GSTR 2003/D9 - Goods and services tax: in the application of items 2, 3 and paragraph (b) of item 4 in the table in subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999 when is a 'non-resident' or other 'recipient' of a supply 'not in Australia when the thing supplied is done'? when is 'an entity that is not an Australian resident' 'outside Australia' when the thing supplied is done?

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Draft Goods and Services Tax Ruling

Goods and services tax: in the application of items 2, 3 and paragraph (b) of item 4 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*,

- when is a 'non-resident' or other 'recipient' of a supply 'not in Australia when the thing supplied is done'?
- when is 'an entity that is not an Australian resident' 'outside Australia' when the thing supplied is done?

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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 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 entity to which it applies.*

What this Ruling is about

1. This Ruling examines when a supply is made to a 'non-resident' or other 'recipient' of a supply who is 'not in Australia when the thing supplied is done' for the purposes of items 2 and 3 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax Act) 1999* ('the GST Act'). Subsection 38-190(1) sets out supplies of things (other than goods or real property) that are GST-free.

2. The Ruling also examines when a supply that is made in relation to rights is made to an entity that is not an 'Australian resident' and is 'outside Australia when the thing supplied is done' for the purposes of paragraph (b) of item 4.

3. In particular, the Ruling explains:

- when a supply is made to an entity that is a 'non-resident' or 'an entity that is not an Australian resident' for the purposes of item 2 and paragraph (b) of item 4 respectively;
- when a supply is made to an entity for the purposes of item 3;
- when an entity is 'not in Australia' or is 'outside Australia' when the thing supplied is done; and
- what apportionment is required where an entity is 'not in Australia' or is 'outside Australia' for only part of the time when the thing supplied is done.

4. The Ruling also examines the operation of subsection 38-190(4). This subsection operates to extend the scope of item 3 by deeming certain supplies[1] to be made to a recipient who is 'not in Australia'.

5. This Ruling does not otherwise address the operation of the provisions of subsection 38-190(1).

6. Unless otherwise stated, all legislative references in this Ruling are to the GST Act and all references to an item number are to an item in the table in subsection 38-190(1).

Date of effect

7. This draft Ruling represents the preliminary, though considered, view of the Australian Taxation Office. This draft may not be relied on by taxpayers or practitioners. When the final Ruling is officially released, it will explain our view of the law as it applies from 1 July 2000.

8. The final Ruling will be a public ruling for the purposes of section 37 of the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to which it applies. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and our view of when you can rely on our interpretation of the law in GST public and private rulings.

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

[1] Supplies that are made under an agreement with an Australian resident but provided to another entity outside Australia.

This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the date of effect of the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Previous Rulings

10. This Ruling replaces GSTR 2002/D8, Goods and Services Tax: when is a non-resident 'not in Australia when the thing supplied is done' for the purposes of item 2 in the table in subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*?

11. GSTR 2002/D8 examined when a non-resident is not in Australia when the thing supplied is done for the purposes of item 2 only. We also examine this in the new draft Ruling. However, this Ruling has been expanded to explain the meaning of 'not in Australia' and 'outside Australia' for the purposes of item 3 and paragraph (b) of item 4 respectively.

12. The tests for determining whether a non-resident company or individual is in Australia remain unchanged. However, with further consideration of the criteria used to determine if a non-resident company is in Australia, and in particular the jurisdictional case law that we use to provide guidance on the application of the criteria, we have further clarified and, where necessary, amended some elements of the explanation.

13. Also in GSTR 2002/D8, we expressed the view that item 2 only applied to supplies made to a non-resident company or individual. We now consider that the better view is that it can apply to supplies made to other entity types. In particular, a supply made to a partnership where all the partners are non-residents is a supply that may be GST-free under item 2 (refer to paragraphs 79 to 102 of the Explanations section of the Ruling).

Legislative Context

14. Section 9-5 provides that a taxable supply is made if:

(a) you make a supply for consideration;

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

(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.

15. A supply is GST-free if it is GST-free under Division 38 or under a provision of another Act.[2]

16. Subdivision 38-E sets out when exports of goods and other supplies for consumption outside Australia are GST-free. The Subdivision comprises:

- section 38-185 – exports of goods;
- section 38-187 – lease or hire of goods for use outside Australia;
- section 38-188 – tooling used by non-residents to manufacture goods for export; and
- section 38-190 – supplies of things, other than goods or real property, for consumption outside Australia.

17. The relevant section for the purposes of this Ruling is section 38-190.

18. Subsection 38-190(1) comprises five items which set out supplies of things other than goods or real property that are GST-free. If the requirements of one of those items are met the supply is GST-free,[3] provided subsections 38-190(2) or (3) do not operate to negate that GST-free status.

19. Subsection 38-190(2) provides that a supply covered by any of the items 1 to 5 in the table 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 and would not be GST-free.[4]

20. Subsection 38-190(3) provides that, without limiting subsection 38-190(2), a supply covered by item 2 in the table 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.

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[2] Paragraph 9-30(1)(a).

[3] A supply that is not GST-free under one of the items in subsection 38-190(1) may be GST-free under one of the other items.

[4] Refer to GSTR 2003/7 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1) item 4, paragraph (a) and subsection 38-190(2) at paragraphs 41 to 42 and 143 to 150.

21. Subsection 38-190(4) operates to extend the scope of item 3. The subsection provides that a supply is taken, for the purposes of item 3, to be a supply made to a recipient who is not in Australia if:

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

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

22. Items 2, 3 and 4 appear in the table in subsection 38-190(1) as follows:

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

Item	Topic	These supplies are GST-free[5]
2	Supply to non-resident outside Australia	a supply that is made to a non-resident who is **not in Australia when the thing supplied is done**, and: (a) the supply is neither a supply of work physically performed on goods situated in Australia when the work is done nor a supply directly connected with real property situated in Australia; or (b) the non-resident acquires the thing in carrying on the non-resident's enterprise, but is not registered or required to be registered
3	Supplies used or enjoyed outside Australia	a supply: (a) that is made to **a recipient who is not in Australia** when the thing supplied is done; and (b) the effective use or enjoyment of which takes place outside Australia; other than a supply of work physically performed on goods situated in Australia when the thing supplied is done, or a supply directly connected with real property situated in Australia.

[5] Except to the extent that they are supplies of goods or real property.

Supplies of things, other than goods or real property, for consumption outside Australia		
Item	**Topic**	**These supplies are GST-free**[5]
4	Rights	a supply that is made in relation to rights if: (a) the rights are for use outside Australia ; or (b) the supply is to an entity that is not an Australian resident and is **outside Australia when the thing supplied is done**.

Ruling

Items 2, 3 and paragraph (b) of item 4

23. An important issue in the application of these items is when is a supply made to a non-resident (or other recipient of a supply) who is 'not in Australia' or 'outside Australia' 'when the thing supplied is done'.

Item 2

24. Item 2 applies where a supply, other than a supply of goods or real property, is made to a non-resident who is not in Australia when the thing supplied is done and the other requirements of the item are met. A supply is *made* to a non-resident where that non-resident is the entity that contracts with the supplier for the making of the supply. The requirement that the non-resident is not in Australia when the thing supplied is done is a requirement that the non-resident is not in Australia in relation to the supply when the thing supplied is done.

Paragraph (b) of item 4

25. Paragraph (b) of item 4 applies where a supply that is made in relation to rights is to an entity that is not an Australian resident and that entity is outside Australia when the thing supplied is done. 'An entity that is not an Australian resident' is a non-resident. A supply of rights is *to* a non-resident where that non-resident is the entity that contracts with the supplier for the making of the supply. The requirement that the non-resident is outside Australia when the thing supplied is done is a requirement that the non-resident is not in Australia in relation to the supply when the thing supplied is done.

The meaning of non-resident in item 2 and paragraph (b) of item 4

26. A supply that is made to a non-resident, for the purposes of item 2 and paragraph (b) of item 4, includes a supply made to:

- an individual (or an individual acting in the capacity of trustee of a trust) who is not a resident of Australia as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* ('ITAA 1936');[6]
- a company (or a company acting in the capacity of trustee of a trust) that is not a resident of Australia as defined in subsection 6(1) of the ITAA 1936;[7]
- a partnership of which all the partners are non-resident individuals and/or non-resident companies; or
- a corporate limited partnership that is not a resident of Australia as defined in section 94T of the ITAA 1936.[8]

27. Where a supply is made to the trustees of a trust that has more than one trustee, all the trustees must be non-residents for the supply to be a supply made to a non-resident.

Item 3

28. Item 3 applies where a supply, other than a supply of goods or real property, is made to a recipient who is not in Australia when the thing supplied is done and the other requirements of the item are met. A supply is *made* to an entity where that entity contracts with the supplier for the making of the supply. The requirement that the recipient is not in Australia when the thing supplied is done is a requirement that the recipient is not in Australia in relation to the supply when the thing supplied is done.

Subsection 38-190(4)

29. Subsection 38-190(4) operates to extend the scope of item 3 by treating a supply as being made to a recipient who is not in Australia if:

- the supply is made under an agreement entered into, whether directly or indirectly, with an Australian resident; and

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[6] Refer to paragraph 63 of the Explanations section where the definition is reproduced.
[7] Refer to paragraph 63 of the Explanations section where the definition is reproduced.
[8] Refer to paragraph 103 of the Explanations section.

