GSTR 2000/D7 - Goods and Services Tax: supplies connected with Australia

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Draft Goods and Services Tax Ruling
Goods and Services Tax: supplies connected with Australia

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Preamble

This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxation officers, taxpayers and practitioners as it is not a Ruling or advice in terms of section 37 of the ***Taxation Administration Act 1953****. When officially released it will be a public ruling for the purposes of section 37 and may be relied upon by any person to whom it applies.*

What this Ruling is about

1. This Ruling is about *'supplies connected with Australia'*, which under the *A New Tax System (Goods and Services Tax) Act 1999* ('the GST Act'), may be taxable supplies[1] and subject to GST.[2] All legislative references in this Ruling are to the GST Act unless otherwise stated.

2. The Ruling explains when a supply is connected with Australia under section 9-25. In particular, the Ruling looks at when a supply of goods, real property, or things other than goods or real property, is connected with Australia. It does not address whether a supply is a taxable supply.

3. While the Ruling does not address whether a particular supply is a taxable supply, we make reference to, and illustrate by way of examples, the effect of certain provisions on the question of whether a supply is a taxable supply, GST-free[3] or input taxed. The provisions considered are:

- section 38-185 – exports of goods that are GST-free;
- section 38-187 – leases etc, of goods for use outside Australia;
- section 38-190 - supplies of things other than goods or real property, for consumption outside Australia that are GST-free; and

[1] Section 9-5.
[2] Section 7-1.
[3] Refer the definitions section of this ruling.

- Division 84 - offshore supplies other than goods or real property.

4. In this Ruling we also outline the operation of Division 96 and section 156-15 in relation to supplies that are partly connected with Australia.

5. It is recognised in the Ruling that a supply of goods that is connected with Australia may give rise to a taxable supply and a taxable importation.[6] This is explained and illustrated in the Explanations section of the Ruling (see paragraphs 144 to 154). We also summarise in the Context section of the Ruling, the requirements for an importation of goods to be a taxable importation under Division 13 (refer paragraphs 26 to 32).

6. The Ruling does not address telecommunication supplies[7] or financial supplies.[8]

7. Certain terms used in this Ruling are defined, or explained, in the definitions section of the Ruling. These terms, when first mentioned in the body of the Ruling, appear in **bold** type.

Date of effect

8. This Ruling, when finalised will take effect on and from 8 July 1999 (the date of Royal Assent to the GST legislation).

Background

9. To assist you in understanding the GST consequences of a supply that is connected with Australia, we provide below an outline of the basic operation of the GST law in respect of:

- taxable supplies;
- GST-free supplies;
- importations;
- taxable supplies and taxable importations; and
- offshore supplies other than goods or real property.

[6] Subsections 9-25(3) and section 13-5.
[7] Division 85.
[8] Defined in section 195-1.

Taxable supplies

10. The concept of supplies 'connected with Australia' is relevant to determining whether a supply is a taxable supply and subject to GST. Under section 9-5 you make a taxable supply if:

(a) you make the supply for consideration; and

(b) the supply is made in the course or furtherance of an **enterprise** that you carry on; and

(c) the supply is connected with **Australia**; and

(d) you are **registered**, or required to be registered.

However, the supply is not a taxable supply to the extent that it is **GST-free** or **input taxed**.

11. Section 9-25 defines when a supply is 'connected with Australia'. For the purposes of determining whether a supply is connected with Australia, section 9-25 makes a distinction between a supply of goods, a supply of real property and a supply of anything other than goods or real property. This is explored fully in the Ruling and Explanations sections of the Ruling.

GST-free supplies

12. Broadly speaking, provided certain conditions are met, goods that are exported, or supplies of services or things other than goods or real property, that are for consumption outside Australia are GST-free.

13. If a supply is GST-free, no GST is payable on the supply.[9] However, you can still claim an input tax credit for anything acquired or imported to make that GST-free supply.[10]

Export of goods

14. Even though a supply of goods is connected with Australia, if the goods are exported, that supply of goods may be GST-free under section 38-185.

15. Section 38-185 sets out supplies of goods which are GST-free exports. For example, Item 1 of the table in subsection 38-185(1) provides that a supply of goods is GST-free if the supplier exports the goods from Australia before, or within 60 days (or such further period as the Commissioner allows) after:

(a) the day on which the supplier receives any of the consideration for the supply; or

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[9] Subsection 7-1 and section 9-5.
[10] Subsection 7-1(2) and Division 11.

(b) if, on an earlier day, the supplier gives an invoice for the supply - the day on which the supplier gives the invoice.[11]

However, the supply is not GST-free if the supplier reimports the goods into Australia.[12]

Example 1 – GST-free export of goods

16. Vino, an Australian wine merchant, supplies wine to Epicure in France. Vino exports the consignment of wine from Australia 20 days after giving Epicure an invoice for the supply. The supply is GST-free because Vino (the supplier) exports the wine from Australia within 60 days after giving Epicure an invoice for the supply.

*Example 2 – Export of goods by **recipient***

17. Live Ex, an Australian livestock company, supplies cattle to Stock Co, an Iranian company. Stock Co enters into an arrangement whereby it takes possession of the cattle consignment in Australia. This means that Live Ex does not export the cattle. Stock Co takes possession of the cattle consignment in Australia and arranges its freight to Iran.

18. The supply made by Live Ex to Stock Co is not GST-free because Stock Co (the recipient) exports the goods. For the export of goods to be GST-free, the supplier must export the goods. However, it is to be noted that subsection 38-185(3) sets out circumstances when exports are GST-free where ownership of goods passes to an overseas purchaser, who is not registered or required to be registered, before the goods are removed from Australia.

Leases etc of goods for use outside Australia

19. Under section 38-187 a lease or hire of goods for use outside Australia is GST-free. Specifically, the section provides that a supply of goods is GST-free if:

(a) the supply is by way of lease or hire; and

(b) the goods are used outside Australia.

Example 3 - GST-free supply of goods by way of lease

20. Aero Co (an Australian resident company) leases a light aircraft to Flite Co (an Australian resident company). The aircraft is

[11] Item 1 of the table subsection 38-185(1).
[12] Subsection 38-185(2).

used partly in Australia and partly in New Zealand. The supply by Aero Co is GST-free under section 38-187 to the extent that the goods are used outside Australia.

Supplies of things other than goods or real property, for consumption outside Australia

21. Some supplies of things other than goods or real property, that are for consumption outside Australia are GST-free under Division 38.

22. Subsection 38-190(1) lists supplies of things that are GST-free. The GST-free supplies listed are:

(i) a supply that is directly connected with goods or real property situated outside Australia.

(ii) a supply that is made to a recipient who is not an **Australian resident** and is not in Australia when the thing supplied is done (other than a supply directly connected with goods situated in Australia when the thing supplied is done, or with real property situated in Australia).

(iii) a supply that is made to a recipient who is not in Australia when the thing supplied is done and the effective use or enjoyment of which takes place outside Australia (other than a supply directly connected with goods situated in Australia when the thing supplied is done, or with real property situated in Australia).

(iv) a supply that is made in relation to rights if the rights are for use outside Australia or the supply is to an entity that is not an Australian resident and is outside Australia when the thing supplied is done.

(v) a supply that is constituted by the repair, renovation, modification or treatment of goods from outside Australia whose destination is outside Australia.

23. Under subsection 38-190(2) a supply listed as GST-free in subsection 38-190(1) is not GST-free if it is the supply of a right or option to acquire something the supply of which would be connected with Australia. For example, if an Australian hotel supplies a right to accommodation in Australia to an overseas customer, the supply of that right is not GST-free because the supply is to acquire accommodation in Australia, the supply of which is connected with Australia.

24. Under subsection 38-190(3) a supply covered by item (ii) in paragraph 22 above is not GST-free if:

(a) it is a supply under an agreement entered into, whether directly or indirectly, with a **non-resident**; and

(b) the supply is provided, or the agreement requires it to be provided, to another entity in Australia.

Example 4 – A supply covered by item (ii) of subsection 38-190(1) that is not GST-free

25. A school in Australia provides tuition to overseas students in Australia. However, it bills the overseas parents of the students directly. As the supply is being made to the students in Australia the supply is not GST-free under item (ii) in subsection 38-190(1).

Importations

26. The importation of goods into Australia may be a 'taxable importation' and subject to GST.[13] The importation of things other than goods, that are supplied from overseas for use in Australia (and are, therefore, in that sense 'imported') are not taxable importations. However, the importation of things may be subject to GST because of the operation of Division 84 (refer paragraphs 34 to 41 below).

