

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

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Addendum

Goods and Services Tax Ruling

Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2)

This Addendum amends Goods and Services Tax Ruling GSTR 2003/8 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, the legislative context section of the Ruling is updated to reflect amendments that inserted paragraph 9-25(5)(c), which sets out certain supplies of rights or options offshore that are connected with Australia. The amendments apply to supplies made on or after 1 October 2005.

The Addendum also amends GSTR 2003/8 to:

- take account of the Full Federal Court decision in *Saga Holidays Ltd v. Commissioner of Taxation* [2006] FCAFC 191;
- insert references to subsection 38-190(2A). Subsection 38-190(2A) was inserted by *Tax Laws Amendment (2004 Measures No. 6) Act 2005* and applies to supplies made on or after 1 April 2005;
- update the date of effect clause; and
- update the references section of GSTR 2003/8.

GSTR 2003/8 is amended as follows:

1. Paragraph 7

Omit paragraphs 7 and 8; substitute:

7. This Ruling explains the Commissioner's view of the law as it applies both before and after its date of issue. You can rely upon this Ruling 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.

8. Changes made to this Ruling by an Addendum that issued on 17 October 2007 have been incorporated into this version of the Ruling.^{1A} You can rely on the changes made to the Ruling by the Addendum for the purposes of section 105-60 of Schedule 1 to the TAA 1953 from the date of issue of the Addendum. If the Addendum conflicts with a previous private ruling that you have obtained or a previous public ruling, the Addendum prevails.

8A. 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 previous ruling and have underpaid an amount of GST, you are not liable for the shortfall prior to either the issue date of the 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.

2. Paragraphs 10 and 11

Omit paragraphs 10, 11 and 12; substitute:

Connected with Australia

10. Section 9-25 establishes when a supply is connected with Australia. In the case of supplies of things other than goods or real property, a supply is connected with Australia if the thing is done in Australia or the supply is made through an enterprise that the supplier carries on in Australia.³ If the supply is not connected under either of these tests, and the supply is a right or option to acquire another thing and the supply of the other thing would be connected with Australia, the supply of the right or option is connected with Australia.^{3A}

11. With a supply of a right or option, the thing that is done is the creation, grant, transfer, assignment or surrender of the right or option. Whether a right or option is created, granted, transferred, assigned or surrendered in Australia will depend on how the creation, grant, transfer, assignment or surrender is effected. For example, if a right to use intellectual property is granted by the execution of a written contract, the grant of the right is done in Australia if the contract is executed in Australia.⁴

^{1A} Refer to the Addendum to see how it is that the Addendum amends this Ruling.

³ Paragraphs 9-25(5)(a) and (b).

^{3A} Paragraph 9-25(5)(c).

⁴ For further detail, see paragraphs 202 to 208 of GSTR 2000/31.

11A. With a supply of a right or option to acquire another thing, the supply of which would be connected with Australia, it is the Commissioner's view that the creation, grant, transfer or assignment of the right is connected with Australia if the supply of the other thing would be connected with Australia, irrespective of whether or not the supply of the other thing is in fact made.^{4A}

11B. However, with respect to the *surrender* of a right or option to acquire another thing it is the Commissioner's view that the surrender of the right or option is not connected with Australia merely because the right or option being surrendered concerned the supply of some other thing that would have been connected with Australia. That is, the surrender of a right or option is only connected with Australia if the right or option is surrendered in Australia (that is, paragraph 9-25(5)(a) applies) or the supply is made through an enterprise that the supplier carries on in Australia (that is, paragraph 9-25(5)(b) applies).

11C. As explained in the Explanatory Memorandum^{4B} paragraph 9-25(5)(c) was inserted to address a deficiency in the GST Act under which certain rights or options provided offshore were not subject to GST even when they were for goods, services and other things that will be consumed in Australia. This outcome is contrary to the policy intent of the GST legislation which, broadly, is to tax private consumption of most goods, services and other things in Australia, including imports.