- the supply is provided, or is required to be provided, to another entity outside Australia.

30. A supply that is made under an agreement with an individual or company that is a resident of Australia is a supply made under an agreement with an Australian resident.

31. A supply that is made under an agreement with a partnership or with a partner in a partnership is made under an agreement with an Australian resident if one of the partners in the partnership is a resident of Australia. This is explained further at paragraphs 347 to 352 in the Explanations section.

32. Where a supply is made under an agreement entered into with the trustee of a trust and the trustee is an Australian resident individual or an Australian resident company, this is an agreement entered into with an Australian resident for the purposes of subsection 38-190(4). This is explained further at paragraphs 383 to 384 in the Explanations section.

33. If a trust has more than one trustee the requirement in subsection 38-190(4) that a supply is made under an agreement with an Australian resident is satisfied if at least one of the trustees is an Australian resident. This is explained further at paragraph 385 in the Explanations section.

Application of items 2, 3 and paragraph (b) of item 4

34. The flowcharts that follow illustrate, in broad terms, the application of items 2, 3 and paragraph (b) of item 4 to:

- a supply (other than a supply of goods or real property) that is made to an individual including an individual in the capacity of trustee of a trust (refer to flowcharts 1 and 2 on pages 10 and 11 respectively);
- a supply (other than a supply of goods or real property) that is made to a company including a company in the capacity of trustee of a trust (refer to flowcharts 3 and 4 on page 12 and 13 respectively); and
- a supply (other than a supply of goods or real property) that is made to a partnership other than a corporate limited partnership (refer to flowcharts 5 and 6 on pages 14 and 15 respectively).

35. The flowcharts highlight the fact that there are different tests to determine whether an entity is in Australia depending on the type of entity. The flowcharts should be read in conjunction with the relevant paragraphs in this Ruling. These paragraphs are noted in the flowcharts.

Trusts

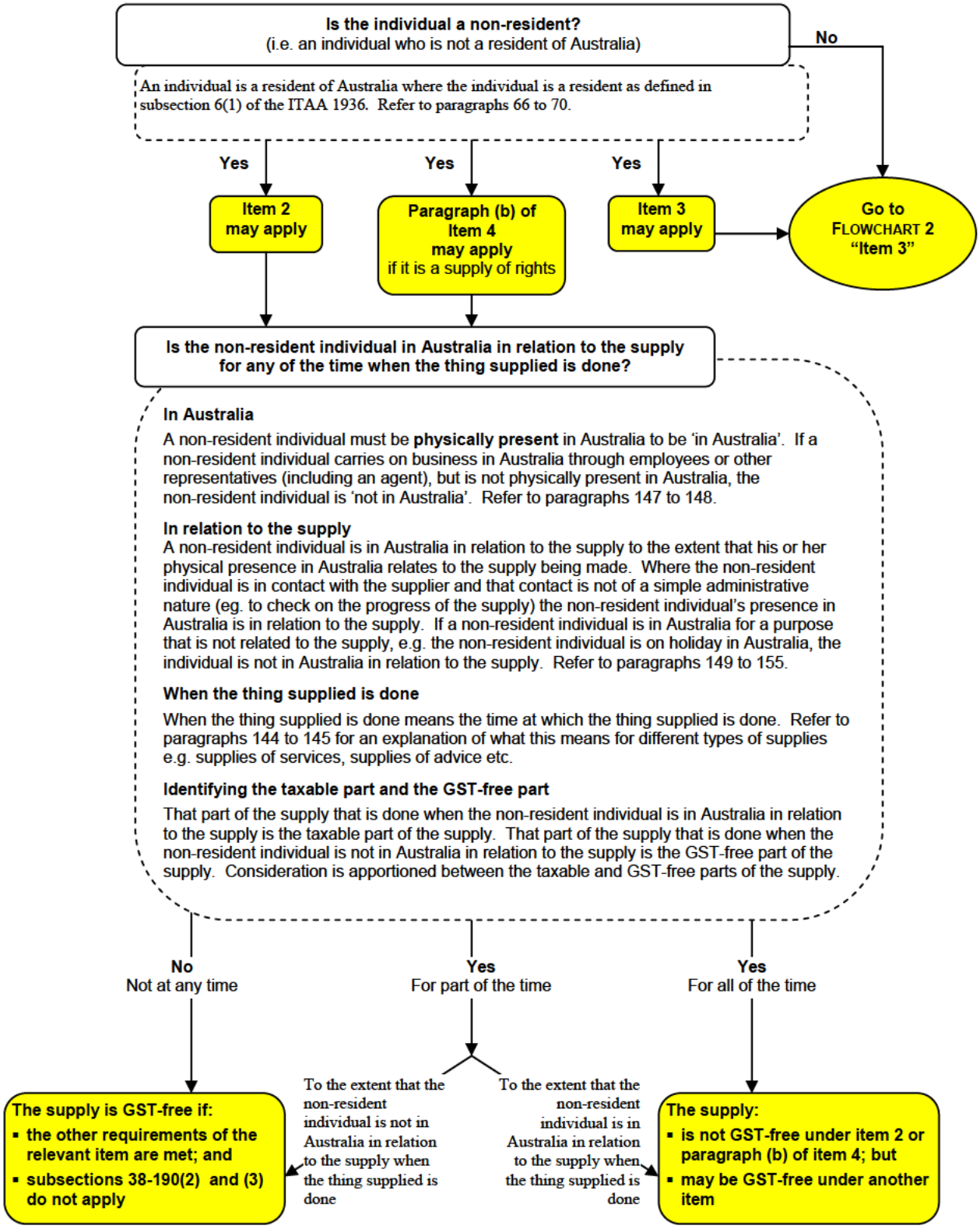
36. A trust is in Australia if the trustee of the trust is in Australia. This means that, if the trustee is an individual, the test to determine whether an individual is in Australia is the relevant test (see flowcharts 1 and 2 on pages 10 and 11 respectively). If the trustee is a company, the test to determine whether a company is in Australia is the relevant test (see flowcharts 3 and 4 on pages 12 and 13 respectively). If the trust has more than one trustee, if any of the trustees are in Australia, the trust is in Australia.

Corporate limited partnerships

37. A corporate limited partnership that was formed in Australia is in Australia. The test for determining whether a non-resident corporate limited partnership is in Australia is the same as the test for determining whether a non-resident company is in Australia (see flowcharts 3 and 4 on pages 12 and 13 respectively).

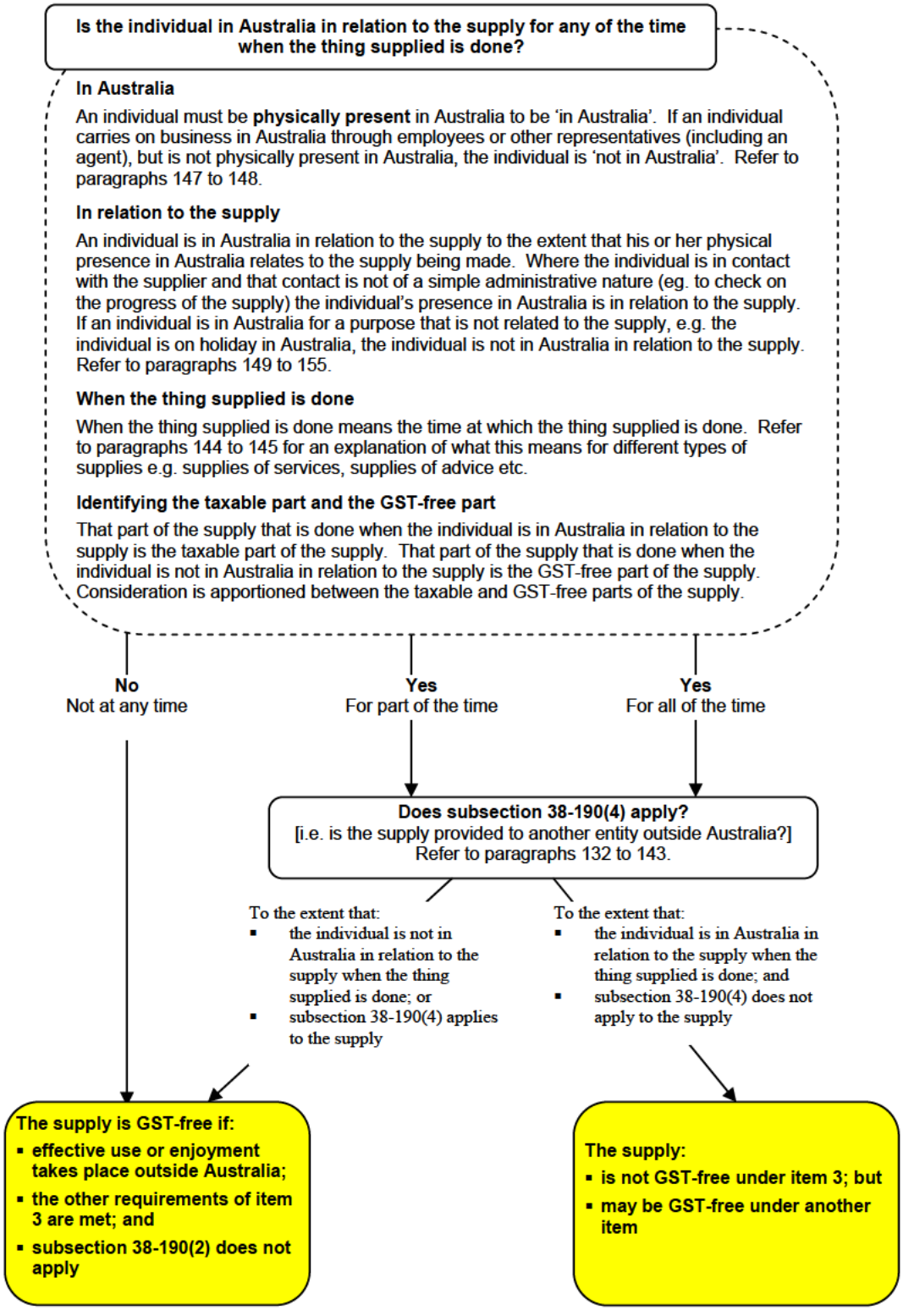
FLOWCHART 1 - Supply made to a non-resident individual (including a non-resident individual acting in the capacity of trustee of a trust)