Taxable importations

27. If you make an importation of goods into Australia, you must pay GST on that importation but only if that importation is a 'taxable importation.[14]

28. Under subsection 13-5(1) you make a 'taxable importation' if:

(a) goods are imported; and

(b) you enter the goods for home consumption (within the meaning of the *Customs Act 1901*).

However, the importation is not a taxable importation to the extent that it is a non-taxable importation.[15]

29. An importation of goods into Australia does not include an importation of money.[16]

30. If you make a 'creditable importation'[17] you are entitled to an input tax credit for that importation.[18]

[13] Subsection 7-1(1) and Division 13.
[14] Section 13-15.
[15] Non-taxable importations is defined section 13-10.
[16] Subsection 13-5(3).
[17] Section 15-5.
[18] Section 15-15.

31. Under section 15-5, you make a 'creditable importation' if:

(a) you import goods solely or partly for a creditable purpose; and

(b) the importation is a taxable importation; and

(c) you are registered, or required to be registered.

32. You import goods for a creditable purpose to the extent that you import the goods in carrying on your enterprise.[19] However, you do not import goods for a creditable purpose to the extent that the importation relates to making supplies that would be input taxed or the importation is of a private or domestic nature.[20]

Taxable supply and taxable importation

33. Generally, a taxable importation is distinguishable from a taxable supply. However, sometimes a supplier may make a supply that gives rise to both a taxable importation and a taxable supply. This is explained in the Explanations section at paragraphs 144 to 154 below.

Offshore supplies other than goods or real property

34. If the supply of a thing other than goods or real property, is not connected with Australia the supply may, under section 84-5, be treated as a taxable supply subject to GST, if:

(a) the recipient of the supply acquires the thing supplied solely or partly for the purpose of an enterprise that the recipient carries on in Australia, but not solely for a creditable purpose (paragraph 84-5(1)(a)); and

(b) the supply is for consideration (paragraph 84-5(1)(b)); and

(c) the recipient is registered, or required to be registered (paragraph 84-5(1)(c)).

However the supply is not a taxable supply to the extent that it is GST–free or input taxed.[21]

35. Under subsection 11-15(2) you do not acquire a thing for a creditable purpose to the extent that the acquisition relates to making

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[19] Subsection 15-10 (1).
[20] Subsection 15-10(2). Note subsections 15-10(3) and (4) prescribe certain circumstances where the importation is not treated as one that relates to making supplies that would be input taxed.
[21] Subsection 84-5(1).

supplies that would be input taxed or the acquisition is of a private or domestic nature.[22]

36. Thus if the acquisition of the thing (other than goods or real property) by the recipient relates to making supplies that would be input taxed or the acquisition is partly of a private or domestic nature, the supply is treated under Division 84 as a taxable supply.

37. If the recipient acquires the thing solely for a creditable purpose it is not a taxable supply under section 84-5. This is because if you acquire the thing solely for a creditable purpose and the supply is a taxable supply, you are entitled to an input tax credit equal to the GST payable on that supply.

38. The GST on a supply that is treated as a taxable supply under section 84-5 is payable by the recipient of the supply and is not payable by the supplier.[23] The charge for GST is reversed, hence this Division is commonly referred to as a 'reverse charge' provision.

Example 5 – The importation of things

39. Invest Bank, an Australian financial institution, engages Legal UK, solicitors operating in the UK, to prepare an opinion on the legal aspects of a proposed joint venture banking operation in Australia with a subsidiary of a UK bank. The legal advice is prepared in the UK and provided to Invest Bank in Australia. Under subsection 9-25(5) the supply of that advice is not connected with Australia because the advice is not prepared in Australia and Legal UK has no permanent establishment in Australia (refer paragraphs 167 to 223 of the Explanations section of the Ruling which explain the operation of subsection 9-25(5)).

40. In this example, we assume that the requirements of paragraphs 84-5(1)(b) and 84-5(1)(c) are satisfied. Invest Bank acquires the supply for the purpose of its enterprise carried on in Australia. By virtue of subsection 11-15(2), the acquisition made by Invest Bank is not solely for a creditable purpose because the acquisition relates to making supplies that are input taxed.[24] Thus the supply by Legal UK is a taxable supply under section 84-5.

41. Under section 84-10 Invest Bank, the recipient of the supply, is liable to pay GST on the taxable supply.

[22] Subsections 11-15(3) and (4) set out certain acquisitions that are not to be treated as acquisitions that relate to making supplies that would be input taxed.
[23] Section 84-10 the reverse charge on offshore intangible supplies.
[24] It is assumed here that Invest Bank only makes input taxed supplies (Division 40).

Ruling

Supplies connected with Australia

Supplies of goods

42. A supply of goods is a supply of any form of tangible personal property, that is, any form of personal property that has a physical existence but does not include intangible personal property such as intellectual property like a copyright.

43. A supply of goods can occur by way of sale, lease, hire etc.

44. Where a supply of goods takes place *wholly within Australia* the supply of those goods is connected with Australia if the goods are delivered, or made available, in Australia to the recipient of the supply (subsection 9-25(1)).

45. In the context of subsection 9-25(1) goods are delivered in Australia if the goods are physically delivered in Australia**.** Goods are made available in Australia if the goods are physically available in Australia.

46. A supply of goods is wholly within Australia where the supply does not involve goods being:

(i) removed from Australia (this is a supply of goods from Australia); or

(ii) brought to Australia in circumstances where the supplier either imports the goods into Australia or installs or assembles the goods in Australia (this is a supply of goods *to* Australia).

47. Goods which are the subject of a supply that is wholly within Australia may be domestic or imported goods (see the example at paragraph 121 of the Explanations section).

48. Also, an overseas supplier may make a supply of goods that is wholly within Australia. For example, an overseas supplier may acquire goods in Australia and supply those goods to a recipient in Australia.

49. Where goods are supplied from Australia, the supply of those goods is connected with Australia if the supply involves those goods being removed from Australia (subsection 9-25(2)).

50. Goods removed from Australia means the goods are physically taken out of Australia.

51. Where goods are supplied to Australia, the supply of those goods is connected with Australia if the supply involves those goods being brought to Australia and the supplier imports the goods into

Australia (paragraph 9-25(3)(a)) or installs or assembles the goods in Australia (paragraph 9-25(3)(b)).

52. Under subsection 9-25(3) the supplier is either an exporter and importer or an exporter and installer.

53. Paragraph 9-25(3)(a) does not apply to a supply of goods that involves goods being brought to Australia where the recipient imports the goods into Australia.[25]

54. Also, where the recipient imports the goods into Australia, the supply of goods is not connected with Australia under subsection 9-25(1) because the goods are not delivered, or made available, in Australia to the recipient of the supply.

55. If a supplier imports the goods into Australia through a customs broker, the supply of those goods is connected with Australia under paragraph 9-25(3)(a).

56. A supply that is connected with Australia under paragraph 9-25(3)(a) may be both a taxable supply and a taxable importation where the supplier imports the goods into Australia.

Supplies of real property

57. Real property is defined to include:

(a) any interest in or right over land; or

(b) a personal right to call for or be granted any interest in or right over land; or

(c) a licence to occupy land or any other contractual right exercisable over or in relation to land.[26]

58. A supply of real property is connected with Australia if the real property, or the land to which the real property relates, is in Australia (subsection 9-25(4)). Land in this context means the physical land.

59. The reference in subsection 9-25(4) to 'land to which the real property relates' means that an interest in, or right over land is connected with Australia if the physical land to which the interest or right over it relates, is in Australia.

60. A supply of real property is connected with Australia if it involves, for example:

- the sale of land situated in Australia; or

[25] In this case the goods are supplied on an FOB or CIF basis. FOB and CIF are defined in the definitions section of the Ruling at paragraphs 241 and 242 respectively.
[26] Section 195-1.

- the grant, assignment or surrender of any interest in or right over land in Australia – e.g., a lease of land; or
- a personal right to call for or be granted any interest or right over land in Australia; or
- a licence to occupy land in Australia; or
- any other contractual right exercisable over or in relation to land in Australia.

Supplies of anything else

61. A supply of anything other than goods or real property is connected with Australia if either:

(a) the thing is done in Australia (paragraph 9-25(5)(a)); or

(b) the supplier makes the supply through an enterprise that the supplier carries on in Australia (paragraph 9-25(5) (b)).