11D. It would, however, be inconsistent with the policy intent of the amendment for a supply of a surrender of a right or option to acquire another thing to be connected with Australia merely because the supply of the other thing, which will not be supplied as the right or option is being surrendered, would have been connected with Australia had it been supplied. In contrast to the creation, grant, transfer or assignment of a right or option to acquire some other thing that is connected with Australia, with the surrender of a right or option there can be no consumption of the underlying thing in Australia. Taking the approach that paragraph 9-25(5)(c) does not apply to the surrender of a right or option to acquire another thing ensures consistency with the policy intent of the amendment and ensures that paragraph 9-25(5)(c) does not apply inappropriately.

^{4A} This is consistent with Hill J's comments (at paragraph 42) in *HP Mercantile Pty Ltd v. FC of T* 2005 ATC 4571 with respect to the requirement in paragraph 11-15(2)(a) that an acquisition relates to making supplies that 'would be' input taxed. Hill J noted 'a need in framing a provision disentitling a taxpayer to input tax credits to use a word suggesting conditionality, to ensure that a credit would not be available if there would have been a relationship between the acquisition and a future supply, in the event that no future supply eventuated'.

^{4B} See paragraphs 3.2 to 3.5 of the Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 1) 2005 enacted as *Taxation Laws Amendment Act (No. 1) 2005*.

12. In summary, the supply of a right or option is connected with Australia, and therefore a taxable supply if the other requirements of section 9-5 are met, if:

- the creation, grant, transfer, assignment or surrender of the right or option is done in Australia (paragraph 9-25(5)(a)); or
- the creation, grant, transfer, assignment or surrender of the right is made by the supplier through an enterprise that the supplier carries on in Australia (paragraph 9-25(5)(b)); or
- the supply is the creation, grant, transfer or assignment of a right or option to acquire another thing and the supply of that other thing would be connected with Australia (paragraph 9-25(5)(c)).

A supply of a right or option that is not connected with Australia is not a taxable supply under section 9-5.⁵

3. Paragraph 13

Immediately before the paragraph, insert:

GST-free supplies

4. Footnote 9

Omit the text; substitute:

Provided subsection 38-190(2), subsection 38-190(2A) or subsection 38-190(3) does not operate to negate that GST-free status.

5. Paragraph 24

At the end of the paragraph, insert:

^{10A} For example in *Saga Holidays Limited v. Commissioner of Taxation* [2006] FCAFC 191 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 contractual right exercisable over or in relation to land and thus a taxable supply of real property connected with Australia. Such a supply would not be covered by item 4.

⁵ However, an intangible supply from offshore that is not connected with Australia may be a taxable supply under Division 84. Division 84 may also apply where the supply is connected with Australia because of paragraph 9-25(5)(c).

6. Paragraph 56

At the end of the paragraph, insert:

^{14A} See also footnote 10A.

7. Footnote 38

Omit the text; substitute:

Provided subsection 38-190(2) or subsection 38-190(2A) does not operate to negate the GST-free status of the supply.

8. Detailed contents list

Insert:

Connected with Australia	10
GST-free supplies	13

9. References

(a) Omit:

- TAA 1953 37

substitute:

- ANTS(GST)A 1999 9-25(5)(a)
- ANTS(GST)A 1999 9-25(5)(b)
- ANTS(GST)A 1999 9-25(5)(c)
- ANTS(GST)A 1999 11-15(2)(a)
- ANTS(GST)A 1999 38-190(2A)
- ANTS(GST)A 1999 Div 84
- TAA 1953 Sch 1 105-60
- Taxation Laws Amendment Act (No. 1) 2005

(b) Insert:

- HP Mercantile Pty Ltd v. FC of T 2005 ATC 4571
- Saga Holidays Limited v. Commissioner of Taxation [2006] FCAFC 191
- Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 1) 2005

GSTR 2003/8

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.

Commissioner of Taxation

17 October 2007

ATO references

NO: 2006/20258
ISSN: 1443-5160
ATOlaw topic: Goods and Services Tax ~~ International services ~~
supplies of rights
Goods and Services Tax ~~ General rules and concepts ~~
supplies connected with Australia