases of this kind is like the provision of a service, which is done where the service is performed. Note again, that the supply may be GST-free.

Example 9 – legal advice prepared in Australia

48. *Lidis QC in Adelaide provides legal advice in the form of a written opinion to AngCo in the United States (US). The supply of this advice satisfies paragraph 9-25(5)(a) because the advice is prepared in Australia.*

The creation, grant, transfer, assignment or surrender of a right

49. A supply can be the creation, grant, transfer, assignment or surrender of a right. In these cases the 'thing' being supplied is done where the right is created in that other person, granted, transferred or assigned to that other person or surrendered respectively.

50. The act that creates that right in another or grants, transfers or assigns that right to another, or surrenders the right, depends on the facts of each individual case.

51. If, under an agreement, you supply another party the grant of a right to use certain intellectual property, the granting of that right is done where the agreement is made. That is where the last act necessary to create a binding contract was performed. If the agreement is made in Australia[13], the supply of that right satisfies paragraph 9-25(5)(a).

52. If the agreement is made outside Australia, the supply does not satisfy paragraph 9-25(5)(a).

53. Where the agreement is for both the development of the intellectual property and the assignment of any rights to that intellectual property, the supply is a supply of services and satisfies paragraph 9-25(5)(a) where the services are done in Australia. In these circumstances, the supply is not a supply made outside of Australia merely because the agreement was made outside of Australia.

Example 10 – licence to use intellectual property granted outside of Australia

54. *Boffin Co, a US resident, owns the copyright in Boffin II software. It grants Cyber Ltd, an Australian resident, a licence to modify, adapt and copy the software in Australia for three years. The*

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[13] A contract is made where the last act necessary to create a binding contract is performed (see *WA Dewhurst and Co Pty Ltd v Cawrse* [1960] VR 278).

written agreement granting the licence is executed and exchanged by both parties in the US. The supply does not satisfy paragraph 9-25(5)(a).

Entry into, or release from, an obligation

55. If the supply is the entry into or release from an obligation to do anything, or to refrain from an act, or to tolerate an act or situation, the 'thing' is done where the obligation is entered into or the release is effected. This depends on how, in any given case, the entry into, or the release from, the obligation is effected.

Example 11 – obligation to refrain from an act done in Australia

56. *T Co Aust Pty Ltd enters into a restrictive covenant with UK Co, a UK resident, requiring T Co Aust Pty Ltd 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 Pty Ltd satisfies paragraph 9-25(5)(a) if the obligation arises under a contract made in Australia.*

Digital supplies

57. Many of the supplies discussed above (that is, services, advice, information and rights) can be supplied as digital products or services. Digital supplies include things such as e-books, e-magazines and e-newspapers, streaming services for music, television and movies, digital software, mobile apps, online games, online advertising and self-paced online training.

58. The only circumstance in which an analysis of where a digital supply is 'done' needs to be undertaken is where the recipient of the digital supply is a non-resident who is not an Australian-based business recipient.

59. Regardless of the type of digital supply, it will not be connected with Australia if:

- it is supplied by a non-resident who does not make the supply through the non-resident entity's Australian GST presence
- the supply is not made to an Australian consumer[14], and
- the thing is done in Australia and it is supplied to an Australian-based business recipient.[15]

[14] See paragraph 9-25(5)(d) and GSTR 2017/1.
[15] Where a supply is to an Australian-based business recipient it will be disconnected under section 9-26. See paragraphs 66 to 78 of this Ruling.

60. Where the digital supply is otherwise not connected with Australia it is necessary to determine whether a digital supply is 'done' in Australia. When determining what is supplied, it is the subject of the supply or its component parts which must be characterised, rather than the activities, actions, means, processes or systems involved. In determining what the 'thing' being supplied is, first consider the thing of value in the agreement between the parties. This can often be indicated by what causes the consideration to move from one contracting party to the other. Once the 'thing' is defined, you must then consider where that thing is 'done'.