Thing is done in Australia

62. Thing is defined to mean anything that can be supplied or imported.[27] It is the subject of the supply. Under paragraph 9-25(5)(a) the connection with Australia requires that the 'thing' being supplied is 'done' in Australia.

63. The meaning of 'done' depends on the nature of the 'thing' being supplied. 'Done' can mean, for example, performed, executed, completed, finished etc depending on what is supplied.

64. If the 'thing' being supplied is a service, the supply of that service is typically done where the service is performed. If the service is performed in Australia, the service is done in Australia and the supply of that service is connected with Australia under paragraph 9-25(5)(a). This is the case even if the recipient of the supply is outside Australia.

65. However, the supply of a service to an offshore recipient may be GST-free under section 38-190. That section is outlined at paragraphs 21 to 25 above.

66. Under subsection 38-190(1) a service may be GST-free if:

(i) the service is directly connected with goods or real property situated outside Australia; or

(ii) the services are provided to a recipient who is not an Australian resident and who is not in Australia when

[27] Section 195-1.

the thing supplied is done, that is, while the service is performed. The service must not be directly connected with goods situated in Australia when the service is performed or with real property situated in Australia; or

(iii) the services are provided to a recipient who is not in Australia when the thing supplied is done, that is, while the services are performed and the services are to be used or enjoyed outside Australia. Again the service must not be directly connected with goods situated in Australia when the service is performed or with real property situated in Australia.

67. The pre-condition that the recipient is not in Australia at the relevant time requires that neither the recipient, nor a representative of the recipient if the recipient is a company, is in Australia in relation to the supply.

68. Sometimes a service may involve both the work being done and the delivery of the product of that work to the recipient. For example, in the case of an architect engaged to prepare and provide a plan, the plan is delivered to the recipient. The service comprises both the doing of the work and the delivery of the product of that work to the recipient. However, the delivery of the work does not determine where the service is done. The service is done where the work is done. In the case of the supply of a plan by an architect, the service is done where the plan is drawn. The product of that service e.g., the plan, is not a separate supply from the supply of that service.

69. If a supply is the provision of advice or information and the supply involves work to create, develop or produce that information or advice, the advice or information is done where it is prepared, produced, or created, as the case may be. The supply of that advice or information is connected with Australia if the advice or information is prepared, created or produced in Australia.

70. For example, if a lawyer prepares a legal opinion and provides that opinion to an offshore recipient, the provision of that opinion is connected with Australia because the opinion is prepared in Australia. The provision of advice or information in cases of this kind is akin to the provision of a service which is done where the service is performed. Again, delivery of the end product is not relevant. The supply may be GST-free under subsection 38-190(1).

71. If the provision of advice or information is an instantaneous supply of advice or information, that advice or information is done where the advice or information is provided. For example, if a client rings his or her accountant to obtain advice on an urgent matter and the accountant responds there and then over the phone, the advice is done where it is provided by the accountant. Again, depending on the

circumstances, the supply may be GST-free under subsection 38-190(1).

72. If the supply is the creation, grant, transfer, assignment or surrender of a right, the creation of that right in another, the granting, transfer or assignment of that right to another, or the surrender of that right, is done where the right is created in that other person, granted, transferred or assigned to that other person or surrendered respectively.

73. The act that creates that right in another or grants, transfers or assigns that right to another, or surrenders the right, will depend on the facts of each individual case.

74. If, for example, a right is granted under an agreement to another to use certain intellectual property, the granting of that right to another is done where the agreement is made. If the agreement is made[28] in Australia the supply of that right is connected with Australia. If the agreement is made outside Australia the supply is not connected with Australia under paragraph 9-25(5)(a). However, even if the agreement is made outside Australia the supply is connected with Australia under paragraph 9-25(5)(b) if the supplier makes the supply through an enterprise that the supplier carries on in Australia (refer paragraphs 78 to 89 below).

75. If the supply is the entry into, or release from, an obligation to do anything, or to refrain from an act, or to tolerate an act or situation, the entering into that obligation or the release from that obligation is done where the obligation is entered into or the release is effected.

Thing is partly done in Australia

76. If a thing is only partly done in Australia, the supply is connected with Australia to the extent that the thing is done in Australia. However, the part of the supply that is not connected with Australia under paragraph 9-25(5)(a) may nonetheless be connected with Australia if the supply is made through an enterprise that the supplier carries on in Australia (refer to paragraph 9-25(5)(b) which is discussed at paragraphs 78 to 79 below).

77. If the doing of one part of a thing may reasonably be regarded as merely incidental to the doing of another part of the supply, the incidental part is taken to be done where the part to which it is incidental is done.

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[28] A contract is made where the last act necessary to create a binding contract is performed (see *W. A. Dewhurst and Co. Pty. Ltd. v. Cawrse* [1960] V.R. 278 at 282.

The supply is made through an enterprise carried on in Australia

78. If a supply of a thing is not connected with Australia because the thing is not done in Australia, the supply is connected with Australia if, under paragraph 9-25(5)(b), the supplier makes the supply through an enterprise that the supplier carries on in Australia.

79. The concept of carrying on an enterprise in Australia is defined in terms of the definition of 'permanent establishment' in subsection 6(1) of the *Income Tax Assessment Act 1936*.

80. Specifically, under subsection 9-25(6) the supplier carries on an enterprise in Australia if the enterprise is carried on through:

(a) a permanent establishment (as defined in subsection 6(1) of the *Income Tax Assessment Act 1936*); or

(b) a place that would be such a permanent establishment if paragraph (e), (f) or (g) of that definition did not apply.

81. An enterprise is defined in section 9-20 (see the definitions section of the Ruling at paragraph 228). Broadly speaking, an enterprise is an activity, or series of activities done in a particular manner. For example, an enterprise is an activity, or series of activities, done in the form of a business.[29]

82. Carrying on an enterprise includes doing anything in the course of the commencement or termination of the enterprise.[30]

83. Hence a supply of a thing other than goods or real property, is connected with Australia under paragraph 9-25(5)(b) if the supplier:

(i) carries on an enterprise through a permanent establishment (as defined) in Australia; and

(ii) the supply is made through that permanent establishment (as defined).

84. Thus for a supply to be connected with Australia under paragraph 9-25(5)(b), a connection must be established between the Australian permanent establishment and the supply.

85. Under the business profits article of various double taxation agreements[31] entered into by Australia, the profits that are exclusively taxable in the country of source are the business profits that are 'attributable' to a permanent establishment. Similar language is also used in the *Income Tax Assessment Act 1936*. Despite the difference in terminology the underlying concept of connection to a permanent establishment is the same. Thus in establishing whether a supply is

[29] Paragraph 9-20(1)(a).
[30] Section 195-1.
[31] Double Taxation Agreements are agreements entered into by Australia with other countries to provide relief from the double taxation of income or gains.

made through a permanent establishment guidance can be drawn from existing case law and commentaries such as the commentaries on the 'OECD Model Tax Convention on Income and on Capital'.

86. There is no specific set of circumstances which must be satisfied before a supply is connected with a permanent establishment. Rather, each case will be determined on the basis of its individual facts and circumstances. However, some factors that will usually indicate that the supply is made through a permanent establishment include:

- the permanent establishment has the authority to sign contracts or accept purchase orders for the supply;
- the permanent establishment has the authority to make important decisions in respect of the supply;
- the permanent establishment physically makes e.g., manufactures or produces, the supply;
- if the supply is a service, the service is provided by the permanent establishment;
- if the supply is the provision of advice or information such as a legal opinion, the permanent establishment provides that advice or information;
- if the supply is the grant, creation, assignment, transfer or surrender of a right, the permanent establishment grants, creates, assigns, transfers or surrenders that right.

87. Both a resident and a non-resident can have a permanent establishment in Australia for the purposes of the application of paragraph 9-25(5)(b). The paragraph is not limited in operation to a non-resident (see Example 39 at paragraph 220 in the Explanation section).

88. The definition of permanent establishment for the purposes of subsection 9-25(6) is wider than the definition of permanent establishment found in subsection 6(1) of the *Income Tax Assessment Act 1936.* This is because the exclusions from a permanent establishment in subsection 6(1) of the *Income Tax Assessment Act 1936* – paragraphs (e), (f) and (g) are not similarly excluded from the definition of permanent establishment for the purposes of subsection 9-25(6).

