TR 2001/D9 - Income tax: withholding from payments where recipient does not quote ABN

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Draft Taxation Ruling
Income tax: withholding from payments where recipient does not quote ABN

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Preamble

Draft Taxation Rulings (DTRs) represent the preliminary, though considered, views of the Australian Taxation Office. DTRs may not be relied on by taxation officers, taxpayers and practitioners. It is only final Taxation Rulings that represent authoritative statements by the Australian Taxation Office of its stance on the particular matters covered in the Ruling.

What this Ruling is about

1. This Ruling provides guidance as to whether an entity making a payment in respect of a supply is required to withhold an amount under section 12-190 of Part 2-5 (the PAYG provisions) of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

2. That section imposes an obligation on the paying entity to withhold an amount from the relevant payment where the payment is for a supply made or proposed to be made in the course or furtherance of an enterprise carried on by the supplier in Australia and none of the exceptions listed in the section apply.

3. This ruling is only concerned with payments to which section 12-190 of Schedule 1 to the TAA applies. In this ruling a reference to section 12-190 is a reference to section 12-190 of Schedule 1 to the TAA.

Background

Context of Reform - section 12-190

4. This new withholding event provides that a payer must withhold from a payment made for a supply if the payer does not have an invoice or some other document relating to the supply which quotes the supplier's ABN and none of the other exceptions to the requirement to withhold provided for in section 12-190 are satisfied.

5. The event is designed to act as a compliance measure to ensure that entities, especially those who are not required to be registered for the Goods and Services Tax (GST), do not avoid their taxation obligations by requesting cash payments.

6. Section 12-190 is not designed to be another general withholding collection mechanism - it should only operate where suppliers that are carrying on an enterprise fail to quote their ABN number to the payer. The withholding rate for failure to provide an ABN as required by the provision is the equivalent of the highest marginal rate plus the medicare levy, that is 48.5%.

7. All suppliers that carry on an enterprise should obtain an ABN and quote it in relation to all supplies that they make to other enterprises to ensure the provision does not operate.

Ruling and Explanations

When does a payer need to withhold

8. Subsection 12-190(1) provides that:

An entity (the payer) must withhold an amount from a payment it makes to another entity if:

> *(a) the payment is for a *supply that the other entity has made, or proposes to make, to the payer in the course or furtherance of an *enterprise *carried on in Australia by the other entity; and*
>
> *(b) none of the exceptions in this section applies.*

9. Subsections (2)-(6) set out exceptions to the requirement to withhold. The primary exception is that the supplier has quoted their ABN to the payer on an invoice or some other document relating to the supply at or before the time of payment. The provision is set out in full in Appendix A

Application of the provision

10. Section 3(1A) of *A New Tax System (Pay As You Go) Act 1999* which inserted the PAYG provisions into Schedule 1 to the TAA 1953 provides that section 12-190 applies to a payment made on or after 1 July 2000, but only if some or all of the supply is made on or after that day. When a supply has been made is determined under *A New Tax System* (*Goods and Services Tax Transition) Act 1999*.

11. The provision does not apply where a payment is made before 1 July 2000. If a payment is made on or after 1 July 2000, then whether or not the provision applies depends on when the supply is made.

12. If a supply is made wholly on or before 30 June 2000 and payment is made on or after 1 July 2000 the provision does not apply. If part of the supply is made before 1 July 2000 and part of the supply

is made on or after 1 July 2000 and the payment is made on or after 1 July 2000 the provision applies.

Example

13. John and Nev enter into a contract for the supply of goods on 2 June 2000. Nev pays John on 28 June 2000 and the goods are supplied on 15 July 2000. In this example, if John does not supply his ABN to Nev, there is no requirement to withhold as the payment was made before 1 July 2000.

14. If Nev paid John on 25 July 2000, then Nev would be required to withhold if John did not quote his ABN to Nev before payment.

15. Subsection 12-190(1) contains a number of key terms and phrases that are fundamental in clarifying when the provisions has potential operation. Paragraphs 17 to 54 of this Ruling clarify these terms and phrases and paragraphs 55 to 112 explain the key exceptions provided for in section 12-190 to the requirement to withhold.

16. The key terms and phrases contained in section 12-190 that require further explanation include:

(a) entity;

(b) supply;

(c) payment for supply; and

(d) in the course or furtherance of an enterprise carried on in Australia.

What is an entity?

17. Section 12-190 provides that *an entity must withhold an amount from a payment it makes to another entity if the payment is for a supply that the other entity has made, or proposes to make, to the payer……..*

18. The term entity takes it meaning from section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997)[1]. Under that provision, an entity is defined by section 960-100 of the ITAA 1997 to mean an individual, body corporate, body politic, partnership, any other unincorporated association or body of persons, a trust, or a superannuation fund.

[1] Section 3AA(2) of the *Taxation Administration Act 1953* provides that an expression has the same meaning in Schedule 1 as in the *Income Tax Assessment Act 1997*.

19. The entity receiving the payment must be the entity that made the supply and the entity that makes the payment must be the entity that received the supply. In determining whether an entity has made a payment to the supplier, section 11-5 of Schedule 1 to the TAA 1953, which deals with constructive payments, is relevant. The concept of a constructive payment is further explained at paragraphs 36-38.

Is there a supply?

20. Section 12-190 requires that there be a payment for a 'supply'.

21. The term supply takes it meaning from the Goods and Services Tax legislation. Section 9-10 of *A New Tax System (Goods and Services Act) 1999* (GST Act 1999) states that a supply is any form of supply whatsoever and includes:

- a supply of goods;
- a supply of services;
- a provision of advice or information;
- a grant, assignment or surrender of *real property;
- a creation, grant, transfer, assignment or surrender of any right;
- a *financial supply;
- an entry into, or release from, an obligation:
  - to do anything;
  - to refrain from an act; or
  - to tolerate an act or situation;
- any combination of any 2 or more of the matters referred to above.

GSTR 2000/11 provides guidance on the meaning of supply.

22. Supply is defined as 'any form of supply whatsoever'. In other jurisdictions the term 'supply' has been held to take its ordinary and natural meaning, being 'to furnish or to serve'. Similarly, the definition of 'supply' in the Macquarie Dictionary is 'to furnish or provide (something wanting or requisite: to supply electricity to a community)'.