Item 2 and paragraph (b) of item 4



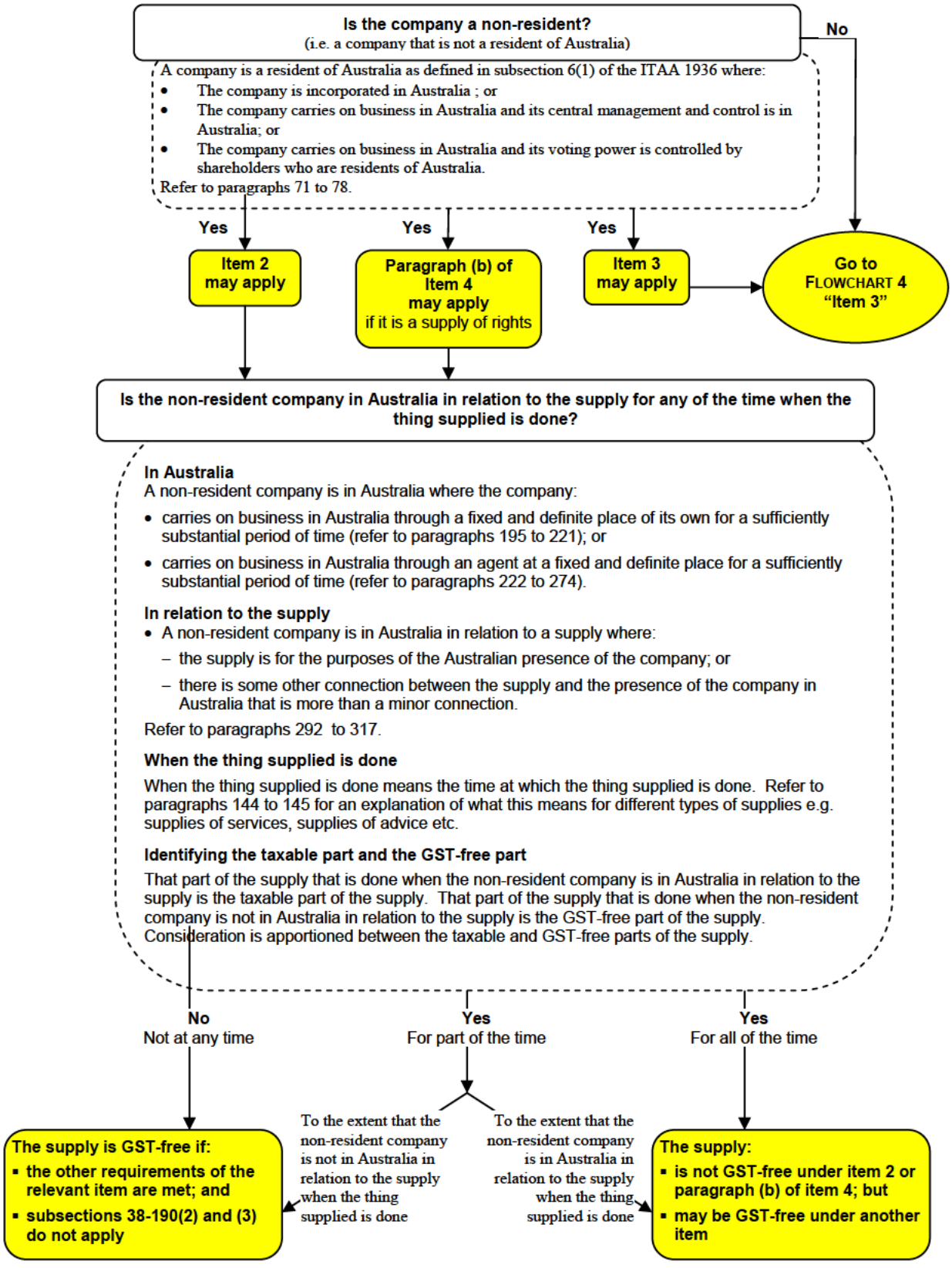
FLOWCHART 2 - Supply made to an individual (including an individual acting in the capacity of trustee of a trust). Individual includes a non-resident individual.

Item 3



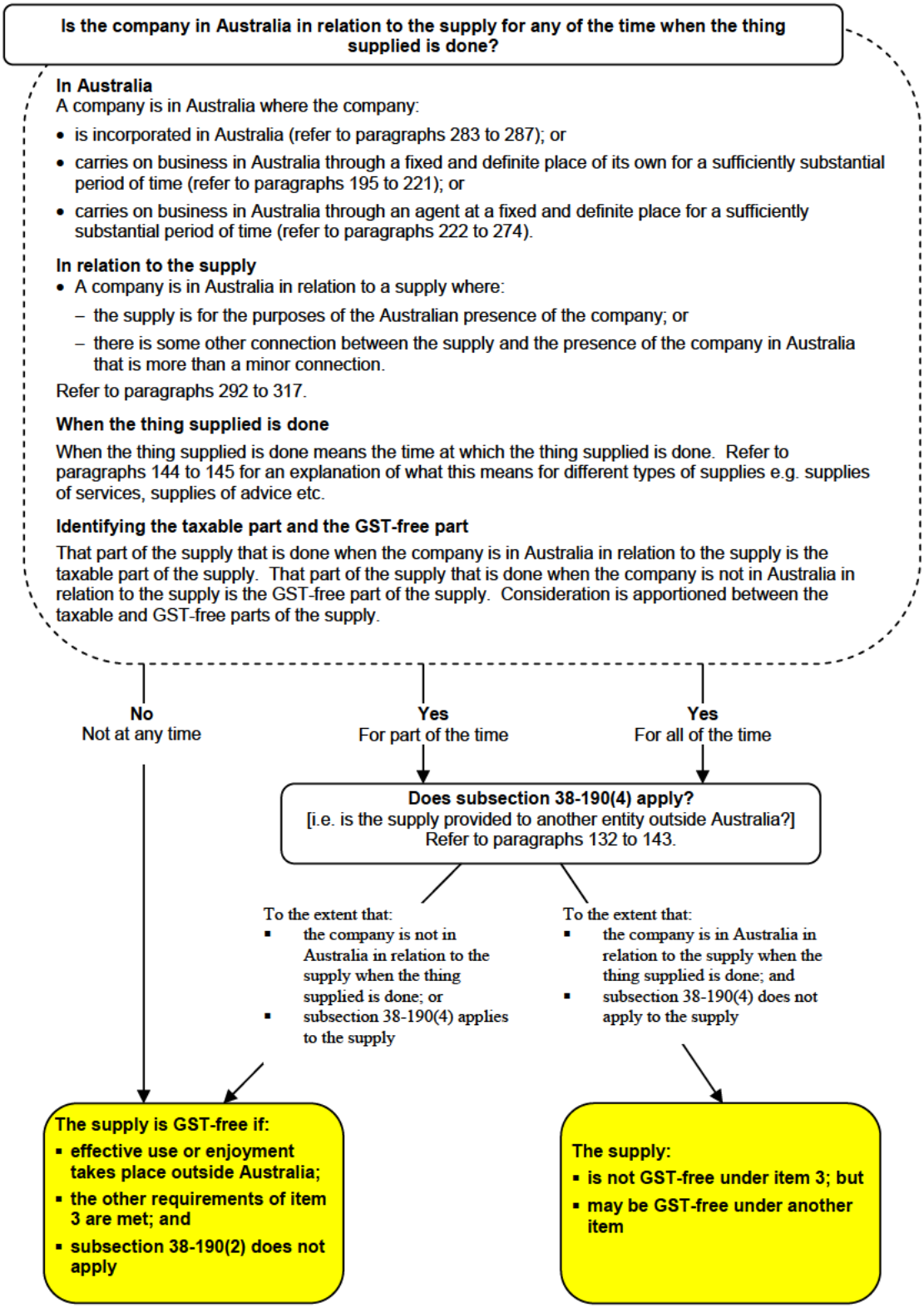
FLOWCHART 3 - Supply made to a non-resident company (including a non-resident company acting in the capacity of trustee of a trust)

