LCR 2016/1 - GST and carrying on an enterprise in the indirect tax zone (Australia)

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GST and carrying on an enterprise in the indirect tax zone (Australia)

Relying on this Ruling

This publication is a public ruling for the purposes of the *Taxation Administration Act 1953.*

This Law Companion Ruling describes how the Commissioner will apply the law in the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016*. If you rely on this Ruling in good faith you will not have to pay any underpaid tax, penalties or interest in respect of matters it covers if it does not correctly state how a relevant provision applies to you.

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What this Ruling is about

1. This Ruling discusses:

- a test in the Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016[1] (the Amending Act) for when an enterprise of an entity is carried on in the *indirect tax zone*[2] (Australia)
- specific issues in applying this test to non-resident entities, and
- some of the consequences of satisfying this test, for example, registration.

2. This Ruling does not discuss when a payer is required to withhold from a payment it makes to a supplier under Australia's ABN withholding rules. Under that legislation, the phrase 'in the course or furtherance of an enterprise carried on in Australia' is used but is defined differently to the similar term that is discussed in this Ruling.[3]

3. The test for when an *enterprise of an entity is carried on in Australia*[4] appears in section 9-27. This test is used in the GST Act in a variety of ways, and may affect the extent to which an entity is accountable for GST on supplies or acquisitions.

4. Generally, the types of supplies that are affected by the test are things other than goods or real property (for example, legal or accounting services, or supplies of digital products). The test is applicable to all types of entities.

5. Applying the test in section 9-27 to a non-resident, has two main outcomes:

- where the non-resident entity has a GST enterprise presence, the entity will be treated in the same way as a domestic entity, and

[1] All legislative references are to the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) as amended by the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* (Amending Act), unless context otherwise dictates.
[2] In general terms, the 'indirect tax zone' is the area that Australia's GST applies to, and will be referred to as 'Australia' in this document, except where explained in detail at paragraphs 25 to 27 of this Ruling.
[3] For further guidance refer to Taxation Ruling TR 2002/9 *Income tax: withholding from payments where recipient does not quote ABN*.
[4] Where appropriate, we shorten *enterprise of an entity that is carried on in Australia* by referring to this as the entity's 'GST enterprise presence', or, where more appropriate, 'enterprise presence'.

- where they do not have a GST enterprise presence, then a non-resident will generally only be subject to GST on supplies to unregistered entities in Australia.[5]

Early engagement

6. We would like to work closely with anyone likely to be affected by the amendments to the GST Act to provide greater certainty on the operation of the law.

7. If, after considering the new law in conjunction with this Ruling, you think that you may need to register for GST, we are available to answer any queries and discuss your circumstances. The key point of contact, should you wish to discuss further, is AustraliaGST@ato.gov.au.

Outline of the law

8. The Amending Act changes how GST applies to cross-border supplies involving non-resident entities. The changes in the Amending Act are divided into two parts – business-to-consumer supplies in Schedule 1, and business-to-business supplies in Schedule 2.

9. Schedule 1 predominantly impacts supplies of digital products and services that may not currently fall within the scope of the GST Act.

10. Schedule 2 makes other cross-border supplies between businesses GST-free or no longer connected with Australia. This means that the non-resident supplier will not need to account for GST on those supplies, and the obligation to account for GST on these supplies may instead fall to the recipient.

11. Schedule 2 also replaces the previous test in the GST Act for when an enterprise of an entity is carried on in Australia by repealing subsection 9-25(6) and inserting section 9-27. This Ruling mainly focuses on the test in section 9-27. It also briefly considers other changes to the GST Act in Schedule 1 and the other changes in Schedule 2.

Date of effect

11A This Ruling is a public ruling with effect from 5 May 2016, having regard to the application dates set out in the Amending Act.

12. The application dates for the changes to the GST Act under Schedules 1 and 2 of the Amending Act are not the same.

13. Schedule 1 of the Amending Act[5A] (predominantly about imposing GST on digital supplies and services) applies in working out net amounts for tax periods starting on or after 1 July 2017.

14. Schedule 2 of the Amending Act[5B] (which includes the amendment to the test for carrying on an enterprise in Australia) applies in working out net amounts for tax periods starting on or after 1 October 2016.