23. It should be noted that there is no requirement for the supply to be a taxable supply as defined in section 9-5 of the GST Act 1999.

Is there payment for a supply?

24. Division 12 of the PAYG provisions does not apply to a payment in so far as it consists of providing a non-cash benefit; Division 12 applies to cash payments. Where the payment is made by the provision of a non-cash benefit, a payment is required to be made to the Commissioner as set out in Division 14 of the TAA 1953.

25. For the purposes of section 12-190, the payment must be 'for' the supply which is made or proposed to be made.

26. This can be contrasted with the language used in the GST legislation that a payment will be 'consideration' for the purposes of the GST Act if the payment is 'in connection with', 'in response to' or 'for the inducement' of a supply (see section 195-1 and 9-15 of the GST Act 1999).

27. The preposition 'for' has, among other meanings, the meanings 'in place of, instead of, in exchange for, as the price of, in the requital of' and, also, 'with the object or purpose of, in order to obtain' and, again, 'by reason of or on account of, of operative cause, the effect of' (see the Shorter Oxford Dictionary). The word 'for' has a somewhat narrower meaning than 'in connection with' (see *Berry* v. *FC of T* (1953) 89 CLR 653[2]), but includes more than payments which are a price, in the strict sense, of supply; it includes payments made in requital of, or for the purpose of obtaining, or as an effect of having obtained supply. (A payment made to induce supply may be said to be for supply.) A payment may be for a supply even though there is no legal obligation to make it.

28. A payment made voluntarily may be payment for a supply. However, for a voluntary payment to fall within section 12-190 the voluntary payment would have to be made in return for, on account of, or by reason of, or in order to obtain the supply provided, which in turn will require a practical causal relationship between payment and supply. A voluntary payment that is a gift in the strictest sense of the term will generally lack such a relationship, for to be a gift in the strictest sense of the word, the donor must not obtain any advantage of a material character in return for providing the gift (see, for example, *FC of T* v. *McPhail* (1968) 117 CLR at 117). That is to say, there will not be a supply for the gift. A voluntary payment will also lack the appropriate relationship with supply if it is made on account of, or in return for something other than supply, albeit in connection with supply, as where the payment is made on account of personal friendship with the supplier.

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[2] Note however that the decision in Berry concerned the meaning of the expression 'consideration for', rather than 'payment for'; the technical contractual meaning of 'consideration for' is not identical with the meaning of 'payment for'.

29. The no ABN withholding event will not apply to gifts that have the above characteristics because there would not be the relevant nexus between the provision of the gift and the supply.

30. Further, where the receipt of the gift would not be assessable in the hands of the supplier, that is, it would be treated as exempt income, then the no ABN event will not apply (see section 12-1).

31. Taxation Ruling IT 2674 is mainly concerned with whether gifts received by church workers are assessable income. However, the principles that apply in determining whether gifts received by church workers are assessable income are no different to those which apply in determining whether gifts received by taxpayers in the course or furtherance of an enterprise are assessable income.

32. Broadly IT 2674 provides that a gift will form part of a taxpayer's assessable income if it is possible to:

(a) relate the receipt of the gift to any income producing activity; or

(b) point to any employment, personal exertion or other income earning activity of which the receipt of the gift is in a relevant sense a product or incident.

Example

33. A professional accounting association may hold a conference and invite a guest speaker who is carrying on a business as an accountant. The accountant provides his or her services without charge. At the end of the conference, the association may present the speaker with an item in recognition of their efforts such as a bottle of wine or a book valued at more than $55. The accountant may also be reimbursed for airfares or accommodation expenditure.

34. The speaker has made a supply of a service which is considered to be in the course or furtherance of his or her enterprise. In return the speaker receives a payment for that service in the form of the wine or book or reimbursement. The association is not under any contractual obligation to provide the speaker with the wine or book. However, the professional accounting association does receive a material advantage in the form of the accountant's expert services. The wine, book or reimbursement provided to the accountant is not a gift in the true sense of the word.

35. The wine, book or reimbursement is a product in the relevant sense of the accountant's income earning activities and would form part of his or her assessable income. If the accountant failed to provide his or her ABN to the professional accounting association the association would be required to withhold under Division 14 of the TAA 1953.

Constructive Payment

36. Section 11-5(1) provides that in working out whether an entity (payer) has paid an amount to another entity, and when the payment is made, the amount is taken to have been paid to the other entity when the first entity (payer) applies or deals with the amount in any way on the other's behalf or as the other directs.

37. This means that a payer will be considered to have made a payment to the supplier where, for example, the payer pays an amount into a bank account as requested by the supplier.

38. Payment can be made either before or after the supply has been made. Section 12-190 provides that the payer must withhold from a payment for a supply that the supplier has made, or proposes to make, to the payer.

The payment and supply must be made in the course or furtherance of an enterprise carried on in Australia

39. Under section 12-190(1), the supplier must make the supply in the course or furtherance of an enterprise carried on in Australia for the provision to apply. Similarly, under paragraph 12-190(4)(a), the payer must also make the payment in the course or furtherance of an enterprise carried on in Australia by the payer.

What is meant by 'in the course or furtherance'?

40. The payment and the supply must be made in the course or furtherance of the entity's enterprise. To be 'in the course of' means 'while doing'[3]. In this context, to be 'in the furtherance of' means 'to advance'[4].

Example

41. Jack runs a Thai Restaurant that is recognised as one of the most popular small restaurants in town. It is a family business and he employs an additional 5 staff. Jack does not cater to functions. A longstanding customer is planning a staff function to show the company's appreciation for the extra hours the staff have worked in recent times and wants Jack to cater for the function. Jack needs to hire an additional 10 staff for the day.

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[3] Macquarie Dictionary 2nd Edition 1991

[4] Macquarie Dictionary 2nd Edition 1991

42. The supply is made by Jack in the course or furtherance of his enterprise. The payment is also made in the course or furtherance of the customer's enterprise even though it was a one off event.

What is an enterprise?

