GSTD 2007/3 - Goods and services tax: if a non-resident entity owns residential rental premises in Australia and an Australian accountant makes a supply to that entity consisting of advice about the premises and tax return preparation services, is that supply wholly or partly GST-free if made on or after 1 April 2005?

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Goods and Services Tax Determination

Goods and services tax: if a non-resident entity owns residential rental premises in Australia and an Australian accountant makes a supply to that entity consisting of advice about the premises and tax return preparation services, is that supply wholly or partly GST-free if made on or after 1 April 2005?

Preamble

This document is a ruling for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*. You can rely on the information presented in this document which provides advice on the operation of the GST system.

1. No, the supply is not GST-free. Even if the supply made by the Australian accountant to the non-resident property owner is GST-free under item 2 or item 3 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act),[1] subsection 38-190(2A) negates the GST-free status of that supply.

2. The GST-free status is negated under subsection 38-190(2A) because the acquisition of the advice and tax return preparation services by the non-resident property owner relates (directly or indirectly, or wholly or partly) to the making of a supply of real property situated in Australia that would be input taxed under Subdivision 40-B (lease, hire or licence of residential premises) or Subdivision 40-C (sale or long-term lease of residential premises).[2]

3. Even if the acquisition of these services also relates to the making of supplies that are not input taxed supplies of real property, the supply is not GST-free. There is no apportionment under subsection 38-190(2A). For example, if the tax return preparation services relate to income returned from sources other than the making of input taxed supplies of real property or the advice includes other matters such as share investments, the supply of services to the non-resident property owner is not partly GST-free. Therefore, if the requirements of section 9-5 are met, the supply by the Australian accountant to the non-resident property owner is a taxable supply.

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[1] All legislative references in this Determination are to the GST Act and all references to an item number are to an item in the table in subsection 38-190(1) unless otherwise indicated.

[2] See GSTR 2000/20 Goods and Services Tax: commercial residential premises for guidance on what is residential premises.

4. In practice the Australian accountant may make a single supply of services comprising advice and tax return preparation services or two separate supplies being a supply of advice and a supply of tax return preparation services. Whether there is a single supply of services or two separate supplies in any given case is determined according to the facts of the particular case and is not discussed in this Determination.

Background

5. A non-resident property owner commonly acquires a wide range of supplies in the course of renting or selling property situated in Australia. For example, the non-resident property owner may acquire real estate services, conveyancing services, repair services and accounting services.

6. Prior to 1 April 2005, supplies of such services made to a non-resident property owner were often GST-free under item 2 or 3 if the non-resident property owner was not in Australia in relation to the supply[3] when the services were performed. By comparison, the same services were not GST-free if supplied to a resident property owner, or a non-resident property owner, who was in Australia in relation to the supply when the services were performed.

7. Subsection 38-190(2A) removes this anomaly by negating the GST-free status of a supply to a non-resident property owner if the acquisition of that supply relates, directly or indirectly, or wholly or partly, to the making of a supply of real property in Australia that would be wholly or partly input taxed under Subdivision 40-B or 40-C.
Subsection 38-190(2A) ensures the same GST treatment applies to both non-resident and resident property owners who supply residential premises situated in Australia.

Explanation

8. Section 38-190 provides that in certain circumstances supplies of things, other than goods or real property, for consumption outside Australia are GST-free. A supply is GST-free if it meets the requirements of items 1 to 5. However, the GST-free status of the supply is negated if subsection 38-190(2),[4] 38-190(2A) or 38-190(3)[5] applies to the supply.

9. If a supply made by an Australian accountant consists of advice and tax return preparation services and that supply is made to a non-resident property owner who is not in Australia when the services are performed, the supply of the services is GST-free under paragraph (a) of item 2. The supply of advice and tax return preparation services is neither a supply of work physically performed on goods situated in Australia when the work is done, nor a supply directly connected with real property in Australia.[6] Under paragraph (b) of item 2, a supply that is acquired by a non-resident who is carrying on an enterprise and who is not registered or required to be registered is GST-free even if the supply is directly connected with real property in Australia.

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[3] See GSTR 2004/7 Goods and services tax: in the application of items 2 and 3 and paragraph (b) of item 4 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*: when is a 'non-resident' or other 'recipient' of a supply 'not in Australia when the thing supplied is done'?; when is 'an entity that is not an Australian resident' 'outside Australia when the thing supplied is done'?

[4] See GSTR 2003/8 Goods and services tax: supply of rights for use outside Australia - subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

[5] See 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*.

[6] See GSTR 2003/7 Goods and services tax: what do the expressions 'directly connected with goods or real property' and 'a supply of work physically performed on goods' mean for the purposes of subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*?

10. However, under subsection 38-190(2A), a supply made on or after 1 April 2005 that is covered by any of items 2 to 4 is not GST-free if:

- the acquisition of the supply relates (whether directly or indirectly, or wholly or partly) to the making of a supply of real property situated in Australia; and
- the supply of that property would be, wholly or partly, input taxed under Subdivision 40-B or 40-C.