15. Both Schedules 1 and 2 application dates are subject to transition rules:

- Schedule 1 has special transitional rules for supplies made on a progressive or periodic basis.[6]

[5] This includes individuals that do not carry on an enterprise, as well as enterprises that are unregistered.
[5A] *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016*.
[5B] *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016*.
[6] Refer item 39 of Part 3 of Schedule 1 to the Amending Act

- Schedule 2 prevents the amendments applying to certain agreements entered into prior to the commencement of the Amending Act.[7]

Section 9-27 of the GST Act

16. Previously, an enterprise was carried on in Australia if it met the test in subsection 9-25(6). This used a modified version of the income tax definition of 'permanent establishment' in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936). Section 9-27 introduces a test tailored for consumption tax that retains elements of the ITAA 1936 definition while removing aspects considered less relevant for a consumption tax.

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

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

18. There are a number of consequences for an entity with a GST enterprise presence. For example, the entity should note that:

- the supplies it makes through that enterprise presence are connected with Australia under paragraph 9-25(5)(b)
- those supplies may count towards the GST registration threshold, so the entity may be required to register for GST, and
- acquisitions it makes from a non-resident entity without a GST enterprise presence may be subject to reverse charge under section 84-5.

19. The entity may need to review any existing arrangements it has with resident agents (as the GST liability on a supply through a GST enterprise presence must be imposed on the non-resident principal instead of the resident agent).[8] However, where the requirements of section 57-7 are met, the resident agent will remain liable for GST.

20. Finally, an entity that no longer carries on an enterprise in Australia because of the change from the previous test described in paragraph 11 of this Ruling will be entitled to enter into voluntary reverse charge agreements for supplies of goods or real property, if the other conditions in Division 83 are met. These entities will not have previously been entitled to enter into a voluntary reverse charge agreement because supplies made through a GST enterprise presence could not be subject to these voluntary reverse charge agreements.

21. The consequences mentioned in paragraphs 19 to 21 of this Ruling are discussed in more detail in paragraphs 74 to 100 of this Ruling.

Specific issues for guidance

22. The following paragraphs deal with the requirements for an entity to establish that they have a GST enterprise presence. These are that the enterprise must be carried on:

- in Australia (that is, in the indirect tax zone, see paragraphs 25 to 27 of this Ruling)

[7] Refer item 27 of Part 5 of Schedule 2 to the Amending Act.
[8] Refer paragraph 57-5(3)(b) and paragraphs 88 to 91 of this Ruling.

- by one or more *relevant individuals* (see paragraphs 28 to 36 of this Ruling)
- in a *fixed place* (see paragraphs 37 to 46 of this Ruling), or
- in one or more places for 183 days or more, or the entity must intend to carry it on for 183 days or more (see paragraphs 46 to 73 of this Ruling).

When is an enterprise carried on in Australia?

23. The first requirement for an enterprise to be carried on in Australia is that one or more individuals are in Australia. There are various additional requirements, which are discussed in paragraphs 28 to 73 of this Ruling.

24. The location of an entity's employees, officers or agents is an important consideration for section 9-27. A non-resident entity that locates its employees, officers or agents outside Australia does not have a GST enterprise presence. Therefore, any GST obligations of the non-resident for supplies of intangibles will generally be limited to supplies made to unregistered entities in Australia.[9]

What is the indirect tax zone?

25. Under the test in section 9-27, entities need to consider whether they make supplies through an enterprise carried on in the 'indirect tax zone' and, consequently, whether they need to register for GST.

26. The 'indirect tax zone' includes all land territory of Australia (except external Territories), the coastal sea and the installations described in section 5C of the *Customs Act 1901*. Typically, the installations referred to in section 5C are oil drilling rigs and similar mining exploration installations attached to the Australian seabed.[10]

27. The external Territories that are not in the 'indirect tax zone' are:

- Christmas Island
- Cocos (Keeling) Islands
- Territory of Ashmore and Cartier Islands
- Norfolk Island
- Heard Island, and
- McDonald Islands.

Which individuals can carry on an enterprise in Australia?

28. The individuals who can carry on an enterprise are[11]:

- if the entity is an individual – that individual
- an employee or officer of the entity, or
- an individual who is, or is employed by, an agent of the entity that
  - has, and habitually exercises, authority to conclude contracts on behalf of the entity, and

[9] This includes individuals that do not carry on an enterprise, as well as enterprises that are unregistered.
[10] This paragraph describes the practical outcome of the definition of 'indirect tax zone' under section 195-1 of the GST Act.
[11] Subsection 9-27(3).