43. An enterprise is defined in section 9-20 of the GST Act 1999. It is a broad term and includes an activity or activities, done:

- in the form of a business;
- in the form of an adventure or concern in the nature of trade;
- on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property;
- by the trustee of a fund that is covered by, or by an authority or institution that is covered by, Subdivision 30-B of the *Income Tax Assessment Act 1997* and to which deductible gifts can be made;
- by a charitable institution or by a trustee of a charitable fund;
- by a religious institution; or
- by the Commonwealth, a State or a Territory, or by a body corporate, or corporation sole, established for a public purpose by or under a law of the Commonwealth, a State or a Territory.

44. The Commissioner has released Miscellaneous Taxation Ruling MT 2000/1 which provides guidance, among other matters, as to the meaning of an enterprise.

What is not an enterprise

45. An enterprise does not include activities done by an employee (section 12-35 of Schedule 1 to the TAA 1953) or in connection with earning withholding payments covered by section 12-40 of Schedule 1 to the TAA 1953 (concerning payments to company directors), section 12-45 of Schedule 1 to the TAA 1953 (concerning payments to office holders), or section 12-60 of Schedule 1 to the TAA 1953 (concerning payments made under labour hire arrangements or specified by regulations) - see paragraph 9-20(2)(a), and subsection 9-20(4) of the GST Act 1999.

46. An enterprise does not include an activity or series of activities done as:

- a private recreational pursuit or hobby;

- by an individual (other than a trustee of a charitable fund), or a *partnership (all the members of which are individuals), without a reasonable expectation of profit or gain; or
- as a member of a local governing body established by or under a *State law or *Territory law (except a local governing body to which subsection 12-45(3) in Schedule 1 to the TAA 1953 applies).

See paragraphs 9-20(2)(b) to 9-20(2)(d).

When is an enterprise carried on in Australia?

47. For the no ABN withholding event to apply, the supply must be made in the course of furtherance of an enterprise carried on in Australia. This phrase also takes its meaning from the GST Act 1999 (subsection 9-25(6)). For an enterprise to be carried on in Australia, the enterprise must be carried on through a permanent establishment in Australia.

48. A permanent establishment is defined in subsection 6(1) of the *Income Tax Assessment Act 1936* and means a place in Australia at or through which a person carries on business and includes (see paragraphs (a) to (d) of the definition):

- a place where the person is carrying on business through an agent;
- a place where the person has, is using or is installing substantial equipment of substantial machinery;
- a place where the person is engaged in a construction project; and
- where the person is engaged in selling goods manufactured, assembled, processed, packed or distributed by another for or at the order of the person and one of the tests regarding participation and control are satisfied, the place where the goods are manufactured, assembled, processed, packed or distributed.

The subsection 6(1) definition specifically excludes three types of agency situations (see paragraphs (e) to (g) of the definition). It should be noted that for the purposes of the withholding event, these situations are not excluded and permanent establishment takes a broader meaning. It is not the purpose of this Ruling to discuss the meaning of permanent establishment.

49. Where the non-resident is not carrying on an enterprise in Australia, the payer may seek a written statement from the

non-resident to verify that they are not carrying on an enterprise in Australia. There is no requirement for this statement to be in any particular form; as noted at paragraphs 119 – 121, the Commissioner has released a form that may be used in these circumstances. It should be signed, dated and identify the non-resident and the supply or class of supplies to which the statement relates. The payer could not rely on this statement where, for example, they paid money in relation to the supply to an Australian bank account and the payer was aware that the supplier had an office in Australia.

Internet and permanent establishment

50. In relation to internet supplies, it may be difficult to establish whether the supplier has a permanent establishment in Australia and to obtain a written statement from the supplier.

51. If the supplier has not provided an ABN and the URL does not identify the supplier as having an Australian connection (such as .com.au), and there is no other information reasonably available to the payer to lead them to believe that the supplier may have a permanent establishment in Australia (e.g., retail outlets in Australia, or an Australian address, phone number etc.), then the payer will not need to withhold. In these circumstances, it would be prudent to retain a record of the reason for not withholding.

52. Division 16 of the PAYG provisions contains offence and penalty provisions where a payer does not withhold. Under the legislation the Commissioner has a discretion to remit all or part of any penalty. Circumstances where the Commissioner may remit a penalty for failure to withhold would include circumstances where a payer has not withheld, it was later established that the supplier did have a permanent establishment in Australia and:

- the payer could not have reasonably known this at the time of payment;
- it was not reasonably possible to verify this with the supplier before payment; and
- the payer kept a record of the reason for not withholding (or is able to demonstrate due diligence).

Australia

53. The no ABN withholding event does not apply if the supplier or the payer carry on their enterprise in an external territory including the Cocos Islands or Christmas Island.

54. The phrase ‘carried on in Australia’ is defined under subsection 995-1(1) of the ITAA 1997 to have the meaning given by

subsection 9-25(6) of the GST Act 1999. In the GST Act 1999, Australia is defined to not include any external Territory. However, it includes an installation (within the meaning of the *Customs Act 1901*) that is deemed by section 5C of the *Customs Act 1901* to be part of Australia.

The exceptions - when is there no requirement to withhold?

55. For the no ABN withholding provision to apply, the operative requirements contained in paragraph 12-190(1)(a) must be satisfied (e.g., there must be a supply, the supply must be made by an entity carrying on an enterprise in Australia etc.). If these conditions are satisfied then the provision will require a withholding unless one of the exceptions listed in the provision is satisfied. These exceptions are contained in subsections 12-190(2) to (6) and provide that there is no requirement to withhold:

(i) if a supplier quotes their ABN on

- an invoice or
- some other document relating to the supply (subsection 12-190(2));

(ii) if the other entity has made the supply, or proposes to make the supply, through an agent and, when the payment is made

(a) the agent has given the payer an invoice that relates to the supply and quotes the agent's ABN; or

(b) the payer has some other document relating to the supply on which the agent's ABN is quoted (subsection 12-190(2A));

(iii) if the payment is made otherwise than in the course or furtherance of an enterprise carried on in Australia by the payer (paragraph 12-190(4)(a));

(iv) if the payment does not exceed $50 (disregarding so much of it as relates to GST payable on the supply) or, if the payer has also made, or proposes to make, one or more other payments to the other entity for the supply, the total of all the payments (disregarding so much of them as relates to GST payable on the supply) does not exceed $50 (paragraph 12-190(4)(b));

(v) if the supply is made by a member of a local governing body (paragraph 12-190(4)(c));

(vi) if the supply is wholly input taxed (paragraph 12-190(4)(d));

(vii) if the payment is from an investment body paying an amount to which section 12-140 or section 12-145 applies (subsection 12-190(5)); or

(viii) where the income is exempt income in the hands of the supplier (section 12-1).