Supplies connected under paragraph 9-25(5)(c) – when the supply is of a right or option to acquire another thing and the supply of the other thing would be connected with Australia

61. Under paragraph 9-25(5)(c) a supply of a right or option to acquire some other thing is also connected with Australia, where the supply of the other thing would be connected with Australia.

62. Paragraph 9-25(5)(c) is only relevant where the supply of the right or option does not satisfy paragraphs 9-25(5)(a) or (b) and is not the supply of real property.[16]

63. Paragraph 9-25(5)(c) is limited to supplies of rights or options to acquire goods, services or other intangibles the supply of which would be connected with Australia.

Example 12 – supply of rights or options to things connected with Australia

64. *Cuisineworld is a non-resident entity in the UK that specialises in supplying cooking classes at renowned restaurants around the world, along with bus tours. Cuisineworld has no business operations outside of the UK. Cuisineworld acquires an Australian holiday cooking package on a GST inclusive basis from Oz Travel Pty Ltd, a resident tour wholesaler in Sydney. The Australian holiday cooking packages are on-sold by Cuisineworld to tourists as rights or options to acquire cooking classes and to take bus tours in Australia.*

65. *The supply by Cuisineworld of rights or options to acquire cooking classes (training services) and bus tours (services) is a supply of intangibles, and accordingly the supplier needs to consider subsection 9-25(5). Neither paragraph 9-25(5)(a) nor (b) is applicable as the supply of the rights is done in the UK and Cuisineworld does not have an Australian GST presence. However, as the rights or options are to acquire cooking classes and bus tours in Australia and*

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[16] The supply of rights exercisable over or in relation to land is a supply of real property and thus connected with Australia if the land is in Australia. In such cases the right is connected with Australia under subsection 9-25(4) and not paragraph 9-25(5)(c). See *Saga Holidays Limited v Commissioner of Taxation* [2006] FCAFC 191.

those services would be connected with Australia under either paragraphs 9-25(5)(a) or (b), the supply of the rights or options to acquire those services satisfies paragraph 9-25(5)(c).

Exceptions to the 'connected with Australia' rules

66. Section 9-26 outlines exceptions to the 'connected with Australia' rules for various supplies made by non-resident suppliers. If a supply falls under section 9-26 it is not connected with Australia under section 9-25. These supplies are referred to as 'disconnected supplies'.

67. There is one instance where supplies that would ordinarily be 'disconnected' under section 9-26 remain connected with Australia. This applies in certain circumstances where the non-resident supplier has a resident agent and enters into an agreement with the agent that subsection 9-26(1) does not apply.[17]

'Disconnected' supplies – supplies made to an Australian based business recipient

68. Unless the circumstances in paragraph 69 of this Ruling apply, a supply that is 'done' in Australia is disconnected under section 9-26 if all of the following requirements are met: [18]

- the supplier is a non-resident[19]
- the supplier does not make the supply through an Australian GST presence – see paragraphs 8 to 31 in this Ruling, and
- the supply is made to an 'Australian-based business recipient'.

69. An entity is an Australian-based business recipient[20] if all of the following apply:

- the entity is registered for GST
- the acquisition of the thing supplied is not solely of a private or domestic nature
- an enterprise of the entity is carried on in Australia.[21]

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[17] See section 57-7.
[18] See table item 1 in paragraph 9-26(1)(c).
[19] Goods and Services Tax Ruling GSTR 2004/7 *Goods and services tax: in the application of items 2 and 3 and paragraph (b) of item 4 in the table in subsection 38–190(1) of the A New Tax System (Goods and Services Tax) Act 1999* deals with the residency status of entities including partnerships and trusts.
[20] Refer to Diagram 2.3B and Example 1.1 in the Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016.
[21] The acquisition does not have to relate to the enterprise that is carried on in Australia.