- is not a broker, general commission agent or other agent of independent status that is acting in the ordinary course of the agent's business as such an agent.

29. Section 9-27 applies only to agents that are dependent agents who have, and habitually exercise, authority to conclude contracts on behalf of their principal. It also applies to employees of those dependent agents.

30. The terms 'employee' and 'agent' are not defined in the GST Act and take their ordinary meaning, subject to context and applicable rules of statutory interpretation.[12]

31. The definition of 'officer' is, however, contained in the *Corporations Act 2001* and includes directors and secretaries of the corporation.[13]

32. Where one or more relevant individuals are in Australia carrying on an enterprise of the entity, paragraph 9-27(1)(a) is satisfied.

Example 1 – Employees of subcontractors – no GST enterprise presence

33. *GlobalBuild, a non-resident entity, enters into a contract to provide architectural services to AusCo which is located in Australia.*

34. *GlobalBuild does not have any employees in Australia and subcontracts the work to SydneyBuild, a company that is not a labour hire firm. SydneyBuild allocates its Sydney-based employees to AusCo's project.*

35. *There is no agency relationship between GlobalBuild and SydneyBuild (or any of its employees). The employees of SydneyBuild are not relevant in determining whether GlobalBuild is carrying on an enterprise in Australia. As a result, GlobalBuild does not satisfy the first part of the GST enterprise presence test given no individuals are located in Australia who carry on its enterprise.*

36. The next issue is whether the enterprise is carried on through a *fixed place* in Australia, or is carried on, or intended to be carried on, for more than 183 days in a 12 month period, through one or more places in Australia.

When is an enterprise carried on in a fixed place?

37. One of the factors that may determine whether an entity has a GST enterprise presence is whether the enterprise is carried on through a 'fixed place'.[14] The term 'fixed place' is not defined in the GST Act. Given the context of the Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016 (the Bill), it is interpreted consistently with the term 'fixed place' in the permanent establishment articles in Australia's tax treaties and the similar term used in the definition of 'permanent establishment' in subsection 6(1) of the ITAA 1936, as explained in TR 2002/5.[15]

38. Applying that interpretation, the place must have an element of permanence, both geographic and temporal.[16] The term 'fixed' requires a stable or continual connection

[12] An explanation of the ordinary meaning of 'employee' is contained within Superannuation Guarantee Ruling SGR 2005/1 *Superannuation guarantee: who is an employee?* An explanation of the general law of agency can be found in Goods and Services Tax Ruling GSTR 2000/37 *Goods and services tax: agency relationships and the application of the law.*

[13] Section 9 of the *Corporations Act 2001.*

[14] Refer subparagraph 9-27(1)(b)(i).

[15] Taxation Ruling TR 2002/5 *Income tax: Permanent establishment – What is 'a place at or through which [a] person carries on any business' in the definition of permanent establishment in subsection 6(1) of the Income Tax Assessment Act 1936?*

[16] Refer paragraphs 9 and 30 to 32 of TR 2002/5.

between the enterprise and the place that is more than temporary or transitory in nature. However, the term 'fixed' does not imply 'everlasting or forever'.[17]

39. Given the role of the 183 day rule[17A], the importance of the 'fixed place' test is most relevant to circumstances where an enterprise operates from a 'fixed place' for 183 days or less. The *OECD Commentary on the Model Tax Convention* and ATO rulings mention that there can be circumstances in which a period of less than six months is sufficient to lead to the conclusion that temporal permanence exists. Where the period in Australia is less than six months, there may still be temporal permanence where the connection with Australia is very strong. For example, the enterprise returns to a particular location in Australia on an on-going and regular basis, but for a short period each time.[18] In such cases of recurring activity, each period of time during which the place is used needs to be considered in combination with the number of times during which that place is used (which may extend over a number of years).[19]

Example 2 – Enterprise carried on in a fixed place

40. *A non-resident enterprise has seasonal access to a ski resort in Australia over a five year period. The ski resort is used by the enterprise for four months each year to run a ski school.*

41. *As skiing is a seasonal sport, the enterprise employs instructors to be based at the ski resort in Australia for four months each year.*