89. Thus, permanent establishment for the purposes of subsection 9-25(6) means a place at or through which a person carries on any business and, without limiting the generality of the foregoing, includes:

(a) a place where the person is carrying on business through an agent;

(b) a place where the person has, is using or is installing substantial equipment or substantial machinery;

(c) a place where the person is engaged in a construction project; and

(d) where the person is engaged in selling goods manufactured, assembled, processed, packed or distributed by another person for, or at or to the order of, the first-mentioned person and either of those persons participates in the management, control or capital of the other person or another person participates in the management, control of both of those persons – the place where the goods are manufactured, assembled, processed, packed or distributed.

Supplies that are partly connected with Australia

90. A supply may be a supply of more than one kind of the following:

- a supply of goods;
- a supply of real property;
- a telecommunication supply;
- a supply of anything, other than goods or real property, that is not a telecommunication supply.

91. Under section 96-5, if as a result of the application of section 9-25, only part of the actual supply is connected with Australia, the actual supply is treated as if it were separate supplies.

92. Under subsection 96-5(2) the part of the actual supply that is connected with Australia is treated as if it were a separate supply that is connected with Australia.

93. Under subsection 96-5(3) the part of the actual supply that is not connected with Australia is treated as if it were a separate supply that is not connected with Australia.

94. Under subsection 96-5(4) if one of the kinds of supply that forms part of the actual supply may reasonably be regarded as incidental to:

(a) the other kind of supply that forms part of the actual supply; or

(b) one (but not both) of the other kinds of supply that form part of the actual supply;

and its value (if it were a separate taxable supply) would not exceed $50,000, it is treated as part of that other kind of supply.

95. A part of a supply is reasonably regarded as incidental to another part of a supply if it is minor relative to the other part of the supply.

96. If a part of a supply is reasonably regarded as incidental to another part of a supply, and its value is below the dollar threshold, the incidental supply is treated in the same way as that other part of the supply rather than treating the two parts of the supply as separate supplies.

97. Section 96-10 provides special rules for calculating the value of the taxable components of supplies that are only partly connected with Australia.

98. Division 156 provides for certain supplies and acquisitions made for a period or on a progressive basis to be treated as separate supplies.

99. Under section 156-15, if:

(a) a taxable supply is made for a period or on a progressive basis; and

(b) the supply is made for consideration that is to be provided on a progressive or periodic basis; and

(c) the whole of a progressive or periodic component of the supply would not be connected with Australia if it were a separate supply;

that component of the supply is treated as if it were a separate supply that is not connected with Australia.

Explanations (this forms part of the Ruling)

Supply

100. A supply is defined to mean 'any form of supply whatsoever'.[32] Without limiting the fact that a supply is any form of supply, a supply is defined in subsection 9-10(2), to include any of the following:

(a) a supply of goods;

(b) a supply of services;

(c) a provision of advice or information;

[32] Subsection 9-10(1).

(d) a grant, assignment or surrender of real property;

(e) a creation, grant, transfer, assignment or surrender of any right;

(f) a financial supply;

(g) an entry into, or release from, an obligation:

(i) to do anything; or

(ii) to refrain from an act; or

(iii) to tolerate an act or situation;

(h) and any combination of any 2 or more of the matters referred to in paragraphs (a) to (g).

However, a supply does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money.[33]

101. Section 9-25 sets out when a supply of something is connected with Australia. A distinction is drawn between a supply of goods, a supply of real property, and a supply of anything else. This distinction means that it is critical to ascertain what it is that is being supplied.

102. Sections 38-185, 38-187 and 38-190 which set out the circumstances in which a supply is GST-free also make a distinction between the different kinds of supply.

A supply of goods

103. Section 195-1 defines goods as meaning any form of *tangible personal property*. Personal property embraces all forms of property other than land or an interest in land. 'Tangible' connotes a physical existence and has the effect of excluding intangibles. Thus, a good is any form of personal property that has a physical existence but does not include intangible personal property such as intellectual property like a copyright.

104. A supply of goods commonly occurs by way of sale of goods by the supplier to the recipient. A supply of goods also occurs by way of a hire purchase agreement (refer GSTR 1999/D7 Goods and Services Tax: attributing GST payable, input tax credits and adjustments).

105. Where tangible personal property is the subject of a lease or hire arrangement the GST Act contemplates that the supply is a supply of goods rather than the supply of use of the goods. For example, section 38-187 provides that a supply of goods is GST-free if the

[33] Subsection 9-10(4).

supply is by way of lease or hire and the goods are used outside Australia.

106. Also a Senate Further Supplementary Explanatory Memorandum[34] accompanying the GST Transition Bill states in relation to section 11 of the GST Transition Bill (enacted as section 12 of the GST Transition Act) that:

> 'Section 11, as currently drafted, also excludes the supply of goods and real property from the operation of the provision. This has the effect that a supply of goods, or a lease of a building, would not be subject to section 11. The general time of supply provisions in section 6 would apply. For example, if goods were supplied for use for a 3 year period and were removed on 30 June 2000, it is not clear whether section 11 as currently drafted applies to the supply. The government intended that such supplies be taxable to the extent they are made after 1 July 2000. …'[35]

This contemplates that a supply of the use of goods, for example, a supply of goods by way of lease, would be covered by the time of supply rules for goods in section 6 of the GST Transition Bill.

107. Further, a supply of goods by way of lease involves goods being made available on an on-going basis to the lessee. The treatment of a supply of goods by way of a lease as a supply of goods is consistent with the notion that a supply of goods is connected with Australia if the goods are delivered, or made available, in Australia to the recipient of the supply.

108. We consider, therefore, that a supply of goods by way of lease or hire is a supply of goods and not a supply of a thing that is a supply of the use of the goods. This means that for the purposes of determining whether a supply of goods by way of lease or hire is connected with Australia, the relevant subsections are subsections 9-25(1), (2) and (3), which set out when a supply of goods is connected with Australia.

Alternative view

109. A supply of goods by way of lease is a supply of a thing other than goods or real property. Whether a supply of this kind is connected with Australia depends on satisfying the requirements of subsection 9-25(5).

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[34] Further Supplementary Explanatory Memorandum accompanying the A New Tax System (Goods and Services Tax Transition) Bill 1998) at paragraph 7.5. The limitation referred to in the passage was removed by the amendment.

[35] As above, at paragraph 7.5.

110. A hire of property that is not tangible personal property, for example, a licence to use a copyright is a supply of a thing being the creation of the right to use that thing in the recipient and subsection 9-25(5) applies in determining whether the supply of that thing is connected with Australia (see paragraphs 161 to 184 below).

111. In determining whether a supply of goods is connected with Australia a distinction is made in section 9-25 between supplies of goods *wholly within* Australia, supplies of goods *from* Australia, and supplies of goods *to* Australia.

Supplies of goods wholly within Australia

112. Subsection 9-25(1) provides that a supply of goods is connected with Australia if the goods are 'delivered, or made available', in Australia to the recipient of the supply. The recipient, in relation to a supply, is the entity to which the supply is made.[36]

113. In the context of subsection 9-25(1) the phrase 'delivered, or made available' takes the meaning that the goods are either physically delivered, or if not physically delivered, physically made available in Australia.

114. Made available refers to the situation where goods are not actually delivered to the recipient but rather the supplier makes the goods physically available to the recipient in Australia. For example, a supplier may make goods available for collection by the recipient. This is the case where a supplier of sand sells a load of sand to a customer and the customer takes away the sand which the supplier makes available.

115. Thus, goods are 'delivered' in Australia if the goods are actually physically delivered in Australia. Goods are made available in Australia if the goods are physically available for the recipient in Australia. Both 'delivered' and 'made available' look at the place where the physical goods are at the relevant time.

116. The heading to this subsection, 'Supplies *of goods wholly within Australia'*, forms part of the GST Act pursuant to subsection 182-1(1) and points to the operation of subsection 9-25(1) being limited to the supply of goods wholly within Australia. This limitation is also supported by the Explanatory Memorandum[37] accompanying the GST Act which shows, diagrammatically, the supply and receipt of goods wholly within Australia.

117. Subsection 9-25(1) does not apply to goods where the supply is a supply of goods *from Australia* or *to Australia*. Supplies of this

[36] Section 195-1.
[37] Further Supplementary Explanatory Memorandum accompanying the A New Tax System *(*Goods and Services Tax Transition) Bill 1998) at p 28 to 29.

kind are covered by subsections 9-25(2) and (3) respectively (refer paragraphs 126 and 131 respectively).

118. However, this does not mean that the goods, the subject of a supply wholly within Australia, have to be domestic goods only. The goods being supplied may be domestic or imported goods. This is illustrated in Example 7 at paragraph 121 below.