11. The test in subsection 38-190(2A) is whether there is a connection between the acquisition of the supply and the making of a supply of real property that is input taxed under Subdivision 40-B or 40-C. It is not a requirement that the acquisition relates *only* to the making of supplies of real property that would be input taxed under Subdivision 40-B or 40-C. Subsection 38-190(2A) negates the GST-free status of a supply, such as the supply of advice or tax return preparation services to a non-resident property owner, even if the acquisition of those services also relates, directly or indirectly or wholly or partly, to the making of supplies that are not input taxed supplies of real property.

12. The phrase 'relates to', is not defined and takes its ordinary meaning. It has been held to be capable of wide meaning.[7] In any case, that the phrase is intended to have a wide meaning and application is put beyond doubt by the words 'whether directly or indirectly, or wholly or partly' in subsection 38-190(2A), which amplify its scope.

13. The Explanatory Memorandum (EM) accompanying the Bill[8] that inserted subsection 38-190(2A) further evidences Parliament's intention that the provision should have broad application. Example 9.2 illustrates that the acquisition of a supply of tax advice in the course of tax return preparation is not GST-free even though the acquisition of the advice only relates in part to the making of a supply of a rental property and the advice on the rental property only indirectly relates to the making of that supply. The EM also indicates (at paragraph 9.6) that the acquisition of architectural services for a particular property, real estate property management services, building insurance, legal services in preparing an instrument of mortgage over real property, public liability insurance and advertising services can relate (either directly or indirectly) to the making of supplies of real property.

14. The acquisition of tax return preparation services relates to the making of a supply of residential rental premises situated in Australia that would be input taxed under Subdivision 40-B or 40-C, if the tax return preparation services are performed, whether in whole or in part, to return income, deductions or other matters in respect of those premises. That an acquisition can relate to the making of input taxed supplies in an earlier period is consistent with the comments of Hill J in *HP Mercantile Pty Ltd v. FCT*[9] concerning the requirement in paragraph 11-15(2)(a) that the 'acquisition relates to making supplies that would be input taxed'.

15. The acquisition of advice by the non-resident property owner relates to the making of a supply of residential rental premises situated in Australia that would be input taxed under Subdivision 40-B or 40-C, if the advice, whether in whole or in part, is about the residential premises. One example is advice concerning the capital gains tax implications if the property were sold. Another is advice about the effectiveness of the property as an investment as compared to other investments that the non-resident property owner could make.

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[7] See *HP Mercantile Pty Ltd v. FCT* 2005 ATC 4571, at 4578.
[8] Tax Laws Amendment (2004 Measures No. 6) Bill 2004 enacted as *Tax Laws Amendment (2004 Measures No. 6) Act 2005*.
[9] 2005 ATC 4571, at 4581.

16. Subsection 38-190(2A) negates the GST-free status of a supply if the acquisition of that supply relates to the making of supplies of real property situated in Australia that would be input taxed under Subdivision 40-B or 40-C. It is not a requirement that the input taxed supplies are actually made.[10]

17. Further, satisfaction of the requirement that the acquisition of the supply relates to the making of a supply that would be input taxed under Subdivision 40-B or 40-C, does not depend on whether or not the non-resident property owner first meets the requirements of paragraphs 9-5(a) to (d). This is illustrated by Example 9.3 in the EM as in that example subsection 38-190(2A) applied in circumstances where the non-resident property owner was not registered nor required to be registered for GST.

18. Example 9.3 also makes it clear that there is no apportionment under subsection 38-190(2A) even if the acquisition of the supply is only partly related to the making of a supply of the residential premises that would be input taxed, or the property is only partly input taxed, under Subdivision 40-B or 40-C. However, even though subsection 38-190(2A) does not allow apportionment, a non-resident property owner is entitled to an input tax credit to the extent that the acquisition of the supply is a creditable acquisition.[11]

19. The following examples illustrate the application of subsection 38-190(2A) to the supply of advice and tax return preparation services by an Australian accountant.

Example 1 – written advice about shares and Australian residential rental premises

20. *Investor Co, a non-resident company, owns investments that comprise residential rental premises in Australia and also some shares in Australian companies. Investor Co acquires written advice on the tax effectiveness of these investments from an Australian accountant. Investor Co is not in Australia when the services are performed.*

21. *There is a single supply of written advice. The acquisition of the advice by Investor Co is partly related to the input taxed supply of the Australian residential rental premises and partly related to Investor Co's other investments in shares. Although the supply of advice by the Australian accountant is GST-free under item 2, subsection 38-190(2A) negates the GST-free status of the supply as its acquisition relates in part to the making of a supply of residential premises that is input taxed under Subdivision 40-B. Thus, the supply by the Australian accountant is not GST-free. The supply is a taxable supply if the other requirements of section 9-5 are met.*

22. *If Investor Co sought advice only about its investments in Australian shares, for example, whether to sell some shares and acquire other shares, the acquisition of the advice does not relate (directly or indirectly) to the making of a supply of real property in Australia and subsection 38-190(2A) does not negate the GST-free status of the supply as established under item 2.*

[10] This is consistent with Hill J's comments in *HP Mercantile Pty Ltd v. FCT* 2005 ATC 4571 at 4579 and 4580 concerning the requirement in paragraph 11-15(2)(a).
[11] Section 11-5.