42. *The recurring nature of the activities, where skiing lessons are provided during four months of each year for a five year period, at the same ski resort, supports both a geographic and temporal permanence.*

43. *Therefore, the non-resident's enterprise of providing skiing lessons is carried on through a fixed place in Australia.*

Example 3 – Enterprise not carried on in a fixed place

44. *Neil is a professional golfer and a resident of Namibia. He visits Australia to compete in an Australian golf tournament. The event is played at a prominent course in a major Australian city and takes four days. Neil is in Australia for a total of two weeks (including practice days and rest days). The question is whether the golf course is a fixed place through which Neil carries on his enterprise.*

45. *For the golf course to be a fixed place through which Neil carries on his enterprise, his activities as a professional golfer in Australia would need to be both geographically and temporally permanent. While Neil plays at a single location, and the course itself is geographically permanent, he plays at the course for only seven days (including practice days). As a result, sufficient temporal permanence does not exist and the golf course is therefore not a fixed place through which Neil carries on his enterprise in Australia.*

The 183 day rule

46. If the enterprise is carried on by one or more individuals in Australia and is carried on, or intended to be carried on, for more than 183 days in a 12 month period, through one or more places in Australia, a GST enterprise presence will exist. This is referred to as the '183 day rule'.

[17] Paragraph 2.37 of the Explanatory Memorandum to the Bill.
[17A] Refer paragraph 49 of this Ruling.
[18] Refer paragraphs 33 and 34 of TR 2002/5 and paragraphs 6 to 6.3 of the *OECD Model Commentary on Article 5*.
[19] Paragraph 6 of the *OECD Model Commentary on Article 5*.

47. The 183 day rule can be satisfied in either of the following two ways:

- by an entity actually carrying on an enterprise for more than 183 days in Australia, or
- by an entity intending to carry on an enterprise for more than 183 days in Australia.

When is an enterprise carried on for more than 183 days in a 12 month period?

48. One of the requirements for a GST enterprise presence is that the enterprise has been carried on through one or more places for more than 183 days in a 12 month period.[20] The 'places' can be either fixed or temporary in nature. Therefore, time spent by one or more individuals specified in subsection 9-27(3) carrying on an enterprise in any place in Australia contributes to meeting the 183 day rule.[21] If more than one place in Australia has been used on the same date, then only one day is counted towards the total number of days.

49. Further, it is not necessary for the 183 days in Australia to be consecutive. That is, the '183 days in a 12 month period' requirement can be met by:

- an enterprise being carried on in one or more places continuously for more than 183 days in total during a 12 month period, or
- an enterprise being carried on through one or more places continuously or intermittently for more than 183 days during a 12 month period.[22]

50. An enterprise is considered to be carried on in one or more places in Australia if the relevant individuals carrying on the enterprise are set up and operating in line with their normal day to day enterprise arrangements. This means that any temporary absences of the individuals from the place or places where the enterprise operates (for example, weekends or non-standard business days) do not mean that the enterprise is not being carried on at one or more places during those times. Whether the enterprise is set up and operating in line with its normal arrangements could be indicated by factors including (but not limited to):

- typical business practices in the relevant industry, and
- operations being consistent with those envisaged in employment contracts.

Example 4 – Actual days enterprise carried on exceeds 183 days

51. *Digital Co is a US resident entity, and a non-resident of Australia. It supplies software and training to its Australian clients, which are all Australian residents. Sandi works for Digital Co and is based in the USA, but travels regularly to Australia to fulfil the contracts between Digital Co and its clients.*

52. *Sandi works in blocks of one calendar month in Australia. Sometimes she chooses to spend additional time in Australia outside those blocks. The time she spends in Australia outside those blocks of work do not count toward the 183 day rule.*

53. *By contrast, when Sandi is temporarily away from work during the month-long block – on weekends, or if she takes a sick day – these days count toward the 183 day rule.*

54. *One weekend during a block of training in Sydney, Sandi flies to New Zealand for the weekend. Sandi's absence from Australia does not prevent the month long block from counting toward the 183 day rule in full. This is because Digital Co is considered to be*

[20] Subparagraph 9-27(1)(b)(ii).
[21] Paragraph 2.43 of the Explanatory Memorandum to the Bill.
[22] Paragraph 2.40 of the Explanatory Memorandum to the Bill.

carrying on its enterprise in Australia during the month long period, including Sandi's weekend away. The same result would apply if instead of going to New Zealand, Sandi enjoyed a weekend away in the Hunter Valley wine region in Australia.