Example 13 – Australian-based business recipient

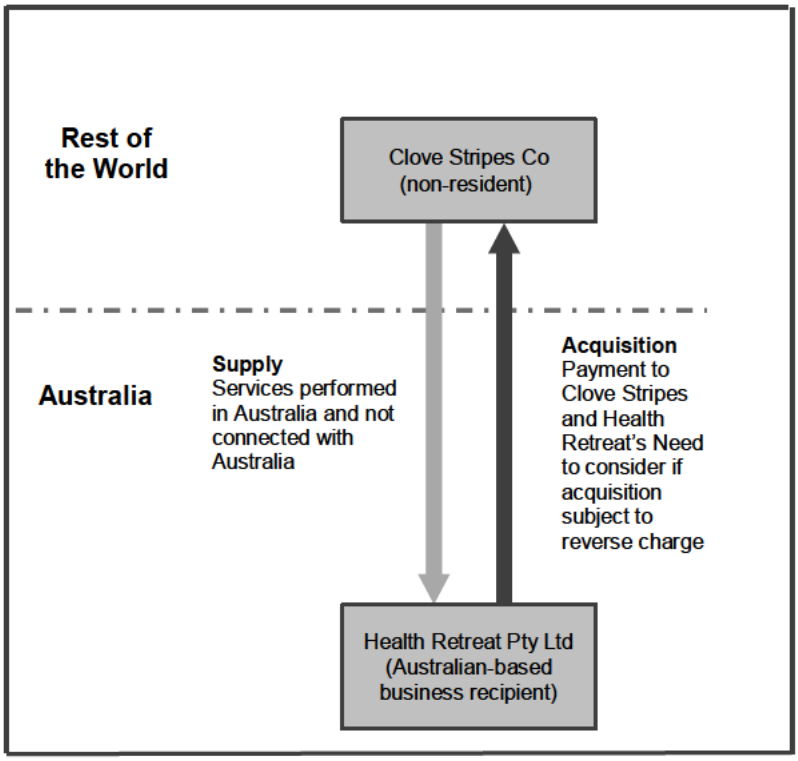
70. *Health Retreat Pty Ltd runs an exercise-based retreat where its staff create tailored exercise programs for clientele. Clove Stripes Co, a non-resident, enters into an agreement with Health Retreat Pty Ltd to supply exercise program support services. Health Retreat Pty Ltd is registered for GST and carries on a business in Australia. The exercise support services being purchased from Clove Stripes Co relate to Health Retreat Pty Ltd's business. Health Retreat Pty Ltd satisfies each of the conditions to be an Australian-based business recipient.*

71. *None of the supplies that Clove Stripes Co makes are through an Australian GST presence. The services are performed in Australia by Tumeric Corp Pty Ltd, an Australian based subcontractor that is engaged by Clove Stripes Co. Tumeric Corp Pty Ltd is not an employee, officer or an agent of Clove Stripes Co, and as such the services undertaken by Tumeric Corp Pty Ltd do not cause Clove Stripes Co to have an Australian GST presence.*

72. *The supplies that Clove Stripes Co makes to Health Retreat Pty Ltd are not connected with Australia. The supplies done in Australia satisfy the conditions for being disconnected because Clove Stripes Co is a non-resident supplier, the supply is not made through an enterprise it carries on in Australia, and Health Retreat Pty Ltd is an Australian-based business recipient of the supply.*

73. *Although the supply is disconnected, Health Retreat Pty Ltd needs to consider whether it has a reverse charge liability. This is because the supply is made to an Australian-based business recipient, and the recipient is responsible for determining whether they have a GST liability for the supply under the reverse charge rules in Subdivision 84-A (see paragraphs 79 to 87 of this Ruling).*

Diagram for example 13: Intangible supply to an Australian-based business recipient – table item 1 in subsection 9-26(1)



'Disconnected' supplies – supplies made between two non-residents

74. A supply that is 'done' in Australia is also disconnected under section 9-26 if all of the following requirements are met.[22] The supplier:

- is a non-resident[23]
- does not make the supply through an enterprise that the supplier carries on in Australia – see paragraphs 8 to 28 of this Ruling, and
- makes the supply to a non-resident who acquires the thing supplied solely for an enterprise carried on by that non-resident outside of Australia. This requirement is similar to that found in table item 2(b) of subsection 38-190(1).[24]

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[22] See table item 2 in paragraph 9-26(1)(c).
[23] GSTR 2004/7 deals with the residency status of entities including partnerships and trusts.
[24] This requirement is discussed in GSTR 2005/6.

