

***GSTD 2004/3A2 - Addendum - Goods and services tax: is a supply of rights to accommodation a supply of real property for the purposes of the A New Tax System (Goods and Services Tax) Act 1999?***

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## Addendum

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### Goods and Services Tax Determination

Goods and services tax: is a supply of rights to accommodation a supply of real property for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999*?

This Addendum amends Goods and Services Tax Determination GSTD 2004/3 to reflect amendments to the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), which were made by the *Tax Laws Amendment (2005 Measures No. 1) Act 2005*. In particular, it reflects amendments to subsections 188-15(3) and 188-20(3), which set out supplies that are disregarded in working out current GST turnover and projected GST turnover respectively. The amendments were made as part of amendments concerning supplies of rights or options offshore and apply to supplies made on or after 1 October 2005. (The transitional measure mentioned in footnote 1B (see item 1 of this Addendum) applies from 29 June 2005.)

The Addendum also amends GSTD 2004/3 to:

- take account of the Full Federal Court decision in *Saga Holidays Ltd v. Commissioner of Taxation* [2006] FCAFC 191;
- update the date of effect clause; and
- update the references section of GSTD 2004/3.

#### **GSTD 2004/3 is amended as follows:**

##### **1. Paragraph 3**

Omit paragraph 3; substitute:

3. Subject to paragraph 3A of this Determination, supplies of rights to accommodation in Australia are taken into account in determining whether an entity's GST turnover meets the registration turnover threshold<sup>1A</sup> in accordance with Divisions 23 and 188.

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<sup>1A</sup> \$75,000 unless the entity is a non-profit body in which case it is \$150,000.

# GSTD 2004/3

3A. Supplies of rights or options to use commercial accommodation<sup>1B</sup> in Australia that are made on or after 1 October 2005 are disregarded in determining whether an entity's GST turnover meets the registration turnover threshold if the supplies are not made in Australia and are made through an enterprise that the supplier does not carry on in Australia.<sup>1C</sup> This means that entities making such supplies may not be required to register for GST unless they make other taxable supplies connected with Australia that exceed the registration turnover threshold.

## 2. Paragraph 7

Omit footnote text; substitute:

In *Saga Holidays Limited v. Commissioner of Taxation* [2006] FCAFC 191 (*Saga Holidays*) Stone J (with whom Gyles J agreed) found it unnecessary to consider whether a supply of hotel accommodation was a licence to occupy land. Stone J (at paragraph 38) was 'satisfied that, at the very least, the contract between Saga and the tourist [for hotel accommodation] can be accurately described as including "a contractual right exercisable... in relation to land" and therefore ... it is not necessary to consider the question of a licence'. Young J (who also agreed with Stone J's reasons) similarly found (at paragraph 74) the supply of hotel accommodation to be the supply of a contractual right exercisable in relation to land in Australia. Goods and Services Tax Ruling GSTR 2003/7 at paragraphs 94 and 95 explains the Commissioner's view that a supply of hotel accommodation is a supply of real property.

## 3. Paragraph 10

At the end of the paragraph, insert:

<sup>3A</sup> This is consistent with the findings of the Full Federal Court in *Saga Holidays*. In *Saga Holidays* it was held that the supply of the accommodation component of an Australian tour package by a United Kingdom tour operator (Saga) to non-residents was a taxable supply of real property connected with Australia.

## 4. Paragraphs 11 and 12

Omit the paragraphs; substitute:

11. As supplies of rights to accommodation in Australia are connected with Australia such supplies are ordinarily taken into account in determining an entity's current GST turnover or projected GST turnover for the purposes of Division 188. This is so whether the rights are granted or assigned in or outside Australia. However, from 1 October 2005 supplies of rights or options to use commercial accommodation in Australia that are made on or after that date are disregarded in determining an entity's current GST turnover or projected GST turnover, if the supplies are not made in Australia and are made through an enterprise that is not carried on in Australia.<sup>3B</sup>

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<sup>1B</sup> Commercial accommodation has the meaning given by section 87-15 and refers to 'commercial residential premises' as defined in section 195-1.

<sup>1C</sup> This is the effect of paragraphs 188-15(3)(c) (current GST turnover) and 188-20(3)(c) (projected GST turnover). A similar transitional provision applies in working out current and projected GST turnover during the months of July, August and September 2005.

<sup>3B</sup> See footnote 1B.

12. Thus tour operators are required to be registered where they carry on an enterprise, make supplies of rights to accommodation in Australia (other than those that are to be disregarded) and the sum of the values of those supplies in a 12 month period<sup>4</sup> meets or exceeds the registration turnover threshold of \$75,000. However, on and from 1 October 2005 a non-resident tour operator is not required to register where the non-resident tour operator only makes supplies of rights or options to use commercial accommodation in Australia and those supplies are not made in Australia and are made through an enterprise that the non-resident tour operator does not carry on in Australia.