55. *After spending January, March, April, June, July and September delivering training, Sandi returns to the US. These months add up to 183 days in total. At that stage, Digital Co does not think they will need to provide their Australian clients with any more training for the foreseeable future. However, one of Digital Co's clients requests Sandi to return for a further two weeks in November to provide training to some new employees.*

56. *During Sandi's two-week block in November, the enterprise had been carried on in Australia for more than 183 days during a 12 month period. Sandi's services from days 184 to 198 were an enterprise carried on in Australia.*

When is an enterprise intended to be carried on for more than 183 days in a 12 month period?

57. An entity may have a GST enterprise presence if it intends to carry on the enterprise in Australia for more than 183 days in a 12 month period. If this is met, then that enterprise of an entity is carried on in Australia.[23]

58. The objective facts and circumstances will determine whether an entity intends to carry on an enterprise in Australia for more than 183 days in a 12 month period.

59. Factors that may be indicative of an intention to carry on an enterprise in Australia for more than 183 days in a 12 month period include (but would not be limited to) a non-resident entity:

- entering into a lease agreement over premises in Australia for more than six months
- hiring Australian-based employees on contracts for more than six months (including permanent engagements), and
- agreeing with existing employees to relocate to Australia for more than six months.

60. Similarly to the first part of the 183 day test, the 'places' relevant to the 183 day test based on intention can be either fixed or temporary in nature, and any day where a place in Australia is intended to be used for the enterprise contributes to meeting the 183 day rule. Each day is counted only once – regardless of how many places the enterprise may be using on that day.

61. Also similarly to the first part of the 183 day test, the relevant days in the 12 month period are counted cumulatively, and need not be consecutive. That is, the '183 days in a 12 month period' requirement can be met by an entity's intending to carry on an enterprise:

- in a single place continuously or intermittently for a cumulative total of more than 183 days during a 12 month period, or
- in different places continuously or intermittently for a cumulative total of more than 183 days during a 12 month period.

62. Again, similarly to the first part of the 183 day rule, planned temporary absences of the relevant individuals do not affect the entity's intention to carry on its enterprise at one or more places during those times.

[23] Refer subparagraph 9-27(1)(b)(iii).

Example 5 – Intended days that enterprise to be carried on exceeds 183 days

63. *Jo Co is a computer service provider and a resident of Japan. It successfully tenders to train the employees of Smith Corp, a company resident in Australia, in a new computer system. To undertake the training, Jo Co enters into agreements with four of its employees for them to relocate to Australia for seven months. Smith Corp provides Jo Co's employees with a room in one of its Sydney offices for that time.*

64. *Jo Co determines that it satisfies the 'intention' limb of the 183 day test. Therefore, Jo Co carries on its enterprise in Australia for the entire time that its employees are in Sydney.*

Example 6 – Change in intention about whether enterprise to be carried on for more than 183 days

65. *Following on from Example 5, assume that two months after its employees arrive in Australia, Jo Co renegotiated its relocation agreements with those employees so that the employees would leave Australia after five months, instead of seven. In these circumstances the 183 day rule would apply to Jo Co for the first two months, during which it was intended that its employees would carry on an enterprise for more than 183 days. The rule would not apply to the final three months after Jo Co's intention changed.*

66. *If the relocation agreements had always stated that the employees would be based at the office of Smith Co for five months, and would not be present in Australia after that period, the 183 day rule would not apply for any part of the period. In this situation, assuming there is no fixed place, no supplies will be connected with the indirect tax zone under paragraph 9-25(5)(b).*

67. *Alternatively, if Jo Co's relocation agreements had originally intended that its employees would be based at the office of Smith Co for five months, but during that period the agreements were renegotiated for the employees to extend their stay to more than 183 days, the 183 day rule would apply from the time the agreements were renegotiated.*

68. *In circumstances where Jo Co does not satisfy the 183 day rule then Jo Co must still consider if the fixed place rules may apply.*

Example 7 – Intention to carry on an enterprise for more than 183 days in more than one place