56. Paragraphs 57 to 112 provide clarification for each of these exceptions.

(i) quoting an ABN on an invoice or some other document relating to the supply when the payment is made – subsection 12-190(2)

57. To avoid having an amount withheld, the supplier's ABN must be quoted to the payer before or at the time the payment is made. The essential criterion is the payer has the ABN 'relating to' the supply when the payment is made.

58. 'Relates to' is equivalent to the term 'in relation to'. A series of cases have found that the words 'in relation to' are of the widest import but must be read in the context in which the words are used in the particular Act. These cases are also relevant to interpreting 'relates to': *O'Grady v. The Northern Queensland Company Limited* (1989-1990) 169 CLR 356; *Burswood Management Ltd v. A-G* (Cth) (1990) 94 ALR 220; *Berry v. FC of T* (1953) 89 CLR 653; *Re Ross-Jones Marinovich; ex parte Green* (1984) 56 ALR 609.

59. The receipt of an invoice that relates to the supply before the actual payment is made which quotes the supplier's ABN would meet the requirements of section 12-190.

60. The term to 'quote' is defined under section 995-1(1) of the ITAA 1997. That provision provides that to quote an entity's ABN means to quote in a form and manner approved by the Commissioner. The ABN may be quoted in the following manner:

- in writing;
- in an electronic document;
- over the telephone; or
- on an internet site.

An oral quotation would need to be recorded on a document (paper or electronic) held by the payer to satisfy the requirement to hold an ABN on 'some other document relating to the supply'.

61. If the supplier quotes their ABN on an invoice or some other document relating to the supply, there will be no requirement for the

payer to withhold. However, the invoice or some other document must be obtained before or at the time payment is made.

62. It should also be noted that a tax invoice may be obtained up to 28 days after the supply has been made (subsection 29-70(2) GST Act 1999), whereas an ABN must be quoted at or before the time of payment if the no ABN withholding event applies.

What is an invoice that relates to the supply?

63. Under section 995-1(1) of the ITAA 1997, an invoice is defined as a document notifying an obligation to make a payment. An invoice for the goods or services provided by a supplier at or before the time of payment that contains the supplier's ABN would satisfy this provision.

64. Businesses that are in the GST system will require a tax invoice to enable them to be able to claim an input tax credit. One of the features of a tax invoice is that it contains the ABN of the supplier (except if it is an invoice created by an agent). [5] Where the tax invoice is not supplied before payment, the payer may be able to rely on some other document notifying an obligation to make a payment relating to the supply that is obtained before or at the time payment is made.

65. Where a payer does not hold a tax invoice at the time of payment, but subsequently acquires the tax invoice after payment they would only be required to keep the tax invoice in their records. Until such time as they receive the tax invoice, they would need to hold 'some other document' that contained the supplier's ABN.

What is 'some other document'?

66. A document may be in paper or electronic form and will satisfy the requirements where it notifies an obligation to make a payment that relates to the supply. In the context of this provision the quotation will relate to the supply if there is sufficient connection to the supply in question. The Commissioner considers that the following examples would satisfy the requirement to quote an ABN on some other document.

Periodic quoting of ABN

67. Many payers will hold lists of approved suppliers that they purchase goods or services from on a regular basis. Where that list contains the ABN of the supplier, it is considered that there is sufficient connection with the supply to meet the quotation

[5] see GSTR 2000/17

requirements where it is reasonably calculated to cover future supplies of that nature.

68. It is reasonable to rely on an earlier quotation (subsection 12-190(3)) contained on the list where it relates to periodic supplies. To reasonably rely on this list, the payer should ensure that the list is checked at least once a year with vendors to ensure currency of the list and that the nature of the supplies to which it will apply is correct.

Quotation notice/Price List

69. If a supplier gives a quote which forms the basis of an offer that was accepted, the quotation document would satisfy the requirement to quote an ABN on 'some other document' if it contained the supplier's ABN.

Recipient created invoices

70. A recipient created invoice provided for under the GST legislation would satisfy the requirement to quote an ABN on some other document.[6]

71. In some situations, a supplier may issue a document before it is certain that they will make a supply because the document is merely an offer. Examples are insurance renewal notices, motor vehicle registration and subscription notices. Supplies made by subscription include subscriptions to trade magazines, online legal research and subscriptions to professional associations. In these situations, there is no supply until the recipient accepts the offer. In many cases, the recipient accepts the offer by making a payment. If these types of documents contain an ABN, they will satisfy the requirement to quote the ABN on some other document relating to the supply.

Catalogues and other promotional documents eg auction catalogue, price lists etc

72. Similarly to above, these documents would satisfy the requirement to quote an ABN on some other document relating to the supply if an ABN was quoted in them and the relevant supply is subsequently made.

[6] see GST Ruling GSTR 2000/10

Lease agreements, insurance policies, contracts, terms and conditions etc.

73. In relation to periodical supplies such as leases, quoting the ABN on the lease document constitutes quoting the ABN on some other document. Insurance policies and other general contractual documents would also be considered to fall within the some other document exception. A document setting out the terms and conditions of a relationship would also be sufficient provided that it quotes the ABN.

Purchases by a credit card holder

74. If a purchaser chooses to pay by credit card, they should ensure that they obtain the ABN at or before the time payment is made by ensuring that the ABN is printed on the docket.

75. The ABN may be obtained over the phone if the payer records it in writing.

76. Where the supplier does not provide their ABN or a statement that they are not carrying on an enterprise, the payer should withhold 48.5% of the payment unless one of the exceptions in subsections 12-190(2) to (6) applies. The amount authorised to be debited to the credit card should only be 51.5% of the total price. It is not the responsibility of the credit card issuer to obtain an ABN from the supplier before transmitting the funds.

Transactions between credit card company and the merchant

77. In relation to credit card transactions, there is a supply made by the credit card company to the merchant. The credit card company charges a fee and generally would withhold this fee from the amount that it forwards to the merchant in relation to transactions that were paid for by credit card.

78. The merchant would be required to withhold if it did not obtain the credit card company's ABN. The credit card company can provide its ABN on an invoice or some other document relating to the supply.