Item 2 and paragraph (b) of item 4



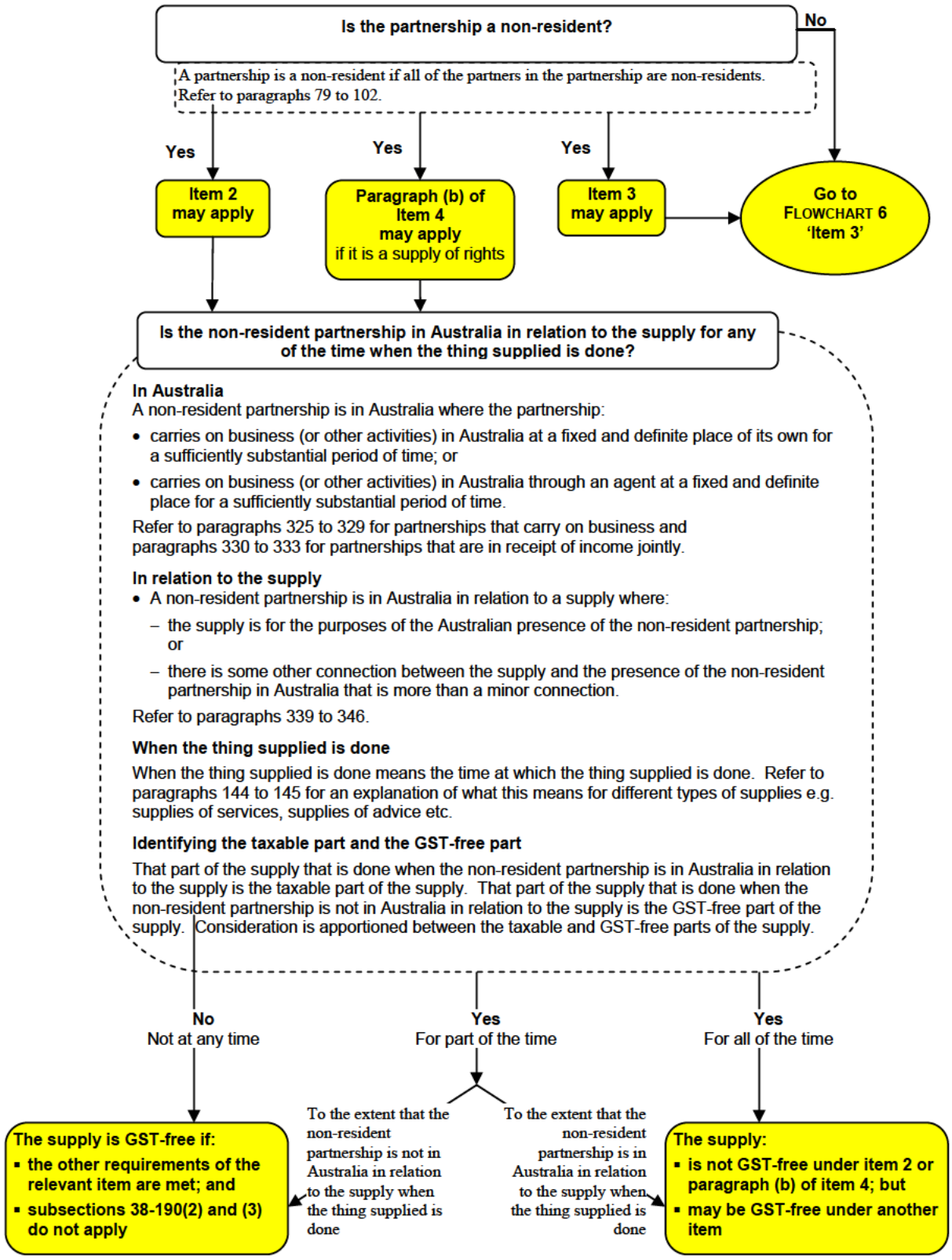
FLOWCHART 4 - Supply made to a company (including a company acting in the capacity of trustee of a trust). Company includes a non-resident company.

Item 3



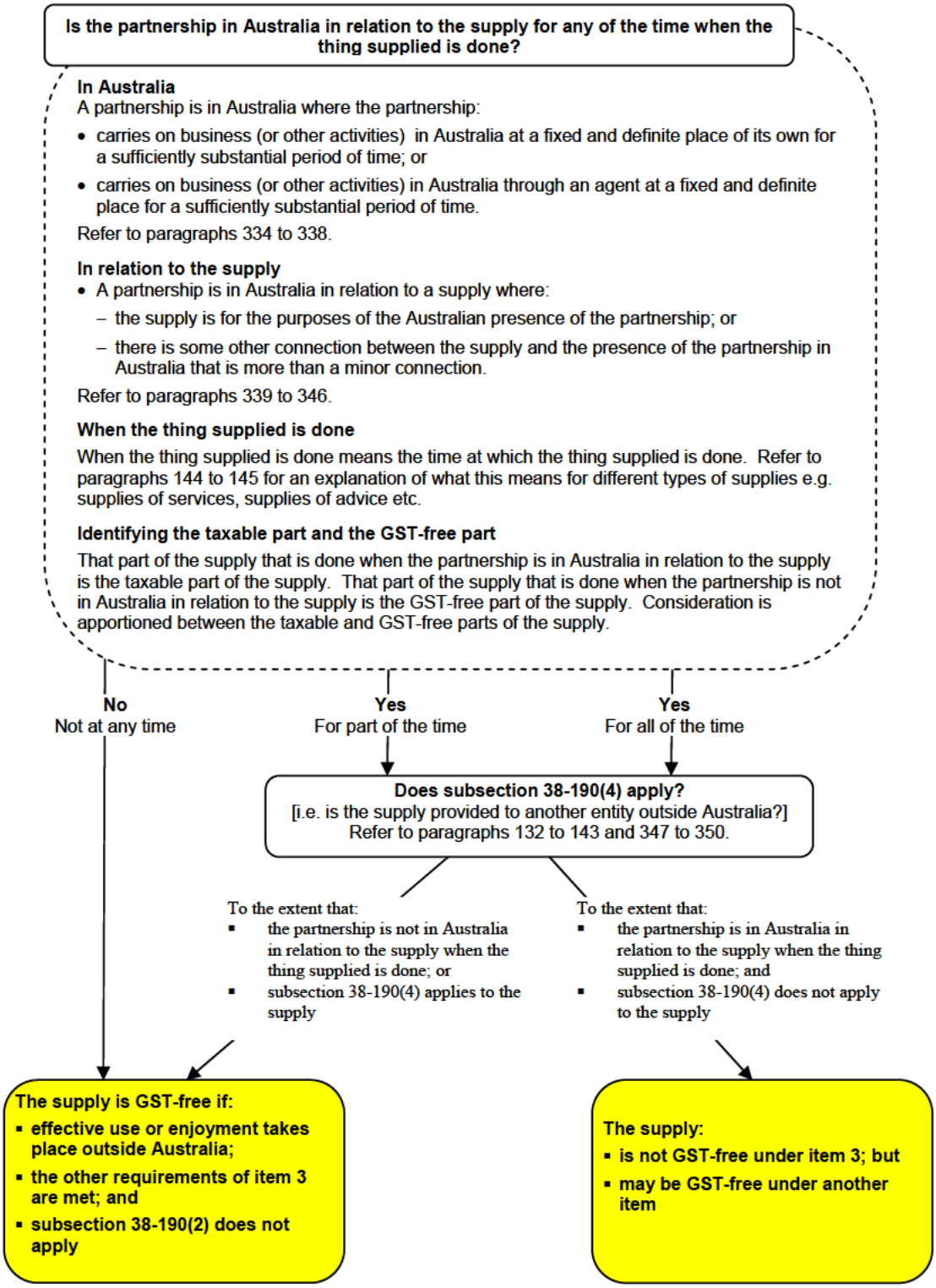
FLOWCHART 5 - Supply made to a non-resident partnership (other than a non-resident corporate limited partnership)

Item 2 and paragraph (b) of item 4



FLOWCHART 6 - Supply made to a partnership (other than a corporate limited partnership). Partnership includes a non-resident partnership.

Item 3



Explanation (this forms part of the Ruling)

Overview of items 2, 3 and paragraph (b) of item 4

38. Section 38-190 applies to 'Supplies of things, other than goods or real property, for consumption outside Australia'. The items in the table in subsection 38-190(1) set out supplies of things, other than goods or real property, for consumption outside Australia that are GST-free where certain requirements are met.

39. The policy intention, as evidenced by the heading to the table in that subsection, is to treat supplies of services or things other than goods or real property as GST-free supplies where consumption of those supplies occurs outside Australia. Thus, the export of services and other things are GST-free in the same way that exports of goods are GST-free.[9]

Item 2

40. For a supply to be within the scope of item 2, the supply must be made to 'a non-resident who is not in Australia when the thing supplied is done'. The meaning of 'non-resident' and the requirement that the recipient is not in Australia when the thing supplied is done (the 'not in Australia' requirement) are discussed in Part I (paragraphs 61 to 113) and Part II (paragraphs 129 to 131) respectively.