119. Also it does not mean that the supplier cannot be an overseas supplier. For example, if the overseas supplier acquires goods in Australia and supplies those goods to the recipient in Australia that supply is connected with Australia under subsection 9-25(1).

Example 6 – Goods delivered in Australia

120. Richard, a computer wholesaler in Perth, sells computers to JB Co, a computer retailer in Adelaide. The computers are delivered to the premises of JB Co in Adelaide. This supply of goods is connected with Australia as the computers (goods) are delivered to JB in Australia.

Example 7 – Goods made available in Australia

121. Joe goes to a foreign car dealer in Perth and, after driving a demonstration model, agrees to purchase an Italian manufactured car of a particular model. The car dealer does not have that model car in stock. The car dealer orders and purchases the car from the Italian manufacturer and organises for the importation of the car into Australia. When the car dealer receives the imported car, Joe is contacted and told that the car is ready for delivery.

122. Even though the car is imported by the car dealer, the supply from the car dealer to Joe is wholly within Australia. This supply is connected with Australia as the car is delivered to Joe in Australia.

123. This example illustrates that although the goods are supplied wholly within Australia, the goods themselves may be imported goods.

124. Under section 13-15 the car dealer, being the importer of the car, is liable to pay GST on the taxable importation that he makes. The car dealer is registered and the supply to Joe is a taxable supply, with GST payable by the car dealer on that supply.[38] The car dealer is entitled to an input tax credit for the GST payable on the importation.[39] The interrelationship between taxable supplies and taxable importations is discussed at paragraphs 144 to 154 below.

[38] Subsection 7-1(1)
[39] Sections 15-15 and 15-20

Example 8 - Goods supplied by way of lease

125. Finance Co (an Australian resident Co) leases computers to domestic and overseas customers. If the computers are delivered, or made available in Australia, to the recipient of the supply, the supply of those computers by way of lease is connected with Australia. However, if the computers are for use outside Australia, the supply is GST-free under section 38-187.

Supply of goods – from Australia

126. A supply of goods is connected with Australia if that supply involves the goods being removed from Australia. 'Removed' in subsection 9-25(2) has its ordinary meaning. 'Remove' means to move from a place, to move or shift to another place, or to displace from a position.[40] Goods being removed from Australia means the goods are physically taken out of Australia.

127. Subsection 9-25(2) is about a supply that involves the removal of the goods from Australia. The subsection does not apply where removal is not part of the supply.

Example 9 – Goods removed from Australia

128. Bris Co, a Brisbane company, sells souvenirs to overseas retailers. The souvenirs are to be shipped to their overseas purchasers. The souvenirs are removed from Australia by export. The supply is connected with Australia.

129. Notwithstanding that this supply is connected with Australia, it may be GST-free. If Bris Co exports the souvenirs from Australia within a specified time (refer paragraphs 14 to 16 above) the supply is GST-free.

Example 10 – Goods supplied by way of lease

130. Aust Co is an Australian biscuit manufacturer. It leases specialised manufacturing equipment to its subsidiary in New Zealand. The equipment is manufactured in Australia and exported to New Zealand. The supply of those goods by way of lease to the New Zealand subsidiary involves the goods being removed from Australia and, therefore, the supply is connected with Australia under subsection 9-25(2). As the goods are for use outside Australia, the supply of those goods is GST-free under section 38-187.

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[40] *The Macquarie Dictionary,* The Macquarie Library Pty Ltd, 2nd ed.

Supply of goods – to Australia

131. A supply of goods is connected with Australia if that supply involves goods being brought to Australia and the supplier either:

(a) imports the goods into Australia (paragraph 9-25(3)(a)); or

(b) installs or assembles the goods in Australia (paragraph 9-25(3)(b)).

Example 11 – Goods imported into Australia by supplier

132. US Co, a US company sells a tractor to Tract Co , an Australian earthmoving operator, on a DDP[41] basis. US Co has to import the tractor into Australia. The supply made by US Co to Tract Co is a supply connected with Australia as the tractor (goods) is brought to Australia and it is US Co (the supplier) that imports it into Australia.

133. If a supply of goods involves the goods being delivered, or made available, to the recipient outside of Australia and the recipient subsequently imports the goods into Australia, the supply is not connected with Australia. The supply is not a taxable supply under section 9-5. However, the importation is a taxable importation and the recipient is liable to pay GST on the taxable importation.[42]

Example 12 – Goods imported into Australia by recipient

134. If in Example 11 US Co sells the tractor to Tract Co on an FOB[43] basis, the tractor is imported into Australia by the recipient and the supply of the tractor is not connected with Australia under paragraph 9-25(3)(a). As the tractor is not delivered, or made available, in Australia to Tract Co, the supply of the tractor is not connected with Australia under subsection 9-25(1). However, the supply is a taxable importation made by Tract Co and Tract Co is liable to pay GST on the taxable importation.[44]

Example 13 – Goods imported into Australia by recipient

135. Aust Cork Ltd, an Australian resident cork importer, has a permanent establishment in Portugal and contracts for the supply of cork from a Portuguese cork supplier. The cork is delivered to the

[41] DDP – means delivered duty paid. The seller is responsible for all costs and risks to a specific destination in the importing country (includes costs such as unloading fees at port, storage, import license fees, duties and taxes, insurance, etc.)
[42] Sections 13-5 and 13-15.
[43] Defined in definitions section of the Ruling at paragraph 241.
[44] Sections 13-5 and 13-15.

permanent establishment of Aust Cork Ltd in Portugal and Aust Cork Ltd then imports the cork into Australia.

136. The supply of cork from the Portuguese cork supplier to Aust Cork Ltd is not connected with Australia because the arrangement between them does not involve the cork being brought to Australia and the supplier is not the party which imports the goods into Australia.

137. However, the importation of the cork into Australia by Aust Cork Ltd is a taxable importation.[45]

138. Under paragraph 9-25(3)(b), if a supply of goods involves the goods being brought to Australia and the supplier installs or assembles the goods in Australia, the supply of the goods is connected with Australia. In the case of goods assembled in Australia, the unassembled goods and the assembled goods are the same goods.

Example 14 - Goods imported into Australia by recipient and assembled in Australia by supplier

139. Aero Lite , an Australian resident, decides to buy a light aircraft manufactured by Flight UK in the UK. The light aircraft parts need to be imported into, and assembled in, Australia. Flight UK agrees to supply and assemble the aircraft in Australia on the basis that Aero Lite arranges for the importation of the aircraft parts. Aero Lite imports the goods on a FOB basis.[46]

140. The supply of the aircraft is connected with Australia because the supply involves the aircraft parts being brought to Australia and the supplier assembling the aircraft in Australia. This is so regardless of the fact that it is the recipient who imports the parts of the aircraft into Australia.

141. Flight UK makes a taxable supply to Aero Lite and GST is payable by Flight UK on the taxable supply made to Aero Lite. The importation of the parts of the aircraft into Australia by Aero Lite is a taxable importation and Aero Lite is liable to pay GST on the importation.[47] Aero Lite is entitled to an input tax credit for the GST payable on the importation provided the importation is a creditable importation.[48]

[45] Section 13-5
[46] FOB – defined in definition section of Ruling a paragraph 241.
[47] section 7-1(1) and section 13-15
[48] Section 15-15.

Example 15 – Goods supplied by way of lease

142. UK Crane Co (a United Kingdom resident company) leases a specialised crane to Construct Co (an Australian resident company) for use in Australia. The supplier imports the crane into Australia from the United Kingdom.

143. As the supplier imports the goods into Australia, the supply is connected with Australia under paragraph 9-25(3)(a). The supply is also a taxable importation under section 13-5.