79. For example, if a credit card company supplied its merchants with a document setting out the terms and conditions of its relationship and that document contained the credit card provider's ABN, it would satisfy the requirement to quote an ABN on 'some other document' relating to the supply.

Other

80. Other documents that will satisfy the provision if they quote the ABN related to the relevant supply and are provided before or at the time of payment include:

- letterhead (it may be a letter by way of introduction in relation to a product that is subsequently purchased);
- order form;
- business card provided in relation to a supply if obtained at or before payment and kept in the records in relation the supply;
- record of over the phone quotation of the ABN; or
- e-mail or internet record (web page).

(ii) the other entity has made the supply, or proposes to make the supply, through an agent and, when the payment is made:

(a) the agent has given the payer an invoice that relates to the supply and quotes the agent's ABN; or

(b) the payer has some other document relating to the supply on which the agent's ABN is quoted - subsection 12-190(2A)

81. This subsection was inserted into section 12-190 by the *A New Tax System (Tax Administration) Act (No2) 2000* on 30 June 2000.

82. This provision provides that where the supplier makes the supply through an agent, the agent's ABN may be quoted to the payer in relation to the supply. The form and manner of the quotation is the same as if the supplier had quoted their ABN.

83. The Commissioner's position on when a relevant transaction under Divisions 57 and 153 (i.e., taxable supply, taxable importation, creditable acquisition or creditable importation) is made through an agent is set out in GSTR 2000/37, paragraphs 45-47. The discussion in that ruling considering when a supply is made through an agent is relevant in this context.

Example

84. A singer's agent may contract on his or her behalf for them to perform at a venue. While the agent does not make the supply of actually performing, it is considered that the supply is made through the agent if the agent has the power to contract on behalf of the supplier. If the agent quotes their ABN on the invoice or some other document relating to the supply, there is no requirement for the payer to withhold.

85. Where the agent does not have the authority to, and does not actually contract on behalf of the principal, but merely brings the two contracting parties together, the supply is not made through the agent and the agent cannot quote their ABN in satisfaction of the quotation requirements. The ABN of the principal would need to be quoted.

(iii) the payment is made otherwise than in the course or furtherance of an enterprise carried on in Australia by the payer paragraph 12-190(4)(a)

86. If the payment is not made in the course or furtherance of an enterprise carried on in Australia by the payer, there is no requirement to withhold.

87. This subsection was inserted into section 12-190 by the *A New Tax System (Tax Administration) Act (No2) 2000* on 30 June 2000. Previously the provision had provided that there was no requirement to withhold if the payment was made by an individual and the payment was for the payer wholly of a private or domestic nature.

88. It was considered that this exclusion was too narrow. The new exception is wider in that it also applies to payers that are not individuals. Also, the provision now clearly excludes payments made to an employee or a labour hire worker relating to their work in that capacity.

Example

89. Naree has just purchased a home in a residential suburb to be used for her private residential accommodation. Naree has her own consulting business and has an ABN as she is carrying on an enterprise in relation to her consulting work. Naree works from her business premises in the city.

90. The home needs painting so Naree engages a painter to paint the exterior and interior of the house. The painter does not provide Naree with his ABN at or before the time of payment. Naree is not required to withhold as the payment is not made in the course or furtherance of an enterprise carried on by Naree. Naree has hired the painter in her personal capacity in relation to a private and domestic matter - not as part of her business or enterprise activities.

(iv) the payment (disregarding so much of it as relates to GST payable on the supply) or, if the payer has also made, or proposes to make, one or more other payments to the other entity for the supply, the total of all the payments (disregarding so much of them as relates to GST payable on the supply) does not exceed $50 or some higher amount as is specified in regulations in force for the purposes of subsection 29-80(1) of the GST Act – paragraph 12-190(4)(b)

91. This paragraph was amended by *A New Tax System (Tax Administration) Act (No2) 2000* to provide that there is no requirement to withhold if the payment for the supply does not exceed $50 or if GST is payable in relation to the supply, the payment does not exceed $55 (inclusive of the GST).

92. The underlying policy intention of section 12-190 was that it would align with the GST requirements as to amounts where a tax invoice would be required. The amended provision ensures this alignment by providing that the threshold amount for the operation of the provision excludes any GST component.

93. The amendments also make it clear that the payment cannot be broken down into amounts of $50 or less, excluding GST, to avoid the application of the provision.

94. It is the total contract price for the supply that must be considered in determining whether the threshold is met. This means the total payment for the supply, not merely the amount invoiced on an occasion. If the contract price for the supply is $120 and the supplier invoices for the supply over three months with amounts of $40 on each invoice, the payer would still need to obtain the ABN of the supplier in relation to supplies made under the contract.

95. It is our view that where the contract covers a variety of matters it is the total contract price that is relevant. For example, if the contract is for the supply of services performed many times and the total payment under the contract was in excess of $50, there would be a requirement to withhold even though each good or service may be individually valued at less than $50.

Example

96. Beach City local council enters into a contract with a qualified inspector for inspection services to be provided to the council on an ongoing basis. The contract contains a schedule specifying the cost of particular services covered by the contract. Some services cost less than $50 whereas others cost more. For example a water meter inspection is charged at $45.

97. The contract provides that the council will pay the inspector monthly in respect of services provided under the contract during that preceding month. Where payment will be more than $50 excluding GST, the inspector will need to have provided to the council his or her ABN at or before the time the payment is made to the council.

(v) the supply is made by a member of a local governing body – paragraph 12-190(4)(c)

98. Where the supply is made by a member of a local governing body, in the course or furtherance of an activity, or series of activities, done as a member, there is no requirement to withhold if an ABN is not quoted by the member (see paragraph 12-190(4)(c)).

(vi) the supply is wholly input taxed – paragraph 12-190(4)(d)

99. Paragraph 12-190(4)(d) was inserted by *A New Tax System (Tax Administration) Bill (No2) 2000* on 30 June 2000 to exclude wholly input taxed supplies from the operation of the provision.

100. Section 995-1(1) of the ITAA 1997 defines input taxed by reference to section 195-1 of the GST Act. The GST Act 1999 provides that input taxed has the meaning given by subsection 9-30(2) and Division 40.