41. Although not addressed in this Ruling, it is important to note the other requirements of item 2. To be GST-free under item 2, either paragraph (a) or paragraph (b) must be satisfied.

42. For a supply to satisfy paragraph (a) of item 2, the supply must neither be a supply of work physically performed on goods situated in Australia when the work is done nor a supply directly connected with real property situated in Australia. [10]

43. For a supply to satisfy paragraph (b) of item 2, the non-resident must acquire the thing in carrying on the non-resident's enterprise but the non-resident must not be registered, or required to be registered, for GST.

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[9] Refer to the Explanatory Memorandum relating to the Indirect Tax Legislation Amendment Bill 2000 at paragraph 3.30.

[10] For further guidance on these concepts refer to GSTR 2003/7 Goods and services tax: What do the expressions 'directly connected with goods and real property' and 'a supply of work physically performed on goods' mean for the purposes of subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*?

Subsections 38-190(2) and (3)

44. Subsections 38-190(2)[11] and (3)[12] operate to negate, in certain circumstances, the GST-free status that would otherwise apply to a supply covered by item 2.

Item 3

45. Item 3 applies to a supply that is made to 'a recipient'[13] who is not in Australia when the thing supplied is done'.

46. Although not addressed in this Ruling, it is important to note the other requirements of item 3 for a supply to be GST-free. The effective use or enjoyment of the supply must take place outside Australia and the supply must neither be a supply of work physically performed on goods situated in Australia when the work is done nor a supply directly connected with real property situated in Australia. [14]

47. While for the purposes of item 2 and paragraph (b) of item 4, the supply must be made to a non-resident, this requirement does not apply for the purposes of item 3. Item 3 applies to supplies made to recipients, that is, all entities to which a supply is made including non-residents. Item 3 is, therefore, broader in scope and may apply where a supply is made, for instance, to an Australian resident.

48. This means, for example, that a supply made to a company incorporated in Australia which does not come within the scope of item 2 or paragraph (b) of item 4 because the company is not a non-resident (see discussion in Part I at paragraphs 61 to 113 regarding the meaning of 'non-resident') may still be GST-free under item 3 if the other requirements of that item are met.

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[11] For further guidance on subsection 38-190(2) - refer to GSTR 2003/7 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

[12] For further guidance on subsection 38-190(3) - refer to GSTR 2003/D7 Goods and services tax: the scope and application of subsection 38-190(3).

[13] 'Recipient' is defined in section 195-1 of the GST Act and means, in relation to a supply, the entity to which the supply is made.

[14] For further guidance on these concepts refer to GSTR 2003/7 Goods and services tax: What do the expressions 'directly connected with goods and real property' and 'a supply of work physically performed on goods' mean for the purposes of subsection 38-190(1) of the *A New Tax System (Goods and Services Tax) Act 1999*?

Subsection 38-190(4)

49. Subsection 38-190(4) operates to extend the scope of item 3 by treating certain supplies as if they are made to recipients who are not in Australia when the thing supplied is done. Subsection 38-190(4) deems a supply to be a supply made to a recipient who is not in Australia where that supply is made under an agreement with an Australian resident and is provided to another entity outside Australia. In the absence of subsection 38-190(4), certain supplies would otherwise fail the 'not in Australia' test. Subsection 38-190(4) is discussed in Part II at paragraphs 132 to 143.

Subsection 38-190(2)

50. Subsection 38-190(2)[15] operates to negate, in certain circumstances, the GST-free status that would otherwise apply to a supply covered by item 3.

Paragraph (b) of item 4

51. Under paragraph (b) of item 4, a supply that is made in relation to rights must be made to 'an entity that is not an Australian resident' and is 'outside Australia' when the thing supplied is done.

52. As the term 'non-resident' is defined in section 195-1 to mean 'an entity that is not an Australian resident', it follows that paragraph (b) of item 4 applies to supplies made to non-residents. The meaning of 'non-resident' is discussed at paragraphs 61 to 113.

53. We consider that 'outside Australia' has the same meaning as 'not in Australia' in items 2 and 3. This is supported by the use of the terms in the legislation. The topic guide for item 2 refers to 'Supply to non-resident outside Australia' while the words used in the third column to describe the supply are 'supply that is made to a non-resident who is not in Australia'. The discussion of the meaning of 'not in Australia' at paragraphs 129 to 131 is relevant, therefore, for the purposes of applying paragraph (b) of item 4.

[15] For further guidance on subsection 38-190(2) - refer to GSTR 2003/7 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

Subsection 38-190(2)

54. Subsection 38-190(2)[16] operates to negate, in certain circumstances, the GST-free status that would otherwise apply to a supply covered by item 4.

How the various requirements of items 2, 3 and paragraph (b) of item 4 are discussed in this ruling

55. We have divided the explanation into four parts.

56. In Part I, we explain when an entity is a non-resident for the purposes of item 2 and paragraph (b) of item 4. Both these provisions apply only to supplies made to non-residents. We also explain when a supply is made to a non-resident for the purposes of each of these items and when a supply is made to a recipient for the purposes of item 3.

57. In Part II, we discuss the expressions 'not in Australia'; 'outside Australia'; and 'when the thing supplied is done'. We also explain the application of subsection 38-190(4).

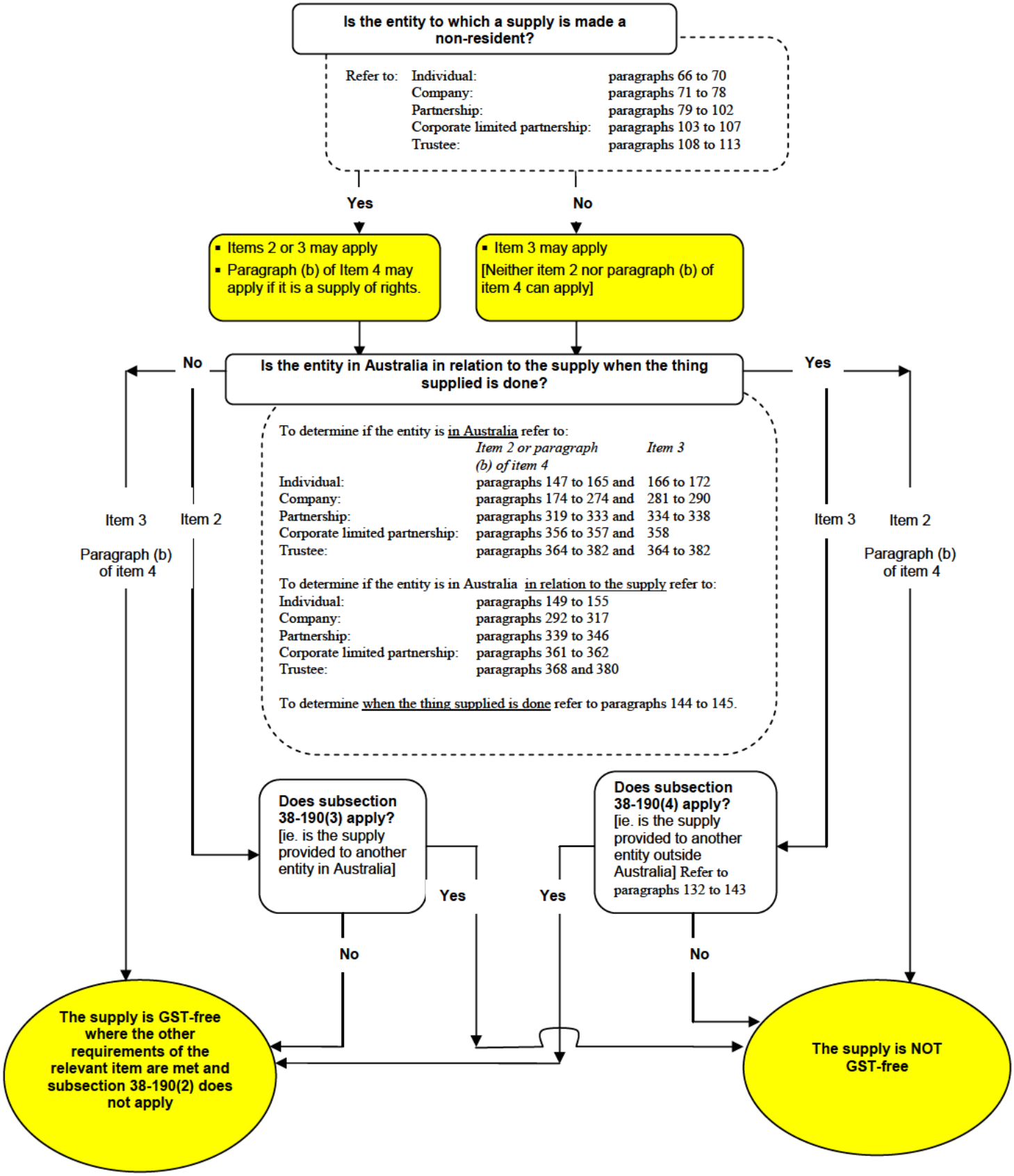
58. In Part III, we explain, in terms of specific entity types, when an entity is 'not in Australia' (the 'not in Australia requirement'). We do this by describing when an entity is in Australia in relation to the supply. We also explain the requirement for apportionment of the supply where the non-resident or other recipient of a supply is in Australia in relation to the supply for part of the time when the thing supplied is done. We discuss the need to apportion the consideration between the GST-free and taxable parts of the supply.