Interaction of the GST concepts of taxable supply and taxable importation

144. A supply that is connected with Australia under paragraph 9-25(3)(a) may be both a taxable supply under section 9-5 and a taxable importation of the supplier under section 13-5. The GST payable on a taxable supply is payable by the supplier. If the supplier also makes a taxable importation, the supplier must pay the GST on the taxable importation.[49] However, if the supplier makes a creditable importation the supplier is entitled to an input tax credit for the GST payable on the importation.[50]

Example 16 – Taxable supply and taxable importation

145. The supply in Example 11 above is both a taxable supply and a taxable importation. A taxable supply is made by US Co to Tract Co and US Co is liable to pay GST on that supply. As US Co imported the tractor into Australia (on a DDP basis), US Co is liable to pay GST on the importation. US Co is entitled to an input tax credit for the creditable importation it makes.[51]

Example 17 – Supply of goods connected with Australia and taxable importation

146. NZ Co, a New Zealand ice-cream equipment supplier enters into a contract with Aust Ice, a Brisbane ice-cream production company, to supply Aust Ice with an ice-cream maker on a DDP[52] basis. NZ Co is registered for GST purposes in Australia.[53]

147. The supply of the equipment (goods) is connected with Australia under paragraph 9-25(3)(a) because the supplier imports the

[49] Section 13-15
[50] Sections 15-15 and 15-20.
[51] Sections 13-5 and 15-15.
[52] DDP - Delivered Duty Paid.
[53] Subsection 23-5 and 23-10.

goods into Australia. The supply is a taxable supply and NZ Co is liable to pay GST on that supply.[54]

148. The importation of the equipment by NZ Co is a taxable importation.[55] GST is payable by NZ Co on the importation, but NZ Co is entitled to an input tax credit for the importation because it is a creditable importation.[56]

Example 18 – taxable supply/taxable importation

149. Tracey operates a business in New Zealand. Tracey regularly imports things into Australia. Bruce operates a business in Australia. Tracey and Bruce are both registered. Tracey sells some goods to Bruce which he is going to use in his business in Australia. The sale is done under a supply and install contract, so Tracey imports the goods and also installs them at Bruce's factory.

150. The importation of the goods by Tracey is a taxable importation. GST is charged on the importation, but she is entitled to an input tax credit for the importation because the importation is also a creditable importation.[57] Under paragraph 9-25(3)(a) the supply of the goods is connected with Australia and is a taxable supply. Bruce is entitled to an input tax credit for the creditable acquisition of the goods.

151. Bruce pays Tracey a GST inclusive price of $110,000 under the contract for the supply and installation of the goods. This is the consideration for the supply. GST on a supply is charged in relation to the consideration for the supply. GST on an importation is charged on the customs value of the goods, plus the transport and insurance costs, plus the customs duty. Here, the customs value plus the transport and insurance costs plus the duty adds up to $70,000.

152. Tracey pays $7,000 GST on the importation (10% of $70,000) and is entitled to an input tax credit of $7,000 on the importation, netting out to zero GST.

153. Tracey also pays $10,000 GST (1/11 of the price of $110,000) on the supply. Bruce is entitled to an input tax credit of $10,000 on the acquisition.

154. This means that Tracey pays $7,000 GST on the importation, which she gets back as an input tax credit and accounts for $10,000 GST for the supply, which Bruce gets back as an input tax credit.

[54] Subsection 7-1(1) and section 9-5
[55] Section 13-15.
[56] Subsection 7-1(1) and section 15-5.
[57] Section 15-15.

Supply of real property

155. Under subsection 9-25(4) a supply of real property is connected with Australia if the real property, or the land to which the real property relates, is in Australia.[58]

156. Land in the context of subsection 9-25(4) means the physical land. Thus the supply of any interest in, or right over, land is connected with Australia if the physical land is in Australia. The test is the location of the land and not the location of the right.

Example 19 – Interest in or right over land

157. Mr Ho, a resident of Hong Kong, sells a commercial property in Perth to Franco, a resident of the United States. The commercial property is land located in Australia. The supply is connected with Australia because the land is in Australia.

Example 20 – Interest in or right over land

158. NZ Co. (a New Zealand resident company) enters into a lease agreement with Irish Co (an Irish resident company) to occupy three floors of an office building owned by Irish Co. in the Melbourne CBD. The supply made by Irish Co. is connected with Australia because the land to which the lease agreement relates is in Australia.

Example 21 – Personal right to call for any interest in or right over land

159. Sing Co (a Singaporean resident company) pays UK Co (a United Kingdom resident company) $120,000 for an option to purchase land owned by UK Co in Sydney. The option to purchase is real property as it is a right to call for an interest in land. The supply of the option to purchase is connected with Australia because the physical land to which the right relates is in Australia.

Example 22 – A supply of real property that is not a taxable supply

160. Mr Chan (a Singaporean resident individual) inherited a block of land in an outer suburb of Melbourne from his Australian uncle. Mr Chan later decided to sell the land as he needed the money to pay for the education of his children in the United states. The sale of the land is a supply of real property connected with Australia as the real property is in Australia. As the supply is not in the course or

[58] Subsection 9-25(4).

furtherance of an enterprise that Mr Chan carries on, the supply of the land is not a taxable supply under section 9-5.

Supply of anything other than goods or real property

161. Under subsection 9-25(5) a supply of anything other than goods or real property, is connected with Australia if either:

(a) the 'thing' is done in Australia; or

(b) the supplier makes the supply through an enterprise that the supplier carries on in Australia.

162. 'Thing' as defined in section 195-1 means anything that can be supplied or imported. It is the subject matter of the supply or importation.

163. Paragraph 9-25(5)(a) looks at what is being supplied and if the 'thing' that is being supplied is done in Australia, the supply of that 'thing' is connected with Australia. Thus, if the supplier does the thing in Australia, the supply of that thing is connected with Australia. If the supplier does not do the thing in Australia, the supply of that thing is not connected with Australia under paragraph 9-25(5)(a) but it may be connected with Australia under paragraph 9-25(5)(b).

164. Paragraph 9-25(5)(b) looks at where the supply is made. If the supply is made through an enterprise that the supplier carries on in Australia, the supply of a 'thing' is connected with Australia, even though the 'thing' that is supplied is not done in Australia.

165. Paragraph 9-25(5)(b) is examined in more detail at paragraphs 212 to 223 below. However, broadly speaking, the paragraph has the effect that if the supply is part and parcel of an Australian based operation of the supplier, the supply of that thing is connected with Australia. If the Australian operation does the thing outside Australia, the supply of the thing is connected with Australia, if the supply is made by the Australian based operation.

166. The supplier under paragraph 9-25(5)(b) may be an Australian resident[59] or a non-resident of Australia.[60]

Paragraph 9-25(5)(a)

Thing is done in Australia

167. 'Thing' in paragraph 9-25(5)(a) is defined in section 195-1. It means anything that can be supplied or imported. 'Thing', in the

[59] Australian resident means a person who is a resident of Australia for the purposes of the ITAA 1936.
[60] Non-resident means an entity that is not an Australian resident.

context of paragraph 9-25(5)(a) is what is supplied. It is the subject matter of the supply.

168. Examples of things that can be supplied, that are not goods or real property (including rights in relation to real property) are illustrated by reference to the meaning of supply in section 9-10. Looking at subsection 9-10(2) things other than goods or real property that can be supplied include:

- services;
- advice;
- information;
- rights;
- obligations to do anything, or to refrain from an act, or to tolerate an act or situation; or
- any combination of any 2 or more of the things referred to above.

169. A supply of any one or more of these things is connected with Australia, if the thing is done in Australia. Thus, in establishing whether a thing is done in Australia it is important to identify:

(i) what is the 'thing' that is being supplied; and

(ii) where that 'thing' is done.

170. 'Done' is not defined in the GST Act nor does it have a specific legal meaning. According to *The Macquarie Dictionary* 'done' means:

'1. Past participle of do.

3. executed; completed; finished; settled.'[61]

171. It is helpful to consider the meaning of 'do'. In *The Macquarie Dictionary* 'do' means:

'1. to perform (acts, duty, penance, a problem, a part etc.).

2. to execute (a piece or amount of work, etc.).

3. to accomplish; finish.'[62]

172. It is also useful to consider the meaning of perform. In *The Macquarie Dictionary* 'perform' means:

'1. to carry out; execute; do

4. to carry into effect; fulfil.

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[61] *The Macquarie Dictionary* 2nd ed. Macquarie University NSW 1995 p521
[62] As above, p514

8. to fulfil a command, promise, or undertaking to execute or do something.'[63]

173. 'Performance' in legal terms means 'the doing of that which is required by a contract, undertaking or statute'.[64]

174. It follows that the meaning of 'done' in the context of paragraph 9-25(5)(a) depends on the nature of the thing being supplied.

175. If the supply is the supply of *services*, services are commonly performed. 'Done' in this context means performed and a service is connected with Australia if it is performed in Australia. Examples of such services include accounting services, legal services, repair services, maintenance services, preparation of, or developing, designs, models, plans, drawings or other like property, engineering, and research, testing, experimental or other like services.