Example 14 – intangible supplies between non-residents

75. *P-Bo Pty Ltd enters into an agreement with Big Nel Ltd to acquire services. Big Nel Ltd supplies services to the employees of P-Bo Pty Ltd through Indy K, an independent sub-contractor that performs the services in Australia.*

76. *P-Bo Pty Ltd and Big Nel Ltd are both non-residents. Neither P-Bo Pty Ltd nor Big Nel Ltd supply or acquire the service through an enterprise they carry on in Australia.*

77. *The supply between Big Nel Ltd and P-Bo Pty Ltd is disconnected with Australia because it is supplied by a non-resident to another non-resident, neither of which carry on an enterprise in Australia, and the non-resident recipient acquired the services solely for the purpose of an enterprise it carries on outside Australia.*

78. *The engagement of Indy K by Big Nel Ltd does not change the disconnection of the supply even though Indy K performs the services in Australia.*[25]

Subdivision 84-A – offshore supplies that are 'reverse charged'

79. Subdivision 84-A makes certain supplies of intangibles 'reverse charged' to the recipient of the supply.

80. The GST on a supply treated as a taxable supply under section 84-5 is payable by the recipient of the supply and is not payable by the supplier. The charge for GST is reversed, so this Subdivision is commonly referred to as a 'reverse charge' provision.

81. A supply of intangibles is a taxable supply under Subdivision 84-A, and subject to GST if all of the following requirements are met:

- the supply is for consideration
- the recipient is registered, or required to be registered
- the supply meets the 'reverse charge connection requirement', and
- the supply meets the 'reverse charge purpose requirement'.

82. However, the supply is not a taxable supply to the extent that it is GST–free or input taxed.

83. The 'reverse charge connection requirement' means the supply must be either:

- not connected with Australia

[25] This is Example 2.4 of the Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016.

- connected with Australia because of paragraph 9-25(5)(c) (about rights or options to acquire another thing), or
- connected with Australia only because of paragraph 9-25(5)(d) (about supplies to Australian consumers) where the supplier has obtained information indicating that the recipient is a business recipient and applied section 84-100.[26]

84. The 'reverse charge purpose requirement' means the recipient of the supply must:

- acquire the thing supplied solely or partly for the purpose of an Australian GST presence, and
- not acquire the thing supplied solely for a creditable purpose.[27]

Example 15 – information prepared outside Australia

85. *An Australian bank, Hobart Bank Ltd, acquires information about its customers from a US credit agency. The US credit agency is a non-resident and does not carry on an enterprise in Australia.*

86. *The supply of information by the US credit agency is not connected with Australia.*

87. *However, the supply of information by the credit agency meets the reverse charge purpose requirement because it is an acquisition that relates to making input taxed supplies. If it meets all the other requirements of Division 84, Hobart Bank Ltd, the recipient of the supply, is liable to pay GST on that supply under sections 84-5 and 84-10.*

Division 83 – non-residents making supplies connected with Australia

88. Where a non-resident makes a supply to a recipient that is registered for GST, Division 83 allows the parties to agree that the GST liability is payable by the recipient. The Division only operates where:

- the supply is not being made by the non-resident through an enterprise it carries on in Australia, and
- the parties have agreed that the GST is payable by the recipient. The agreement must be entered into prior to the supply being made. The parties need to be able to

[26] Table item 3 in subsection 84-5(1) relating to a supply connected with Australia because of paragraph 9-25(5)(d), is effective from 1 July 2017.
[27] For the meaning of creditable purpose, see section 11-15.

substantiate the agreement, which is normally done by producing a written agreement between the parties.

89. Division 83 does not apply to all supplies. The following supplies cannot be reverse charged:

- a taxable supply under Division 84
- a taxable supply made by a non-resident through a resident agent.