59. Part IV contains further examples to illustrate the concepts discussed in the Ruling.

60. The flowchart on the next page is a guide to the requirements of items 2, 3 and paragraph (b) of item 4. Where those requirements are discussed in this Ruling paragraph references are given.

[16] For further guidance on subsection 38-190(2) - refer to GSTR 2003/7 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

NB: this flowchart is a general guide only and should be used in conjunction with the relevant paragraphs of this ruling.



Part I

When is a supply made to an entity that is a non-resident for the purposes of item 2 and paragraph (b) of item 4?

61. The term 'non-resident' is defined in section 195-1 to mean 'an entity that is not an Australian resident'. Entities, for GST purposes, are listed in subsection 184-1. The list includes, for example, individuals, companies, trusts and partnerships.

62. 'Australian resident' is defined in section 195-1 to mean 'a person who is a resident of Australia for the purposes of the ITAA 1936'.

63. A ***resident of Australia*** is defined in subsection 6(1) of the ITAA 1936 and means:

(a) a person, other than a company, who resides in Australia and includes a person -

(i) whose domicile is in Australia, unless the Commissioner is satisfied that his permanent place of abode is outside Australia;

(i) who has actually been in Australia, continuously or intermittently, during more than one-half of the year of income, unless the Commissioner is satisfied that his usual place of abode is outside Australia and that he does not intend to take up residence in Australia; or

(i) who is:

(A) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; or

(B) an eligible employee for the purposes of the *Superannuation Act 1976*; or

(C) the spouse, or a child under 16, of a person covered by subsubparagraph (A) or (B); and

(b) a company which is incorporated in Australia, or which, not being incorporated in Australia, carries on business in Australia, and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents of Australia.

64. A supply is *made* to a non-resident where that non-resident is the entity that contracts with the supplier for the making of the supply.

65. Sometimes, a supplier makes the supply to a non-resident but the thing to be supplied under the contractual arrangements is in fact provided or required to be provided to another entity. If that other entity is in Australia the GST-free status under item 2 is negated.[17]

A supply is made to an individual who is a non-resident

66. A supply that is made to an individual is a supply to a non-resident if the individual is not a resident of Australia as defined in subsection 6(1) of the ITAA 1936.

67. Residency status is a question of fact and is one of the main criteria that determine an individual's liability to Australian income tax. Taxation Ruling TR 98/17[18] provides guidance on determining residency status under the income tax definition.

68. Item 2 applies to a supply that is made to a non-resident individual who is not in Australia when the thing supplied is done.

69. Paragraph (b) of item 4 applies to a supply of rights to a non-resident individual who is outside Australia when the thing supplied is done.

70. The meaning of 'not in Australia' 'outside Australia' and 'when the thing supplied is done' is discussed in the next Part at paragraphs 129 to 131 and 144 to 145. The application of the 'not in Australia' test to non-resident individuals is discussed in Part III at paragraphs 147 to 165.

A supply is made to a company that is a non-resident

71. A supply that is made to a company is a supply to a non-resident if the company is not a resident of Australia.

72. As defined in subsection 6(1) of the ITAA 1936, a company is a resident where the company is incorporated in Australia or, if not incorporated in Australia, it carries on business in Australia and has either its central management and control in Australia or its voting power controlled by shareholders who are residents of Australia.

73. Thus where a company is incorporated in Australia under the *Corporations Act 2001* ('Corporations Act'), it is a resident.

74. Bodies corporate can be incorporated under legislation other than the Corporations Act. For example, the *Associations Incorporation Act 1981* (Qld) ('Associations Incorporation Act') provides for associations that are formed for certain specified purposes to be incorporated. Where bodies incorporate under this Act,

[17] Subsection 38-190(3).
[18] Income tax: residency status of individuals entering Australia.

or a similar Australian Act, they are residents of Australia for the purposes of this Ruling.

75. Where a company is incorporated outside Australia, it may nonetheless be a resident of Australia where it carries on business in Australia and has either its central management or control in Australia or its voting power controlled by shareholders who are residents of Australia.

76. Item 2 applies to a supply that is made to a non-resident company that is not in Australia when the thing supplied is done.

77. Paragraph (b) of item 4 applies to a supply of rights to a non-resident company that is outside Australia when the thing supplied is done.

78. The meaning of 'not in Australia' 'outside Australia' and 'when the thing supplied is done' is discussed at paragraphs 129 to 131 and 144 to 145. The application of the 'not in Australia' test to non-resident companies is discussed at paragraphs 173 to 274.

A supply is made to a partnership that is a non-resident

The meaning of partnership

79. Although a partnership is not a legal entity separate from its members, it is treated, for GST purposes, as if it were a separate entity.[19] That is, the partnership is recognised as an entity separate from the persons that form the partnership. A supply, acquisition or importation made by (or on behalf of) a partner of a partnership in the capacity as a partner is taken to be a supply, acquisition or importation made by the partnership.[20]

80. A partnership is defined in section 195-1 as having the meaning given by section 995-1 of the *Income Tax Assessment Act 1997* ('ITAA 1997'). A partnership, therefore, means an association of persons carrying on business as partners or in receipt of ordinary income or statutory income jointly *but does not include a company*.

81. On this definition, limited partnerships[21] that are corporate limited partnerships (as defined in section 94D of the ITAA 1936) and which are treated as companies under the income tax law[22] are not partnerships for GST purposes.

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[19] The definition of 'entity' in subsection 184-1(1) is set out at paragraph 115 of this Ruling.
[20] Section 184-5.
[21] A limited partnership means a partnership where the liability of at least one of the partners is limited (refer to subsection 6(1) of the ITAA 1936).
[22] Subdivision C, Division 5A of Part III of the ITAA 1936.

A partnership (other than a corporate limited partnership) that is a non-resident

82. On a strict literal interpretation of the definition of non-resident it could be said that any type of entity other than an individual or a company that is a 'resident of Australia', such as a partnership, is a non-resident.

83. Alternatively it could be said that the only entity type recognised by the definitions of 'non-resident' and 'resident of Australia' are non-resident individuals and companies and that, therefore, no entity type other than an individual or company, such as a partnership, is a non-resident.

84. The strict literal view that all partnerships, including partnerships of which all the partners are residents of Australia and which do not carry on any activities outside Australia (referred to here as domestic partnerships) are non-residents is not consistent with the purpose of item 2 of subsection 38-190(1) which is to make GST-free only those supplies made to non-residents outside Australia.

85. On the alternative view, no supply to a partnership would come within the scope of item 2 or paragraph (b) of item 4. However, there is no discernible policy intention to limit the scope of these provisions to certain entity types such as individuals and companies, and exclude others such as partnerships.

86. The adoption of either of these approaches also produces absurd or unreasonable outcomes for other provisions of the GST Act that have application to 'non-residents'. In particular, problems arise with regard to both Divisions 57[23] and 83[24].

Division 83

87. Division 83 allows a non-resident supplier and the recipient of that supply to agree that the GST liability is to be borne by the recipient where certain requirements are met.[25]

88. On the alternative meanings of 'non-resident' discussed above, Division 83 would either apply to all partnerships, including domestic partnerships, or alternatively, it would not apply to any partnership. We consider that neither of these outcomes is intended. Division 83 was inserted in recognition of the fact that many non-resident entities that make supplies that are connected with Australia may not have a

[23] Resident agents acting for non-residents.
[24] Non-residents making supplies connected with Australia.
[25] These requirements are set out in section 83-5.

presence in Australia and may have practical difficulties in providing details necessary for registration.[26]

89. We consider that a partnership, of which all or some of the partners are residents of Australia and which carries on an enterprise in Australia, is not intended to come within the scope of Division 83. Such entities do not have any practical difficulties in complying with the GST legislation. Similarly, it does not give effect to the purpose of Division 83 to exclude from its operation all partnerships including those where all the partners are non-residents and which may find it difficult to provide all the necessary details for GST registration.

Division 57

90. Division 57 provides that a resident agent that makes taxable supplies or importations or creditable acquisitions or importations for a non-resident is liable for the GST payable on those supplies or importations and entitled to the input tax credits on those acquisitions or importations. As explained in the Explanatory Memorandum[27] the reason for this is that if a non-resident is acting through an agent, there is someone in the Australian jurisdiction on whom liability can be placed. Placing the liability on someone who is in Australia decreases the compliance risk.

91. If either of the two approaches discussed above is adopted in interpreting 'non-resident', Division 57 would operate in unintended ways.

92. If all partnerships were 'non-residents' for the purposes of Division 57, resident agents of all partnerships including domestic partnerships would be liable for GST payable and entitled to input tax credits on all supplies and acquisitions made on behalf of the partnerships. We consider that this is not the intended application of Division 57.