Example 2 – tax return preparation services – Australian residential and commercial rental premises

23. *John, a non-resident, owns a two storey rental property in Australia. The ground floor is leased as a shop (commercial premises) and the top floor is leased as residential premises. John engages an Australian accountant to prepare his tax return and is not in Australia when the services are performed. The supply is therefore GST-free under item 2.*

24. *The acquisition of the tax return preparation services relates to the making of a supply of real property situated in Australia as the services are performed to return income, deductions or other matters in respect of that property. Although the supply of the tax return preparation services is GST-free under item 2, the acquisition of the tax return preparation services relates to the making of a supply of real property that is partly input taxed under Subdivision 40-B (that is, the top floor residential premises) and thus subsection 38-190(2A) negates the GST-free status of the entire supply. The supply of the tax return preparation services by the Australian accountant is a taxable supply if the other requirements of section 9-5 are met.*

25. *However, John may be entitled to an input tax credit to the extent that the acquisition of the tax return preparation services relates to the leasing of the commercial premises and is a creditable acquisition.*[12]

Example 3 – tax return preparation services and tax advice

26. *Erica, a non-resident, owns a stratum titled unit in a serviced apartment complex. Erica leases the unit to Phil who resides in Australia and in his own right lets apartments in the complex to guests for short stays. Erica is therefore leasing residential premises to Phil which is an input taxed supply under Subdivision 40-B.*

27. *Erica has an Australian accountant who prepares and lodges her tax return that includes her leasing income and deductions in respect of that unit and also income from some other investments in shares. When speaking on the phone to her accountant about the preparation of her tax return she also seeks tax advice about her plans to invest in some Australian managed funds. In the same conversation her accountant gives her a detailed understanding of the tax issues in relation to managed funds. Erica is not in Australia when the services are performed.*

28. *The facts indicate that there is a single supply of services which includes tax return preparation and advice. Although the supply of the tax return preparation services and advice is GST-free under item 2, the acquisition of the tax return preparation services relate, in part, to the making of a supply of real property that would be input taxed under Subdivision 40-B. Subsection 38-190(2A) therefore negates the GST-free status of the entire supply. The supply of the tax return preparation services and advice by the Australian accountant is a taxable supply where the other requirements of section 9-5 are met.*

[12] Section 11-5.

Example 4 – advice about shareholdings in an Australian company the only assets of which are residential rental premises

29. *Mary, a non-resident, has shares in an Australian company the only assets of which are residential rental apartments in Australia. Mary acquires advice from an Australian accountant about her share investment and withholding tax. The acquisition of advice by Mary does not relate to the making of supplies of real property but relates to the holding of shares by Mary. If the supply of advice by the accountant to Mary is GST-free under item 2, subsection 38-190(2A) does not negate the GST-free status of that supply.*

Date of Effect

30. 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*. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

31. If this Determination conflicts with a previous private ruling that you have obtained or a previous public ruling, this public ruling prevails. However, if you have relied on a previous ruling, you are protected in respect of what you have done up to the date of issue of this public ruling 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 Ruling 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.

Commissioner of Taxation
12 December 2007

Previous draft:

GSTD 2007/D2

Related Rulings/Determinations:

GSTR 1999/1; GSTR 2000/20;
GSTR 2003/7; GSTR 2003/8; GSTR 2004/7;
GSTR 2005/6

Subject references:

- acquisition
- GST-free
- input taxed
- non-resident
- real property
- rental property
- residential premises
- recipient
- supply

Legislative references:

- 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 11-5
- ANTS(GST)A 1999 11-15(2)(a)
- ANTS(GST)A 1999 38-190
- ANTS(GST)A 1999 38-190(1)
- ANTS(GST)A 1999 38-190(2)
- ANTS(GST)A 1999 38-190(2A)
- ANTS(GST)A 1999 38-190(3)
- ANTS(GST)A 1999 Subdiv 40-B
- ANTS(GST)A 1999 Subdiv 40-C
- Tax Laws Amendment (2004 Measures No. 6) Act 2005
- TAA 1953 Sch 1 105-60

Case references:

- HP Mercantile Pty Ltd v. Federal Commissioner of Taxation 2005 ATC 4571; 60 ATR 106

Other references:

- Explanatory Memorandum to Tax Laws Amendment (2004 Measures No. 6) Bill 2004
- Tax Laws Amendment (2004 Measures No. 6) Bill 2004

ATO references

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