101. Subsection 9-30(2) of the GST Act 1999 provides that a supply is input taxed if:

(a) it is input taxed under Division 40 or under a provision of another Act; or

(b) it is a supply of a right to receive a supply that would be input taxed under paragraph (a).

102. Division 40 of the GST Act 1999 lists six categories of supplies that are input taxed. These categories cover:

(a) Financial supplies (Subdivision 40-A of the GST Act 1999);

(b) Residential rent (Subdivision 40-B of the GST Act 1999);

(c) Residential premises (Subdivision 40-C of the GST Act 1999);

(d) Precious metals (Subdivision 40-D of the GST Act 1999);

(e) School tuckshops and canteens (Subdivision 40-D of the GST Act 1999); and

(f) Fund-raising events conducted by charitable institutions etc (Subdivision 40-F of the GST Act 1999).

It is not the purpose of this Ruling to explain these provisions.

Example

103. A standard residential rental agreement involves a supply of residential premises by a landlord to a tenant. A landlord of residential premises is carrying on an enterprise (section 38(1)(c) of the *A New Tax System (Australian Business Number) Act 1999*). The supply of residential premises is a supply in the course or furtherance of the enterprise.

104. Where the tenant uses the premises solely for residential use there would be no need for the tenant to obtain the ABN of the landlord. The no ABN withholding event does not apply for two reasons:

(i) the payment made by the tenant would not be in the course or furtherance of an enterprise carried on by the tenant/payer (paragraph 12-190(4)(a));

(ii) the supply is wholly input taxed (paragraph 12-190(4)(d).[7]

(vii) the payment is from an investment body paying an amount to which section 12-140 or section 12-145 applies – subsection 12-190(5)

105. These provisions (section 12-140 and 12-145) contain certain exceptions to the requirement to withhold. The provisions deal with the requirement to quote a Tax File Number (TFN) in relation to certain investments as described in Part VA of the ITAA 1936 *(*such as interest bearing accounts or deposits with financial institutions).

106. There is no requirement to withhold if the investor has quoted their ABN to the payer (section 12-155). Further, there is no requirement to withhold where the amount of the payment is in relation to a fully franked dividend or is below the thresholds set by the regulations (sections 12-165 and 12-170).

(viii) exempt income

107. In addition to the exceptions contained in the provision itself, section 12-1 of Schedule 1 to the TAA 1953 provides that there will

[7] Refer to GSTD 2000/9

be no withholding requirement where the whole of the payment is *exempt income of the recipient.

108. The term exempt income is explained in section 6-20 of the ITAA 1997.

109. The total income of certain entities may be exempt from income tax (section 11-5 of the ITAA 1997).

110. In other cases income may be exempt no matter whose it is (section 11-10 of the ITAA 1997) and in other cases income may be exempt only if it is derived by certain entities (section 11-15 of the ITAA 1997).

111. Income will also be exempt where it is not taxable by virtue of the provision of one of the International Treaties. Subsection 6-20 (2) provides that ordinary income is exempt to the extent that this Act excludes it from being assessable income. 'This Act' is defined to include the *Income Tax Assessment Act 1936*. Section 4(1) of the *International Tax Agreement Act 1953* (ITA Act 1953) provides that "the Assessment Act" is to be incorporated and shall be read as one with this Act". This means that the provisions of the two Acts are to be considered as if they are all in the one Act.[8]

112. The 'Assessment Act' is defined to mean the ITAA 1936 or the ITAA 1997. This means that where the ITA Act 1953 provides that income is not taxable in Australia, it will satisfy the definition of exempt income and section 12-190 will not require a withholding.

Informing the payer that the withholding event does not apply

113. Where the supplier is not carrying on an enterprise in Australia or one of the other exclusions to the provision apply, how does the supplier inform the payer that there is no requirement to withhold?

114. If the payer is aware that an exception applies so that there is no requirement to withhold, then they are not required to withhold even where a supplier has not quoted an ABN. For example, there is no requirement to withhold where the payment for the supply does not exceed $55 (including GST) or the payer is aware that the supplier is a tax exempt entity such as a public hospital. It may be evident that the supplier is not carrying on an enterprise - for example, where goods are purchased from a garage sale. In these instances, it would be prudent for the payer to ensure that their records are sufficient for them to be able to identify the reason for not withholding where an ABN was not supplied.

115. However, it is recognised that the payer may not be aware that the requirement to withhold does not apply unless the supplier informs

[8] Pearce and Geddes Statutory Interpretation 3rd Ed 7.25

them of this. For example, where the supplier is not carrying on an enterprise in Australia, this may or may not be apparent to the payer.

116. Subsection 12-190(6) provides that where the payer holds a written statement from the supplier who is an individual that they are not carrying on an enterprise or that the transaction is, for example, a hobby or a private recreational pursuit, and the payer has no reasonable grounds to believe that the statement is incorrect, the payer will not be required to withhold.

117. This subsection outlines a clear mechanism for the supplier to inform the payer that there should be no withholding in a particular case.

118. In any case where the supplier believes that the payer should not withhold, they should provide the payer with a written statement to that effect. In many cases, it would be in the payer's interest to request that the supplier inform them before payment if there is any reason why they should not withhold if the supplier has not supplied an ABN. This could be done, for example, on an order form etc.

119. The Commissioner has issued a standard form that may be used by a supplier to advise the payer of an appropriate reason for not withholding for failure to quote an ABN. This form is called "Statement by a supplier - Reasons for not quoting an Australian Business Number (ABN) to an enterprise".

120. The form may be provided in relation to any particular supplies. Where the statement made in the form applies to a particular class of supplies, it would be prudent for the payer to request that the supplier renews or confirms their statement after a period of one year.

121. The statement does not provide a blanket protection for the payer. It must be reasonable for the payer to rely upon the statement made on the form. For example if the payer is regularly paying a person to perform services for them, they might need to question the validity of a statement provided to them that the activity was merely a hobby.

Variation to the rate of withholding

122. Section 15-15 of Schedule 1 to the TAA 1953 provides that the Commissioner may, for the purposes of meeting the special circumstances of a particular case or class of cases, vary the amount required to be withheld by an entity from a withholding payment. The Commissioner's power to vary the amount includes the power to vary the amount to nil.