93. If, on the other hand, no partnerships were regarded as being non-residents, Division 57 would have no application to partnerships and Parliament's intention to decrease compliance risks would not have effect for a whole class of suppliers, i.e. partnerships.

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[26] Refer to the Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000 at paragraph 3.3.

[27] Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 at paragraph 6.54.

Another approach – our preferred view

94. We consider that a purposive approach should be taken to determine when a partnership is a non-resident for GST purposes.

95. The GST legislation[28] requires us to import the income tax definition of 'non-resident' and consequently the definition of 'resident of Australia' to determine if an entity is a non-resident for GST purposes. This requirement can only be given sensible effect in applying the provisions of the GST law which rely on the definition of 'non-resident' if we have regard to the residency status of the individual and corporate partners.

96. We consider that a supply that is made to a partnership is a supply that is made to a non-resident where all of the partners in the partnership are non-residents.

97. Identifying a partnership as a non-resident where all of the partners are non-residents is consistent with the policy intent to limit the application of item 2 and paragraph (b) of item 4 to supplies made to non-residents outside Australia. Also this approach is supported by the GST definition of non-resident that plainly puts the focus on non-resident individuals and companies.

98. This approach to the interpretation of 'non-resident' achieves an appropriate outcome for Division 57 purposes where the intention is to place the GST liability on a resident agent where the principal is a non-resident . A resident partner is likely to be in the Australian jurisdiction and therefore is someone on whom liability can be placed.[29]

99. This approach also achieves an appropriate outcome for Division 83 as most difficulties encountered in providing necessary details for registration would be expected to occur where the entity has no representation in Australia. The existence of one or more Australian resident partners would be expected to obviate these difficulties.

100. Item 2, therefore, applies to a supply that is made to a partnership of which all the partners are non-resident individuals and/or non-resident companies, and that partnership is not in Australia when the thing supplied is done.

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[28] See section 195-1, definition of 'non-resident'.

[29] Under subsection 50(1) of the *Taxation Administration Act 1953* (TAA 1953), obligations that are imposed under an indirect tax law on a partnership are imposed on each partner, but may be discharged by any of the partners. Subsection 50(2) of the TAA 1953 provides that the partners are jointly and severally liable to pay any amount that is payable under an indirect tax law by the partnership.

101. Paragraph (b) of item 4 applies to a supply of rights to a partnership of which all the partners are non-resident individuals and/or non-resident companies and that partnership is outside Australia when the thing supplied is done.

102. The meaning of 'not in Australia' 'outside Australia' and 'when the thing supplied is done' is discussed in Part II at paragraphs 129 to 131 and 144 to 145. The application of the 'not in Australia' test to a partnership that is a non-resident is discussed in Part III at paragraphs 319 to 333.

A corporate limited partnership that is a non-resident

103. As the definition of company in section 195-1 includes any other unincorporated association or body of persons excluding a partnership, a corporate limited partnership is a company for GST purposes. A corporate limited partnership is a company for income tax law purposes and is a resident of Australia for purposes of the income tax law if:

- the partnership was formed in Australia;
- the partnership carries on business in Australia; or
- the partnership's central management and control is in Australia.[30]

104. Accordingly, we consider that a supply made to a corporate limited partnership is a supply made to a non-resident if:

- the partnership was formed outside Australia;
- the partnership does not carry on business in Australia; and
- the partnership's central management and control is not in Australia.

105. Item 2 applies to a supply that is made to a corporate limited partnership that is a non-resident and that partnership is not in Australia when the thing supplied is done.

106. Paragraph (b) of item 4 applies to a supply of rights to a corporate limited partnership that is a non-resident and that partnership is outside Australia when the thing supplied is done.

107. The meaning of 'not in Australia' 'outside Australia' and 'when the thing supplied is done' is discussed at paragraphs 129 to 131 and 144 to 145. The application of the 'not in Australia' test to a corporate limited partnership that is a non-resident is discussed at paragraphs 356 to 357.

[30] Section 94T of the ITAA 1936.

A supply is made to a trustee that is a non-resident

108. While a trust is listed as an entity,[31] subsection 184-1(2) provides that the trustee of a trust (or of a superannuation fund) is taken to be an entity consisting of the person who is the trustee, or the persons who are the trustees, at any given time. A person may be, either an individual or a company. The individual or corporate trustee is the entity that makes supplies and acquisitions.

109. Accordingly, we consider that a supply that is made to a trust (or a superannuation fund) is a supply that is made to a non-resident if the trustee of the trust (or superannuation fund) is either:

- an individual who is not a resident of Australia for income tax purposes; or
- a company that is not a resident of Australia for income tax purposes.

110. Item 2 applies to a supply that is made to a trustee that is a non-resident who is not in Australia when the thing supplied is done.

111. Paragraph (b) of item 4 applies to a supply of rights to a trustee that is a non-resident who is outside Australia when the thing supplied is done.

112. The meaning of 'not in Australia' 'outside Australia' and 'when the thing supplied is done' is discussed at paragraphs 129 to 131 and 144 to 145. The application of the 'not in Australia' test to a trustee that is a non-resident is discussed at paragraphs 366 to 370 and 372 to 377.

Trusts with multiple trustees

113. If a trust has more than one trustee, a supply made to those trustees in their capacities as trustees of a trust is a supply made to a non-resident only where all of the trustees are non-residents, i.e. non-resident individuals and/or non-resident companies.

When is a supply made to a recipient for the purposes of item 3?

114. Recipient is defined in section 195-1 and means, in relation to a supply, the entity to which the supply was made.

115. An entity is defined in subsection 184-1(1) of the GST Act to mean any of the following:

(a) an *individual;

[31] Paragraph (g) of subsection 184-1(1).

(b) a body corporate;

(c) a corporation sole;

(d) a body politic;

(e) a *partnership;

(f) any other unincorporated association or body of persons;

(g) a trust; and

(h) a superannuation fund.

The asterisked terms (*) are defined in section 195-1.

116. Unlike item 2, item 3 applies, therefore, to all entities including entities that are non-residents.

117. A supply is *made* to an entity where that entity contracts with the supplier for the making of the supply.

A supply is made to an individual

118. Item 3 applies to any supply that is made to an individual who is not in Australia when the thing supplied is done and the other requirements of the item are met. Unlike item 2, item 3 may apply irrespective of whether that individual is a resident of Australia or a non-resident.

119. This means that even if the recipient of a supply is an Australian resident individual, the supply may be GST-free under item 3 if the individual is not in Australia when the thing supplied is done and the other requirements of item 3 are met.

120. The meaning of 'not in Australia' and 'when the thing supplied is done' is discussed at paragraphs 129 to 131 and 144 to 145. The application of the 'not in Australia' test to individuals for the purposes of item 3 is discussed at paragraphs 166 to 172.

A supply is made to a company

121. Item 3 applies to any supply that is made to a company that is not in Australia when the thing supplied is done and the other requirements of the item are met. Unlike item 2, item 3 may apply to a supply made to a company even if the company is a resident of Australia.

122. The meaning of 'not in Australia' and 'when the thing supplied is done' is discussed at paragraphs 129 to 131 and 144 to 145. The application of the 'not in Australia' test to companies for the purposes of item 3 is discussed at paragraphs 281 to 290.

A supply is made to a partnership

123. Item 3 applies to any supply that is made to a partnership that is not in Australia when the thing supplied is done and the other requirements of the item are met. Unlike item 2, item 3 may apply irrespective of whether the partnership has a partner that is a resident of Australia.

124. The meaning of 'not in Australia' and 'when the thing supplied is done' is discussed at paragraphs 129 to 131 and 144 to 145. The application of the 'not in Australia' test to partnerships for the purposes of item 3 is discussed at paragraphs 334 to 338.

A supply is made to a corporate limited partnership

125. Item 3 applies to any supply that is made to a corporate limited partnership that is not in Australia when the thing supplied is done and the other requirements of the item are met. Unlike item 2, item 3 may apply to a supply made to a corporate limited partnership even if the partnership is a resident of Australia.

126. The meaning of 'not in Australia' and 'when the thing supplied is done' is discussed at paragraphs 129 to 131 and 144 to 145. The application of the 'not in Australia' test to corporate limited partnerships for the purposes of item 3 is discussed at paragraphs 358 to 360.

A supply is made to a trustee

127. Item 3 applies to any supply that is made to an individual or corporate trustee that is not in Australia when the thing supplied is done and the other requirements of the item are met. Unlike item 2, item 3 may apply even though the trustee is a resident of Australia.

128. The meaning of 'not in Australia' and 'when the thing supplied is done' is discussed at paragraphs 129 to 131 and 144 to 145. The application of the 'not in Australia' test to trusts for the purposes of item 3 is discussed at paragraphs 378 to 379.

Part II

The meaning of 'not in Australia' and 'outside Australia'

129. The requirement that a supply is made to a non-resident or recipient who is 'not in Australia' (items 2 and 3 respectively) 'when the thing supplied is done' is in effect a proxy test for determining where the supply to that entity is consumed. The presumption is that

if the non-resident or other recipient of the supply is 'not in Australia' when the thing supplied is done, the supply of that thing is for consumption outside Australia and is GST-free, provided the other requirements of the item are met.