176. If the supply is the provision of *advice or information* and the supply involves the creation, development etc of that advice or information, the supply of that advice or information is done where it is created, developed etc. The supplier would apply existing knowledge, skill and expertise to produce that product. For example, the supply by a QC of a legal opinion is done in Australia, if that opinion is prepared in Australia.

177. If the supply is an *instantaneous provision of advice or information,* the provision of that advice or information is done where it is provided. The meaning of provided will depend on the facts in any given case. For example, a supply of information that is already developed or created or already in existence, such as a supply of information by way of a telephone service, is 'done' where the advice is provided.

178. If the supply is the *creation, grant, transfer, assignment or surrender of any right*, the thing that is being supplied is the creation of that right in the recipient, the granting, transfer, or assignment of that right to the recipient or the surrendering of that right. In this context, the thing is done where the right is created, granted, transferred, assigned or surrendered respectively.

179. Whether a right is created, granted, transferred, assigned or surrendered in Australia will depend on how, in any given case, the creation, grant, transfer assignment or surrender is effected. For example, if the right to use intellectual property is granted by the execution of a written contract, the grant of that right is done in Australia if that contract is made in Australia.

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[63] As above, p 1317.
[64] *The CCH Macquarie Dictionary of Law* 2nd ed. June 1993 at p.129.

180. If the supply is *the obligation to do anything or the obligation to refrain from an act or the obligation to tolerate an act or situation,* the thing that is being supplied is the obligation to do something, to refrain from something, or to tolerate something, and the thing is done where that obligation is entered into.

181. If the supply is *the release from an obligation,* the thing that is being supplied is that release and the thing is done where the release is effected.

182. Whether an obligation is entered into, or the release from an obligation occurs, in Australia, will depend on how, in any given case, the entry into, or the release from, the obligation is effected. For example, if the supplier enters into a restrictive covenant obliging the supplier to refrain from operating business within a certain area, the obligation is done in Australia if the supplier enters into that obligation under a written contract made in Australia.

Alternative view

183. On one view, where the thing is a right, the right is 'done' in Australia if the right is exercised/used in Australia.

184. However, we consider that this alternative view is at odds with the construction of the GST Act as a whole. For example, Division 84 is premised on the possibility that a right to use intellectual property is not connected with Australia where the right is made outside Australia. It is stated at page 213 of the Explanatory Memorandum[65] that:

> "Under subsection 9-25(5) supplies of things other than goods or real property are connected with Australia if the thing is done in Australia or the supplier makes the supply through an enterprise the supplier carries on in Australia. Under these rules a supply of a thing that is not goods or real property, such as an intellectual property right, could be made from outside of Australia when the thing is for consumption in Australia, such as an intellectual property right that is to be exercised in Australia, and the supply would not be connected with Australia. The supply would not be taxable. The supply would not be taxable even if the other requirements of section 9-5 are met."

[65] Explanatory Memorandum accompanying the A New Tax System (Goods and Services Tax) Bill 1998, p 126, par 6.126.

Example 23 - Services done in Australia

185. Account Co, an accounting firm with offices in Melbourne and Sydney, supplies accounting and taxation services. The supply of any accounting and taxation services, which are performed in Australia, is connected with Australia.

Example 24 - Services not done in Australia

186. If, in Example 23, an employee of Account Co flies to London and performs taxation services in that country, the supply of those services is not connected with Australia under paragraph 9-25(5)(a) because the services are not performed in Australia. It would still be necessary to consider whether the supply of that service is connected with Australia under paragraph 9-25(5)(b) – (refer to paragraphs 212 to 223 below).

Example 25 - Services done in Australia but consumed outside Australia

187. If Account Co performs taxation services in Australia but the recipient of the supply of those services is not an Australian resident and is not in Australia while the taxation service is performed, the supply of those taxation services is GST-free under item (2) of the table in subsection 38-190(1), provided the service is not directly connected with goods situated in Australia when the service is performed, or with real property situated in Australia.

Example 26 – Service done in Australia but consumed outside Australia

188. Dobe is a self-employed marine biologist and he is providing research assistance to Phillip, a New Caledonian resident who is conducting research in marine biology. The research assistance is in the form of collating and providing details of sources of information and finding and providing available papers on specific areas.

189. The research work is carried out by Dobe in Australia. The performance of the service occurs in Australia. The supply of the information and papers to Phillip is connected with Australia.

190. The service provided by Dobe in this example is not directly connected with goods or real property situated in Australia and therefore, is GST-free under Subsection 38-190(1) provided that while the research work is done by Dobe, Phillip is not in Australia.

Example 27 – Service done in Australia

191. An architect draws up a plan in Australia for renovations of a building in Perth. The recipient is not an Australian resident and is not in Australia while the services of the architect are performed . However, because the supply is directly connected with real property situated in Australia, the supply of that service is not GST-free under subsection 38-190(1).

Example 28 – Service done in Australia in relation to goods for export

192. Huon is an Australian widget manufacturer. Huon agrees to supply a consignment of widgets to MSCo, a Malaysian retailer, at a special price. This special price is possible due to the arrangement whereby Huon does not carry out a quality assurance check on the widgets before leaving its factory. However, MSCo is able to hire another contractor, Contract Co, to carry out the testing of the widgets before Huon exports them to Malaysia.

193. There are two separate supplies in this example. They are:

- a supply of widgets (goods) made by Huon to MSCo; and
- the provision of a quality testing (service) by Contract Co to MSCo.

194. The supply of widgets is connected with Australia under subsection 9-25(2). The widgets (goods) are removed from Australia by export and provided the conditions of Item 1 in the table in subsection 38-185(1) are met, the export of the goods is GST-free.

195. The provision of a quality testing service by Contract Co is connected with Australia as the service is performed in Australia (paragraph 9-25(5)(a)). This supply is not GST-free because the provision of the quality testing service is directly connected with the widgets (goods) situated in Australia when the service is performed.

Example 29 – Advice prepared in Australia

196. Lidis QC in Adelaide provides legal advice in the form of a written opinion to Ang Co in Darwin. The supply of this advice is connected with Australia because the advice is prepared in Australia.

Example 30 – Advice prepared in Australia, but used outside Australia

197. An Australian resident lawyer supplies legal advice to a US resident company. The US company has a permanent establishment in Australia but the US company is not represented in Australia in

relation to that supply. The supply of the legal advice to the US company is GST-free under subsection 38-190(1) because the company is not an Australian resident and the company is not in Australia while the legal services are performed . It is assumed in this example that the supply is not directly connected with goods or real property situated in Australia.

Example 31 – Information prepared outside Australia

198. Maha Co is an Indonesian company with a permanent establishment in Hobart. Maha Co is applying for a loan from the Hobart Bank. In order to determine the creditworthiness of Maha Co, Hobart Bank acquires some information from a credit rating agency in Indonesia. The supply of this information relating to the creditworthiness of Maha Co is not connected with Australia because the information is not prepared in Australia.

199. However, the supply of information by the Indonesian credit rating agency is treated as a taxable supply under Division 84. Hobart Bank the recipient of the supply is liable to pay GST on that supply under sections 84-5 and 84-10.

Example 32 – Information prepared in Australia but used outside Australia

200. Oz Co is an Australian resident which has a permanent establishment in New Zealand. It is applying for a loan from Kiwi Bank in New Zealand. Kiwi Bank has no operations outside of New Zealand. Kiwi Bank acquires information from a credit rating agency in Australia about the creditworthiness of Oz Co. This supply of information by the credit rating agency in Australia is connected with Australia because the information is prepared in Australia. However, as the recipient is not an Australian resident, the supply is GST-free provided a representative of Kiwi Bank is not in Australia in relation to the supply when the information services are performed.

Example 33 – Right to use intellectual property provided in Australia

201. Boffin Co (a US resident) grants Cyber Co (an Australian resident) the right to use the Boffin II software in Australia for 3 years. The right to use the intellectual property is granted under a written agreement. That agreement is made in Australia and accordingly the granting of the right is a supply that is connected with Australia.

Example 34 – Right to use intellectual property not provided in Australia

202. Cyber Co (an Australian resident) supplies Linx Co (another Australian resident) the right to use the Cyber III software in New Zealand for 5 years. The right is granted by way of a contract made in New Zealand. The supply is not connected with Australia under paragraph 9-25(5)(a). However the supply is connected with Australia under paragraph 9-25(5)(b) if the supply is made through the Australian business of Cyber Co (refer paragraph 212 to 223 below).