123. Where the variation applies to a particular entity, the Commissioner is required to give written notice to that entity. Where the variation applies to a class of entities, the Commissioner is

required to give written notice to each of the entities or to publish a copy of the notice in the Gazette.

124. The Commissioner has exercised this power in a number of cases or class of cases including payments made to individuals under the age of 18 years where the payment does not exceed $120[9]; payments to indigenous artists for artistic works where the indigenous artist has income from art activities of less than $10 000 and the artist qualifies for a Special Zone A rebate[10]; payments made by a member of a body corporate for body corporate levies and like payments[11]; and payments of certain allowances to employees or labour hire workers[12].

What about false or incorrect ABNs?

125. A payer is not required to check the validity of the ABN on the ABN register.[13] However, if the payer has reasonable grounds to believe that the supplier does not have an ABN or the ABN quoted is not that of the supplier they must withhold.

What is reasonable?

126. A payer should withhold where it is not reasonable for them to believe that the ABN quoted to them is the ABN of the supplier or the supplier's agent (subsection 12-190(3); 12-190(3A)).

127. For example, if a supplier called himself Jack Brown one day and Tom Smith on another occasion, the payer would be on notice and should make further enquires as to the identity of the supplier or possible agent involved. If the payer's suspicions are aroused they can check the ABN quoted on the ABN register to confirm the registered entity to which the ABN belongs. They can then check with the supplier if there is any discrepancy. Where the supplier provides an unsatisfactory explanation then it would be prudent to withhold.

128. Similarly if the same individual has quoted two different ABNs on separate occasions, it would be prudent for the payer to

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[9] Special Gazette No S 343, 29 June 2000

[10] Special Gazette No S 343, 29 June 2000

[11] Special Gazette No S 343, 29 June 2000

[12] Special Gazette No S343, 29 June 2000; Special Gazette No S676 28 December 2000.

[13] Unless the supply is subject to the ABN verification system contained in Part 5-30 of Schedule 1 to the *Taxation Administration Act 1953*.[13]

make further enquiries to see if the person is acting as an agent or has more than one enterprise.

129. Where the ABN number quoted is, for example, 111 111 111 11 or 123 456 789 10 then the payer should check the Australian Business Register (ABR) to ensure the ABN is a valid number. An ABN is an 11 digit number - where more or less than 11 numbers are quoted it would be prudent to make further enquiries. It should be noted that where an entity has branches, for the purposes of PAYG they may have a payer number that is 14 digits long, the first 11 being their ABN. The supplier may accidentally quote their 14 digit payer number. In these cases, checking with the supplier would seem an appropriate first response when given a 14 digit number.

130. In certain cases the payer may have been told by the Australian Taxation Office that the ABN is incorrect. This may arise under the reporting and verification provisions contained in Part 5-30 of the TAA 1953. In this case, the payer must withhold.

Payer's obligations

131. Where a supplier who is required to quote their ABN does not do so, the payer will be required to withhold 48.5% of the payment. If a payer is not already registered as a withholder, they will need to register with the Australian Taxation Office (ATO) as a withholder (section 16-140).

132. A payer that withholds an amount under this provision will send this amount into the ATO together with any other amounts that they have been required to withhold, for example from payments of salary or wages to their employees. Payers will send in the amount withheld under this event at the same time that they are required to send in their other withholding amounts. The amounts will be lodged and paid with the Activity Statement[14].

133. The payer will be required to provide the supplier with a payment summary that sets out the amount of tax that the payer has withheld from the supplier. The payment summary must cover that payment only and should be provided at the time of payment or as soon as practicable thereafter (section 16-167). There is no requirement to provide a payment summary if the amount withheld from the payment is nil (subsection 16-167(1)). The payer retains a copy of the payment summary in their records and uses the payment summary in preparation of their annual report.

[14] Except where the entity is classified as a large withholder under section 16-95; 16-125. Large withholders are required to pay electronically. For more information refer to the PAYG Withholding Guide to paying and reporting for large withholders.

Supplier's obligations

134. The supplier then lodges the payment summary with their income tax return and will be entitled to a credit for the amount of tax withheld. This credit will be applied against any taxation debt of the supplier - where there is no tax owing, the supplier would receive a refund of the amount withheld.

135. Where the supplier pays instalments under the PAYG instalment system, they would be required to include in their instalment income the total amount receivable in respect of the supply (ie the amount payable before the payer withheld).

136. Any amount withheld under this provision can only be claimed on lodgement of an income tax return - it cannot be claimed as a credit on an activity statement.

Example

137. If the supplier was registered or required to be registered for GST, they would also need to account for the GST on the total price. For example where the supply inclusive of GST totalled $110, and the supplier had failed to quote their ABN to the payer before payment, the payer would withhold $53.35 and provide the supplier with a payment summary that showed that they had withheld this amount.

138. The payer may request that the supplier provides a tax invoice and the supplier must provide the invoice within 28 days after the request[15] - this may occur after payment has been made. A tax invoice would contain the supplier's ABN. However to ensure there is no withholding, the supplier must quote their ABN to the payer when the payment is made - a tax invoice provided after payment does not alleviate the requirement to withhold where the ABN has not been quoted at the time of payment.

139. Where the supplier was required to pay PAYG instalments, the supplier would need to include in their instalment income as shown in their Activity Statement the total amount (exclusive of the GST component ie $110 - $10) of $100 and remit $10 in respect of the GST. The credit for the amount withheld cannot be claimed on the activity statement. It can only be claimed on lodgement of an annual income tax return.

Private rulings and enforcement procedures

140. The Commissioner cannot give a private binding ruling on the issue of whether a withholding is required to be made in the sense

[15] section 29-70(2) GST Act 1999

provided for by Part IVAA of the TAA 1953 because those provisions do not apply to tax collection matters. While the Commissioner, in accordance with Practice Statement 2001/4, will treat as administratively binding his opinions on such matters as the application of the PAYG provisions, such opinions do not give rise to objection, review and appeal rights provided in respect of Part IVAA rulings.[16]

141. The only avenue of judicial review prior to the commencement of enforcement action is the declaratory writ process instituted in a court of appropriate jurisdiction. Otherwise, a person dissatisfied with the opinion of the Commissioner must wait until enforcement action is instituted - either prosecution or imposition of 'failure to withhold' penalties. In the case of 'failure to withhold penalties', the Commissioner has a general discretion to remit the penalty and general interest charge in whole or in part. It is not the purpose of this Ruling to discuss penalty policies.