## **5. Paragraphs 15 and 16**

Omit the paragraphs; substitute:

15. *The tour operator in Australia sells the rights to accommodation in Australia to a non-resident tour operator. This supply of rights to accommodation in Australia is connected with Australia and is a taxable supply made by the Australian tour operator where the other requirements of section 9-5 are met. As this supply is connected with Australia, the value of the supply is part of the Australian tour operator's GST turnover.*

16. *The non-resident tour operator sells the holiday package (including rights to accommodation) to a tourist intending to visit Australia. The supply of rights to accommodation in Australia is connected with Australia and is a taxable supply if the other requirements of section 9-5 are met, which includes the requirement that the non-resident tour operator is registered, or required to be registered, for GST.*

16A. *The non-resident tour operator, in determining whether it meets the registration turnover threshold and thus is required to be registered for GST, disregards supplies that it made on or after 1 October 2005 if those supplies are of a right or option to use commercial accommodation in Australia, are not made in Australia and are made through its enterprise that is not carried on in Australia. Because of such supplies being disregarded in working out GST turnover the non-resident tour operator, which might otherwise have been required to register, may not be required to do so.*

16B. *If the non-resident tour operator is not required to register, and does not register, it is not entitled to claim any input tax credits with respect to any acquisitions that it makes from suppliers in Australia (for example, rights to accommodation in Australia), and is not required to account for GST in respect of any supplies that it makes that are connected with Australia (for example, supplies of rights to accommodation to tourists). If, however, the non-resident tour operator does register for GST it is entitled to claim input tax credits for any creditable acquisitions that it makes and is required to account for GST in respect of any taxable supplies that it makes, including supplies of rights or options to tourists to use commercial accommodation in Australia.*

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<sup>4</sup> As determined by the relevant tests in Division 188.

# GSTD 2004/3

## 6. Paragraphs 17 and 18

Omit the paragraphs; substitute:

17. This Determination explains the Commissioner's view of the law as it applies both before and after its date of issue. You can rely upon this Determination on and from its date of issue for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* (TAA). Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and the Commissioner's view of when you can rely on this interpretation of the law in GST public and private rulings.

18. Changes made to this Determination by Addenda that issued on 15 August 2007 and 10 October 2007 have been incorporated into this version of the Determination.<sup>5</sup> You can rely on the changes made to the Determination by each Addendum for the purposes of section 105-60 of Schedule 1 to the TAA from the date of issue of the relevant Addendum. If the Addendum conflicts with a previous private ruling that you have obtained or a previous public ruling, the Addendum prevails.

18A. If you have relied on a previous ruling (including the public ruling that the Addendum amends), you are protected in respect of what you have done up to the date of issue of the relevant Addendum or, if there is a change to the legislation, you are protected in respect of what you have done up to the date the legislative change takes effect. This means that if you have relied on the previous ruling and have underpaid an amount of GST, you are not liable for the shortfall prior to either the issue date of the relevant Addendum or the date the legislative change takes effect, as appropriate. Similarly, if you have relied on the previous ruling you are not liable to repay an amount overpaid by the Commissioner as a refund.

## 7. References

(a) Omit:

- TAA 1953 37

substitute:

- ANTS(GST)A99 87-15
- ANTS(GST)A99 188-15(3)(c)
- ANTS(GST)A99 188-20(3)(c)
- TAA 1953 Sch 1 105-60

(b) Insert:

*Case references:*

- *Saga Holidays Limited v. Commissioner of Taxation* [2006] FCAFC 191

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<sup>5</sup> Refer to each Addendum to see how it is that the Addendum amends this Determination.

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This Addendum explains our view of the law as it applies both before and after its date of issue. You can rely upon this Addendum on and from its date of issue for the purpose of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*.

If this Addendum conflicts with a previous private ruling that you have obtained or a previous public ruling, this Addendum prevails. However, if you have relied on a previous ruling (including the public ruling that the Addendum amends), you are protected in respect of what you have done up to the date of issue of the Addendum or, if there is a change to the legislation, you are protected in respect of what you have done up to the date the legislative change takes effect. This means that if you have relied on the earlier ruling and have underpaid an amount of GST, you are not liable for the shortfall prior to either the issue date of this Addendum or the date the legislative change takes effect, as appropriate. Similarly, if you have relied on the earlier ruling you are not liable to repay an amount overpaid by the Commissioner as a refund.

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**Commissioner of Taxation**10 October 2007

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## ATO references

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