69. *Heathcliffe Enterprises is a UK company that produces worldwide musicals about pets and their owners. For their Australian musical enterprise, Heathcliffe Enterprises will base some of its employees in offices in Sydney on 16 September 2017 (two months before the first musical is scheduled in Melbourne) to commence promotional activities for the musical. The musical itself would tour each of the capital cities in Australia over six months, giving a total period of eight months for the musical enterprise. Before the first musical is due to commence in Melbourne, the employees conducting the promotional activities from Sydney will return to the UK, as they will have completed their role. However, before they depart, performers and other tour personnel will arrive in Melbourne to prepare for the first musical performance.*

70. *Under the schedule for the musical tour the performers will travel to the next city after the last performance in one city and commence rehearsals for the scheduled performances in the next city. These rehearsal periods are included in the eight month total duration of the tour.*

71. *Heathcliffe Enterprises intends, based on the Australian musical tour schedule, to carry on an enterprise in Australia for a total of eight months. It does not matter that the employees responsible for the promotional activities and performances are different people, nor that the employees spend time between performances travelling between cities and rehearsing.*

72. *The performance and rehearsal venues, and the offices in Sydney, are all 'places' in Australia intended to be used by one or more individuals in carrying on the enterprise.*

Although the venues are all different places, all the days they are used contribute to meeting the total of more than 183 days in a 12 month period, even though the musical tour enterprise occurs in different places on a continuous or intermittent basis. That is, any day where multiple places are used is only counted once in contributing to the 183 days.

73. *Therefore, Heathcliffe Enterprises' musical tour enterprise is carried on in Australia from the time they commence their promotional activities on 16 September 2017.*

Consequences of carrying on an enterprise in Australia

GST registration

74. The Amending Act has not altered the threshold amount in the GST Act that requires an entity to register. That is, a supplier is required to register if its annualised GST turnover equals, or exceeds, A$75,000 or A$150,000 for non-profit bodies.[24]

75. A supplier that makes supplies through an enterprise that satisfies section 9-27 must count the value of all those supplies to determine whether they meet the GST turnover threshold (including GST-free supplies and supplies made to other registered entities).

76. If a supplier makes supplies through an enterprise that does not satisfy section 9-27, those supplies form part of the GST turnover calculation only if they are connected with Australia under another rule, and are not GST-free.

Example 8 – GST registration

77. *Levy Ltd, a non-resident entity with two employees, began supplying advertising services through a fixed place in Australia on 1 January 2019. Levy Ltd intends to continue operating in Australia until the end of September 2019.*

78. *From 1 January 2019, Levy Ltd's supplies will be connected with Australia, as Levy Ltd is making the supplies through the enterprise it carries on in Australia.*

79. *To determine whether it is required to register, Levy Ltd applies the projected GST turnover test in Division 188. Levy Ltd must count the value of all supplies it has made or is likely to make in the period from 1 January 2019 to 31 December 2019.*

80. *Because Levy Ltd intends to cease operations at the end of September 2019, Levy Ltd only counts the supplies it is likely to make until the end of that month. Levy Ltd determines that its turnover is likely to reach A$90,000 by the end of September 2019, and therefore that it is required to register for GST, and charge GST on its supplies to both registered and unregistered recipients in Australia.*

Example 9 – GST turnover calculation for entities with no GST enterprise presence

81. *Lockley Ltd, a non-resident entity, does not carry on an enterprise in Australia because it does not satisfy section 9-27. Lockley Ltd supplies advertising services to both registered and unregistered enterprises resident in Australia.*

82. *Lockley Ltd's supplies to registered enterprises are not connected with Australia regardless of whether they are performed in Australia or performed remotely.*[25] *In contrast, Lockley Ltd's supplies to unregistered enterprises are connected with Australia.*[26]

83. *In calculating whether it is required to register for GST, Lockley Ltd counts only the value of the supplies made to unregistered enterprises toward the turnover threshold. As a*

[24] Refer section 23-15.
[25] Item 1, subsection 9-26(1).
[26] These supplies are connected with Australia under paragraph 9-25(5)(d) for the purposes of working out net amounts for tax periods starting on or after 1 July 2017.

result Lockley Ltd needs to monitor supplies made to unregistered resident enterprises to determine if they are required to register.

Supplies not connected with Australia

84. As a result of the amendments made by Schedule 2 of the Amending Act, certain cross-border business-to-business supplies will no longer be connected with Australia, despite being done (that is, performed) in Australia.