90. A non-resident supplier that is making taxable supplies (on the basis that it is required to be registered for GST) need not apply to register for GST, if the only reason they need to be registered is because the registration turnover threshold is met when taxable supplies covered by section 83-5 are taken into account.[28]

Division 85 – telecommunication supplies

91. Additional special rules in Division 85 apply to determine whether a telecommunication supply is connected with Australia.

92. A telecommunication supply is a supply relating to the transmission, emission or reception of signals, writing, images, sounds or information of any kind by wire, radio, optical or other electromagnetic systems. It includes the related transfer or assignment of the right to use capacity for such transmission, emission or reception, and the provision of access to global information networks.[29]

93. The definition of 'telecommunication supply' is designed to capture the *means* of communication but not the content, where that content is clearly a different type of supply. The treatment of the content depends on the nature of the service provided.[30]

94. In addition to the normal connection rules, a telecommunication supply is also connected with Australia if the recipient of the supply will effectively use or enjoy the supply in Australia.

95. Division 85 does not apply to supplies that are disconnected under section 9-26.

96. The Commissioner also has the power to determine that a supply is not connected with Australia under Division 85. However, the Commissioner can only make such a determination if the collection of GST on that supply would not be administratively feasible.[31]

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[28] Sections 83-25 and 83-30.
[29] Section 85-10.
[30] Explanatory Memorandum to A New Tax System (Indirect Tax and Consequential Amendments) Bill (No. 2) 1999.
[31] Subsection 85-5(2). See *A New Tax System (Goods and Services Tax) Act 1999 Telecommunication Supplies Determination (No. 38) 2015*.

97. *A New Tax System (Goods and Services Tax) Act 1999 Telecommunication Supplies Determination (No. 38) 2015*[32]*,* provides that it is not administratively feasible to collect GST for supplies:

- made to a telecommunications provider, or
- supplied by a supplier (that does not carry on an enterprise in Australia) not registered for GST.

Example 16 – telecommunication supply not done in Australia

98. *BetterConnect is an offshore telecommunication supplier that is not registered for GST and does not have an Australian GST presence. It supplies Voice over Internet Protocol (VoIP) services which is a telecommunications supply. Their supplies are not done in Australia. The services are only sold to Australian-based business recipients.*

99. *Although the supplies are used and enjoyed by their clients in Australia, the services are not connected under Division 85 as they are covered by the Commissioner's legislative determination.*

100. *If BetterConnect also supplied VoIP services to Australian consumers, those services are connected with Australia under paragraph 9-25(5)(d). This may require BetterConnect to be registered for GST. If BetterConnect is registered for GST, the legislative determination no longer applies. However, the services provided to Australian-based business recipients are connected under Division 85. This is because section 9-26 does not apply to supplies that are not done in Australia.*

101. Where the telecommunication supply is not connected with Australia, it may be necessary to consider the reverse charge rules in Division 84.

102. Where a supply is partly done in Australia, and the recipient of the supply also uses or enjoys the supply in Australia, it is possible that both the supplier and the recipient are partly liable for GST on the supply.This may mean:

- The part of the supply that is done in Australia satisfies paragraph 9-25(5)(a), except where the supply is disconnected under section 9-26. In this case, the part of the supply that is done in Australia is disconnected, and where that supply was acquired for a purpose that is partly creditable, the recipient of the supply may be subject to the reverse charge rules in Subdivision 84-A.
- Where the supplier is registered, the remaining part of the supply (that was not done in Australia, but was used or enjoyed in Australia) is connected with

[32] Registered on 15 September 2015.

Australia under subsection 85-5(1) and is not subject to the reverse charge rules in Subdivision 84-A.

Supplies that are partly connected with Australia

Supplies of the one kind that are partly connected with Australia

103. A supply of intangibles may be partly connected with Australia if the thing is partly done in Australia or the supplier makes the supply partly through an enterprise that the supplier carries on in Australia. If a thing is only partly done in Australia, the supply is connected with Australia to the extent that the thing is done in Australia. However, the part of the supply that is not connected with Australia under paragraph 9-25(5)(a) may still be connected with Australia if the supply is made through an enterprise that the supplier carries on in Australia (refer to paragraph 9-25(5)(b) which is discussed at paragraphs 8 to 28 of this Ruling).