Example 35 – Right to use intellectual property provided in Australia for use partly outside Australia

203. Distributor Co (an Australian resident company) is granted by Cartoon Co (a US resident company) the right to reproduce and sell certain cartoons in Australia and certain cartoons in New Zealand. The right is granted under an agreement made in Australia. The supply is connected with Australia under paragraph 9-25(5)(a). However, the supply is of a right for use in Australia and New Zealand. To the extent that the supply is a right for use outside Australia, the supply is GST-free under item 4 of table 1 in subsection 38-190(1). A taxable supply is only made in respect of the supply of the right for use in Australia.

Example 36– Obligation to refrain from an act - done in Australia

204. T Co Aust (an Australian resident) enters into a restrictive covenant with UK Co (a UK resident) requiring T Co Aust not to compete in Melbourne with a subsidiary of UK Co based in Melbourne. The supply of the obligation to refrain from an act by T Co Aust is connected with Australia if that obligation is entered into in Australia. If, for example, the obligation arises under a contract made in Australia, the supply is connected with Australia.

Thing is partly done in Australia

205. It is implicit in paragraph 9-25(5)(a) that a supply is connected with Australia to the extent that it is done in Australia. A supply is connected with Australia under paragraph 9-25(5)(a) to the extent that the thing is done in Australia.

206. If part of a supply is not connected with Australia under paragraph 9-25(5)(a) the whole supply may nonetheless be connected with Australia if the supply is made through an enterprise that the supplier carries on in Australia (paragraph 9-25(5)(b)).

Paragraph 9-25(5)(b)

The supplier makes the supply through a permanent establishment

207. Paragraph 9-25(5)(b) applies to determine whether a supply of anything other than goods or real property, is connected with Australia if the thing is not done in Australia. Under that paragraph if the 'thing' is not done in Australia, the supply is connected with Australia if the supplier makes the supply 'through' an 'enterprise that the supplier carries on in Australia'.

208. An enterprise is an activity, or series of activities, done in one of the ways prescribed in subsection 9-20(1) – see the definitions section of the Ruling at paragraph 228.

209. The concept of carrying on an enterprise in Australia is defined in terms of the definition of "permanent establishment" in subsection 6(1) of the *Income Tax Assessment Act 1936* ('the 1936 Act'*)*.

210. Specifically, subsection 9-25(6) provides that an enterprise is carried on in Australia if the enterprise is carried on through:

(a) a permanent establishment (as defined in subsection 6(1) of the *Income Tax Assessment Act 1936*); or

(b) a place that would be such a permanent establishment if paragraph (e), (f) or (g) of that definition did not apply.

211. This means that an enterprise is carried on in Australia if the enterprise is carried on through a place in Australia that is a permanent establishment or would be a permanent establishment if the definition in subsection 6(1) of the *Income Tax Assessment Act 1936 excluded* (i.e., did not have) the specific exclusions set out in paragraphs (e) to (g). Under paragraph 9-25(5)(b) the qualifying or excluding paragraphs of (e) to (g) in the *Income Tax Assessment Act 1936* are disregarded and the concept of permanent establishment in the GST Act is wider in scope.

212. A supply of a thing other than goods or real property, is connected with Australia under paragraph 9-25(5)(b) if the supplier carries on in Australia an enterprise by means of a permanent establishment in Australia and the supply is made through that permanent establishment.

213. This means that if there is a permanent establishment in Australia, as defined, it must be established that the supplier makes the supply through that permanent establishment. This requires that a connection be established between the permanent establishment and the supply. This is covered in paragraphs 84 to 86 of the Rulings section of this Ruling.

214. Both a resident and a non-resident can have a permanent establishment in Australia for the purposes of the application of paragraph 9-25(5)(b). It is not limited in operation to a non-resident.

Example 37 – Supply made through a permanent establishment in Australia, but GST-free

215. An Australian resident which has all its business premises in Australia (ie has no offshore operations) grants a resident of New Zealand a right to use a patent in New Zealand. The supply is the grant of the right to use the patent in New Zealand. The right is granted under a legal agreement made in New Zealand to which the managing director of the Australian resident travels for the signing.

216. Under paragraph 9-25(5)(a) the thing supplied, the granting of the right to use the patent, is not done in Australia because the right is granted in New Zealand. However, as the supply is made by the Australian business operation (i.e., the Australian permanent establishment of the Australian resident) the supply of the right to use is connected with Australia under paragraph 9-25(5)(b).

217. While the supply is connected with Australia the supply is not a taxable supply because it is GST-free under subsection 38-190 (1). This is because the rights are for use outside Australia.

Permanent establishment

218. The meaning of permanent establishment is discussed at paragraphs 88 to 89 in the Rulings section.

Division 96 - Supplies that are partly connected with Australia

219. Sometimes a supply may be a mixture of goods, real property and/or things other than goods or real property. The application of section 9-25 may mean that only part of a supply is connected with Australia. Division 96 treats that part of the actual supply that is connected with Australia as if it were a separate supply that is connected to Australia.[66]

220. The amount of GST or input tax credits in respect of a supply are calculated under the general rules in relation to the value of the supply.[67] In the circumstances to which Division 96 applies, the GST or input tax credit should not be calculated in relation to the whole value of the supply, only to the value of the supply that is connected with Australia. Section 96-10 provides how to work out the value of

[66] Section 96-5.
[67] Subdivision 9-C and section 11-25.

the part of the supply that is connected with Australia. The value of the part of the supply that is connected with Australia is the proportion of the whole supply that is connected with Australia multiplied by the value of the whole supply.

Section 156-15 - Progressive or periodic supplies that are partly connected with Australia

221. Division 156 applies to supplies and acquisitions made on a progressive or periodic basis, where the consideration is also provided on a progressive or periodic basis.

222. Under section 156-15 if a component part of a supply to which section 156-5 applies is not connected with Australia, then that part is treated as if it were a separate supply not connected with Australia.

Definitions

223. Under subsection 9-20(1) an **enterprise** is an activity, or series of activities, done:

(a) in the form of a business; or

(b) in the form of an adventure or concern in the nature of trade; or

(c) on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property; or

(d) 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; or

(e) by a charitable institution or by a trustee of a charitable fund; or

(f) by a religious institution; or

(g) 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.

224. However under subsection 9-20(2) enterprise does not include an activity, or a series of activities, done:

(a) by a person as an employee or in connection with earning withholding payments covered by

subsection (4) (unless the activity or series is done in supplying services as the holder of an office that the person has accepted in the course of or in connection with an activity or series of activities of a kind mentioned in subsection (1)); or

(b) as a private recreational pursuit or hobby; or

(c) 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;

(d) 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 *Taxation Administration Act 1953* applies).

225. **Australia** does 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.

226. Under section 23-5 you are required to be **registered** under the GST Act if:

(a) you are **carrying on** an enterprise; and

(b) your annual turnover meets the registration turnover threshold.

227. Under section 195-1 **carrying on** an enterprise includes doing anything in the course of the commencement or termination of the enterprise.

228. Annual turnover is defined in section 195-1. Registration turnover threshold is defined in section 23-15.

229. Under subsection 9-30(1) a supply is **GST–free** if:

(a) it is GST-free under Division 38 or under a provision of another Act; or

(b) it is a supply of a right to receive a supply that would be GST-free under paragraph (a).

230. If a supply is GST-free then no GST is payable on the supply and an entitlement to an input tax credit for anything acquired or imported to make the supply is not affected (refer sections 7-1 and Division 11).

231. Under subsection 9-30(2) 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).

232. If a supply is input taxed there is no entitlement to an input tax credit for the things that are acquired or imported to make the supply.

233. **Recipient**,[68] in relation to a supply, means the entity to which the supply was made.

234. **Australian Resident**[69] **–** means a person who is a resident of Australia for the purposes of the *Income Tax Assessment Act 1936*.

235. **Non-resident**[70] **–** means an entity that is not an Australian Resident

236. **FOB -** means Free On Board. Seller is responsible for all costs and risks until the ships rail (loading onto ship).

237. **CIF –** Cost, insurance and freight. Seller responsible for all transportation costs and marine insurance against buyers risk of loss to port of destination.

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Your comments

239. If you wish to comment on this draft Ruling, please send your comments promptly by 19 May 2000 to:

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Subject references:
- connected with Australia
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- enterprise
- export of goods for consumption outside
- Australia
- GST
- GST-free

- importation of goods
- input taxed
- input tax credit
- offshore supplies
- partly connected with -Australia
- permanent establishment
- real property
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- services
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- taxable supplies

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