85. Some of the amendments in Schedule 2 apply to supplies of intangibles – that is, things other than goods or real property. Supplies of intangibles done in Australia are no longer connected with Australia if they are:

- supplied by a non-resident other than through an enterprise they carry on in Australia, and
- supplied to either:
  - a non-resident that acquires the intangible for the purpose of an enterprise they carry on outside Australia, or
  - an 'Australian based business recipient'.

86. To be an 'Australian based business recipient', the following requirements apply:

- the entity must be registered
- an enterprise of the entity must be carried on in Australia, and
- the entity's acquisition of the thing supplied or provided must not solely be of a private or domestic nature.

87. Supplies that are not connected with Australia are generally not taxable supplies, and therefore recipients would not be entitled to an input tax credit. However, where an Australian-based business recipient must reverse charge the GST on the supply, the supply is a taxable supply and the recipient would be entitled to an input tax credit to the extent the acquisition is for a creditable purpose.[27]

Agreements with resident agents

88. The resident agent rules make an Australian agent liable for the GST on supplies that are made through them by their non-resident principal. However, the GST liability on a supply made by a non-resident supplier through an enterprise they carry on in Australia is not payable by the resident agent.

89. Prior to the Amending Act, any GST on taxable supplies supplied by a non-resident through a resident agent is payable by the resident agent, regardless of whether the non-resident was carrying on an enterprise in Australia.

90. As discussed at paragraph 28 of this Ruling, an enterprise can be carried on in Australia if the enterprise is carried on by a dependent agent who habitually concludes contracts on behalf of their principal, and to employees of those dependent agents. These agents (if an individual), or their employees must be located in Australia.

91. Non-resident suppliers who make supplies through resident agents will need to consider whether their supplies are made through an enterprise they carry on in Australia according to the test in section 9-27.[28]

[27] The compulsory reverse charge rules are contained in Division 84.
[28] Refer to subsection 57-5(3).

Example 10 – GST liabilities and supplies through resident agents

92. *Flora Ltd, a non-resident entity which supplies training services, had a GST enterprise presence under the former test which operated prior to section 9-27.*

93. *Gerber Ltd acts as Flora Ltd's agent and habitually concludes contracts on Flora Ltd's behalf, doing so exclusively for Flora Ltd. As a result, Flora Ltd makes its supplies of training services through Gerber Ltd and therefore under the test in section 9-27, Flora Ltd still has a GST enterprise presence in Australia.*

94. *Until now, Gerber Ltd has been liable for the GST liabilities on the supplies Flora Ltd makes through it, under Division 57.*

95. *However, from the date from which the Bill applies, Flora Ltd will be responsible for its own GST liabilities.*

Voluntary reverse charge arrangements

96. Under Division 83 a non-resident supplier and registered recipient can agree to reverse charge the GST payable on a taxable supply of goods or real property.[29]

97. One of the exceptions to that Division is impacted by the new test under section 9-27. A non-resident who makes the supply through a GST enterprise presence cannot enter into a voluntary reverse charge agreement.

98. Under new section 9-27 there can be more circumstances in which a reverse charge agreement can be entered into for supplies of goods or real property.

Example 11 – Voluntary reverse charge arrangements

99. *Butcher Ltd, a non-resident entity, satisfied the former test for carrying on an enterprise because it was engaged in a construction project in Western Australia in 2012. It commences a second construction project in 2018. The second construction project did not constitute a fixed place, as it lasted for 183 days or less, and at all times was intended to last for 183 days or less. Therefore, under the test in section 9–27, Butcher Ltd is not carrying on an enterprise in Australia.*

100. *Butcher Ltd supplies Timber Ltd, a registered entity, with construction materials for both the 2012 and 2018 projects. Unlike the 2012 project, because Butcher Ltd does not carry on an enterprise in Australia in relation to the 2018 project, Butcher Ltd can now enter into an agreement with Timber Ltd for Timber Ltd to reverse charge the GST on the supply it acquired from Butcher Ltd.*

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[29] Because of subsection 9-26(1), certain supplies by non-residents of things other than goods or real property will become not connected with Australia. These supplies may be reverse charged under the compulsory reverse charge rules in Division 84, or become non-taxable supplies where they are solely for a creditable purpose. In either cases, they will not be relevant for Division 83.

References

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