104. If doing one part of a thing may reasonably be regarded as merely incidental to doing another part of the supply, the incidental part is taken to be done where the part to which it is incidental is done.

105. Where a supplier makes a supply partly through an enterprise that the supplier carries on in Australia, the supply is connected with Australia to the extent that the supply is made through that enterprise. The part of the supply not connected with Australia under paragraph 9-25(5)(b) may still be connected with Australia if the thing is done in Australia.

106. It is the Commissioner's view that the supply of a right or option to acquire another thing may be partly connected with Australia under paragraph 9-25(5)(c), to the extent that the goods, services or other things the right relates to are connected with Australia.

Division 96 – supplies of more than one kind that are partly connected with Australia

107. A supply may be a supply of more than one kind of the following:

- a supply of goods
- a supply of real property
- a telecommunication supply
- a supply of anything, other than goods or real property, that is not a telecommunication supply.

108. Under section 96-5, if as a result of the application of section 9-25, only part of the actual supply is connected with Australia, the actual supply is treated as if it were separate supplies.

Date of effect

109. When the final Ruling is issued, it is proposed to apply both before and after its date of issue, having regard to the application dates set out in the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* (the Amending Act).

110. The application dates for the changes to the GST Act under Schedules 1 and 2 of the Amending Act are as follows:

- The ATO view in relation to imposing GST on digital supplies and services, including when a supply is connected with Australia because it is made to an Australian consumer applies from 1 July 2017.
- The ATO view in relation to the test for carrying on an enterprise in Australia and the rules around when certain supplies are disconnected from Australia applies from 1 October 2016.

111. GSTR 2000/31 is withdrawn on and from the date that this draft Ruling issues. GSTR 2000/31 will cease to apply from that date.

112. However, the final Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the final Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

Commissioner of Taxation
4 September 2019

Appendix 1 – Your comments

113. You are invited to comment on this Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

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

- provide responses to persons providing comments
- be published on **ato.gov.au**.

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

Due date:	**16 October 2019**
Contact officer:	**Megan Aldous**
Email address:	**Megan.Aldous@ato.gov.au**
Telephone:	**(03) 6221 0068**

Appendix 2 – Detailed contents list

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

GSTR 2004/7; GSTR 2005/6; GSTR 2017/1; TR 2006/10; TR 2018/5; LCR 2016/1

Previous Rulings/Determinations:

GSTR 2000/31

Legislative references:

- ANTS(GST)A 1999
- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-5(a)
- ANTS(GST)A 1999 9-5(b)
- ANTS(GST)A 1999 9-5(c)
- ANTS(GST)A 1999 9-5(d)
- ANTS(GST)A 1999 9-20
- ANTS(GST)A 1999 9-25
- ANTS(GST)A 1999 9-25(4)
- ANTS(GST)A 1999 9–25(5)
- ANTS(GST)A 1999 9-25(5)(a)
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- ANTS(GST)A 1999 9-25(5)(c)
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- ANTS(GST)A 1999 9-26(1)
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- ANTS(GST)A 1999 Div 96
- ANTS(GST)A 1999 96-5
- *Corporations Act 200*1
- *Corporations Act 2001 9*
- Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016

Cases relied on:

- Saga Holidays Ltd v Commissioner of Taxation [2006] FCAFC 191; (2006) 156 FCR 256; 2006 ATC 4841; 64 ATR 602
- WA Dewhurst and Co Pty Ltd v Cawrse [1960] VR 278; [1960] VicRp 44

Other references:

- Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016
- Explanatory Memorandum to A New Tax System (Indirect Tax and Consequential Amendments) Bill (No.2) 1999
- A New Tax System (Goods and Services Tax) Act 1999 Telecommunication Supplies Determination (No. 38) 2015

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