Date of effect

142. This Ruling applies to years of income commencing both before and after its date of issue. This Ruling does not apply to taxpayers, to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Detailed contents list

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[16] There is a recommendation to extend the circumstances in which private binding rulings may be obtained to include tax collection matters: *A Tax System Redesigned - Report of the Review of Business Taxation* (the Ralph Report).

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Your comments

144. We invite you to comment on this draft Taxation Ruling. We are allowing 6 weeks for comment before we finalise the Ruling. If you want your comments to be considered, please provide them to us within this period.

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Related Rulings/Determinations:

MT 2000/1; GSTR 2000/11; GSTR 2000/17; GSTR 2000/37; TR 92/20; PS 2001/4; IT 2674

Subject references:

- PAYG
- Withholding
- No ABN withholding

Legislative references:

- Customs Act 1901 5C
- ITAA 1936 6(1)
- TAA 1953 Part 2-5 Sched 1
- TAA 1953 11-5(1) Sched 1
- TAA 1953 12-1 Sched 1
- TAA 1953 12-45(3) Sched 1
- TAA 1953 12-190 Sched 1
- TAA 1953 12-190(1) Sched 1
- TAA 1953 12-190(1)(a) Sched 1
- TAA 1953 12-190(2) Sched 1
- TAA 1953 12-190(2A) Sched 1
- TAA 1953 12-190(3) Sched 1
- TAA 1953 12-190(4) Sched 1
- TAA 1953 12-190(4)(a) Sched 1
- TAA 1953 12-190(4)(b) Sched 1
- TAA 1953 12-190(4)(c) Sched 1
- TAA 1953 12-190(4)(d) Sched 1
- TAA 1953 12-190(5) Sched 1
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- TAA 1953 12-35 Sched 1
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- TAA 1953 12-145 Sched 1
- TAA 1953 12-155 Sched 1
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- ITAA 1997 995-1
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- ANTS(GST)A 1999 3(1A)
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- ANTS(GST)A 1999 Div 40
- ABN Act 1999 38(1)(c)
- ANTS(TA)A(No2) 2000 12-190

Case references:

- Berry v. FC of T (1953) 89 CLR 653
- Burswood Management Ltd v. A-G (Cth) (1990) 94 ALR 220
- FC of T v. McPhail (1968) 117 CLR 111
- O'Grady v. The Northern Queensland Company Limited (1989 – 1990) 169 CLR 356
- Re Ross-Jones Marinovich; ex parte Green (1984) 56 ALR 609

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Appendix A

Section 12-190 of Schedule 1 to the *Taxation Administration Act 1953*

12-190 Recipient does not quote ABN

(1) An entity (the **"payer"**) must withhold an amount from a payment it makes to another entity if:

(a) the payment is for a *supply that the other entity has made, or proposes to make, to the payer in the course or furtherance of an *enterprise *carried on in Australia by the other entity; and

(b) none of the exceptions in this section applies.

ABN correctly quoted

(2) The payer need not withhold an amount under this section if, when the payment is made:

(a) (a) the other entity has given the payer an *invoice that relates to the *supply and *quotes the other entity's *ABN; or

(b) the payer has some other document relating to the supply on which the other entity's ABN is *quoted.

(2A) The payer need not withhold an amount under this section if the other entity has made the *supply, or proposes to make the supply, through an agent and, when the payment is made:

(a) the agent has given the payer an *invoice that relates to the supply and *quotes the agents *ABN; or

(b) the payer has some other document relating to the supply on which the agent ABN is *quoted.

Payer has no reason to believe that ABN has been incorrectly quoted

(3) The payer need not withhold an amount under this section if, when the payment is made:

(a) the other entity has given the payer an *invoice that relates to the *supply and purports to *quote the other entity's *ABN, or the payer has some other document that relates to the supply and purports to *quote the other entity's ABN; and

(b) the other entity does not have an ABN, or the invoice or other document does not in fact quote the other entity's ABN; and

(c) the payer has no reasonable grounds to believe that the other entity does not have an ABN, or that the invoice or other document does not quote the other entity's ABN.

(3A) The payer need not withhold an amount under this section if the other entity has made the *supply, or proposes to make the supply, through an agent and, when the payment is made:

(a) the agent has given the payer an *invoice that relates to the supply and purports to *quote the agents *ABN, or the payer has some other document that relates to the supply and purports to *quote the agents ABN;

(b) the agent does not have an ABN, or the invoice or other document does not in fact quote the agents ABN; and

(c) the payer has no reasonable grounds to believe that the agent does no have an ABN, or that the invoice or other document does not quote the agents ABN.

No need to quote ABN

(4) The payer need not withhold an amount under this section if:

(a) the payment is made otherwise than in the course or furtherance of an *enterprise *carried on in Australia by the payer;

(b) the payment (disregarding so much of it as relates to *GST payable on the *supply), or, if the payer has also made, or proposes to make, one or more other payments to the other entity for the supply, the total of all the payments (disregarding so much of them as relates to *GST payable on the supply) does not exceed $50 or such higher amount as is specified in regulations in force for the purposes of subsection 29-80(1) of the *GST Act;

(c) the supply is made in the course or furtherance of an activity, or series of activities, done as a member of a local governing body established by or under a *State law or *Territory law; or

(d) the supply is wholly *input taxed.

(5) The payer need not withhold an amount under this section if the payment:

(a) is covered by section 12-140 or 12-145 (about not quoting *tax file number in respect of an investment in respect of which the payment is made); or

(b) would be covered by section 12-140 or 12-145 if the other entity had not quoted as mentioned in subsection 12-140(1) or section 12-155;

(c) would be covered by section 12-140 or 12-145 apart from section 12-160, 12-165 or 12-170 (which are exceptions to sections 12-140 and 12-145).

(6) The payer need not withhold an amount under this section if, when the payment is made:

(a) the other entity is an individual and has given the payer a written statement to the effect that:

(i) the *supply is made in the course or furtherance of an activity, or series of activities, done as a private recreational pursuit or hobby; or

(ii) the supply is, for the other entity, wholly of a private or domestic nature; and

(b) the payer has no reasonable grounds to believe that the statement is false or misleading in a material particular.