130. As the place of consumption is, in effect, determined by looking at the location of the entity to which the supply is made at the relevant time, we consider that the expression 'not in Australia' requires that the non-resident or other recipient is not in Australia *in relation to the supply*. This means that a non-resident or other recipient of a supply may satisfy the 'not in Australia' requirement where that entity is in Australia but not in relation to the supply.

131. As noted at paragraph 53 above, we consider that the requirement in paragraph (b) of item 4 that a recipient of a supply is 'outside Australia' is the same as the requirement that a recipient of a supply is 'not in Australia'. Thus, a recipient of a supply is outside Australia if the recipient is not in Australia in relation to the supply.

Subsection 38-190(4)

132. For the purposes of item 3, subsection 38-190(4) treats a supply to a recipient who is in Australia in relation to the supply as if it were a supply to a recipient who is not in Australia where:

- the supply is made under an agreement entered into, whether directly or indirectly, with an Australian resident; and
- that supply is provided, or the agreement requires it to be provided, to another entity outside Australia.

The supply is made under an agreement entered into, whether directly or indirectly, with an Australian resident

133. For subsection 38-190(4) to apply to a supply that is made to a recipient who is in Australia in relation to the supply, the supply must be made under an agreement entered into, directly or indirectly, with an Australian resident.

134. The agreement is entered into directly with an Australian resident where the parties to the agreement are an Australian resident and the supplier.

135. In the context of subsection 38-190(4), we consider that entering into an agreement indirectly with an Australian resident occurs where an entity such as a nominee, agent, trustee or the like enters into the agreement on behalf of the supplier or the Australian resident. For example, a supplier may enter into an agreement with an

agent, or representative, or associate of the Australian resident acting on behalf of the Australian resident.

136. A Draft GST Ruling[32] about the application of subsection 38-190(3), includes a more detailed explanation of what it means for a supply to be 'made under an agreement entered into, whether directly or indirectly, with …' [33]. The principles explained in that Ruling also apply for the purposes of interpreting the same words in subsection 38-190(4).

Australian resident

137. 'Australian resident' is defined in section 195-1 and means a person who is a resident of Australia for the purposes of the ITAA 1936.[34]

138. Whether a supply is made under an agreement with an Australian resident is examined more fully in Part III when considering the application of item 3 and subsection 38-190(4) to specific entity types.

That supply is provided, or the agreement requires it to be provided, to another entity outside Australia

139. That supply refers to the supply made to a recipient who is in Australia in relation to the supply. The Draft GST Ruling referred to in paragraph 136 above includes a detailed explanation of what it means for a supply to be 'provided to another entity'. The principles explained in that Ruling also apply for the purposes of interpreting the same words in subsection 38-190(4).

140. Subsection 38-190(4), like subsection 38-190(3), recognises that a supply may be contractually made to one entity (which must be a non-resident entity for the purposes of subsection 38-190(3)) but provided in fact to another entity. If that other entity is located outside Australia, subsection 38-190(4) recognises that the location test used in item 3 should take into account the location of the entity to which the thing supplied is actually provided.

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[32] Currently GSTR 2003/D7 Goods and Services Tax: the scope of subsection 38-190(3) and its application to supplies of things (other than goods or real property) made to non-residents that are otherwise GST-free under item 2 of the table in subsection 38-190(1).

[33] While subsection 38-190(3) applies only to supplies covered by item 2, like subsection 38-190(4), it applies where a supply that is made under an agreement with one entity is 'provided, or the agreement requires it to be provided, to another entity'.

[34] The definition in the ITAA 1936 is set out at paragraph 63 of this Ruling.

141. Based on the commentary in the Explanatory Memorandum for subsection 38-190(4),[35] the following examples illustrate the types of supplies covered by subsection 38-190(4):

- a supply of mobile telephone roaming made to an Australian employer but provided to an employee outside Australia; and
- a supply of training services made to an Australian employer but provided to employees attending a training course conducted outside Australia.

Example 1 – supply made to an Australian company and provided to employees outside Australia

142. *BrisAir Pty Ltd, a Brisbane based airline, enters into an agreement with Australian Hospitality Training ('AHT') to have its employees attend a training course in Fiji. Subsection 38-190(4) applies to treat BrisAir as not in Australia when the training services are performed as, under the agreement with AHT, the training is provided to another entity, the employees, outside Australia.*

Example 2 – supply made to an Australian company and provided to employees outside Australia.

143. *BrisAir's contract with a telecommunications provider allows the employees to access mobile phone roaming while they are in Fiji. Subsection 38-190(4) applies to treat this supply as being made to a recipient who is not in Australia, because the supply is provided to another entity, the employees, outside Australia.*

The meaning of 'when the thing supplied is done'

144. 'When' the thing supplied is done means the time at which the thing supplied is done. The phrase 'the thing supplied is done' has the same meaning as the expression 'the thing is done' in paragraph 9-25(5)(a). Under that paragraph, a supply is connected with Australia if the thing is done in Australia.

[35] Refer to paragraph 3.27 of the Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000.

145. Consistent with GSTR 2000/31:[36]

- *if the thing supplied is a service* - when the service is done refers to the period of time during which the service is performed;
- *if a supply is the provision of advice or information and the supply involves work to create, develop or produce that information or advice for the recipient* - the thing supplied is the performance of services. When the thing supplied is done includes that period of time during which the advice is prepared, produced or created, as the case may be;
- *if the supply is an instantaneous provision of advice or information* - when the thing supplied is done is the time at which the advice or information is provided;
- *if the supply is the creation, grant, transfer, assignment or surrender of a right* - the thing supplied is done at the time the right is created, granted, transferred, assigned or surrendered; and
- *if the supply is the entry into, or release from, an obligation to do anything, or refrain from an act, or to tolerate an act or situation* - when the thing supplied is done is the time at which the obligation is entered into or the release is effected.

Part III

146. This Part explains, in terms of specific entity types, when an entity is in Australia in relation to the supply. It explains this under the following headings:

Section heading	Paragraph reference
When is an individual in Australia in relation to the supply?	147 to 172
When is a company in Australia?	173 to 291
Is the company in Australia in relation to the supply?	292 to 317
When is a partnership (other than a corporate limited partnership) in Australia?	319 to 338

[36] GSTR 2000/31 Goods and Services Tax: supplies connected with Australia.

Section heading	Paragraph reference
Is the partnership (other than a corporate limited partnership) in Australia in relation to the supply?	339 to 346
When is a corporate limited partnership in Australia?	353 to 360
Is the corporate limited partnership in Australia in relation to the supply?	361 to 363
When is a trustee of a trust in Australia in relation to the supply?	364 to 385
Apportionment	386 to 414

When is an individual in Australia in relation to the supply?

Item 2 and paragraph (b) of item 4 - non-resident individuals

147. In the case of supplies made to an individual, we consider that the physical location of the individual establishes whether that individual is in Australia when the thing supplied is done.

148. Where a supply is made to a non-resident individual and that individual is physically present in Australia when the thing supplied is done, the individual is in Australia. However, the individual must be in Australia in relation to the supply.

In relation to the supply

149. A non-resident individual may be physically present in Australia when the thing supplied is done, but that presence may be unrelated to the supply. If that individual is in Australia on matters unrelated to the supply, the individual recipient is in Australia but not 'in relation to the supply'.

150. For example, if a non-resident individual is in Australia on holidays and has no contact with the supplier, the presence of the non-resident individual in Australia when the thing supplied is done is not in relation to the supply.

151. Where a non-resident individual recipient of a supply is physically in Australia and in contact with the supplier, we consider that presence is in relation to the supply. However, if that contact is limited to contact of a simple administrative nature, such as checking on the progress of the supply, we consider that the presence of the non-resident individual is not in relation to the supply.

Example 3 – individual presence in Australia but not in relation to the supply

152. *A supply of legal services is made to a non-resident sole trader who is in Australia on holiday for part of the time when the services are performed. The non-resident individual has no contact with the supplier while in Australia. The presence of the individual in Australia is not in relation to the supply.*

Example 4 – individual presence in Australia in relation to the supply

153. *A non-resident individual falls over while shopping in a store in Australia. While in Australia the individual seeks legal advice from an Australian legal firm. The legal firm, on behalf of the individual, writes to the shopping centre seeking out of pocket expenses and a small amount for pain and suffering. The non-resident individual is in Australia in relation to the supply of legal advice to the extent that the individual is in Australia and in contact with the supplier.*

Example 5 – individual presence in Australia in relation to the supply

154. *Aus Entertain Co is an Australian company. Aus Entertain Co enters into a contract to provide services to an individual performer who is not a resident of Australia. The contract requires Aus Entertain Co to arrange work in nightclubs for the non-resident performer in Australia and to represent the performer's interests during the course of the engagements.*

155. *If the non-resident performer is in Australia to work in the nightclubs when the service is performed by Aus Entertain Co, to the extent that the non-resident is in contact with Aus Entertain Co while in Australia, the presence of the performer in Australia is in relation to the supply by Aus Entertain Co.*

Representatives in Australia of a non-resident individual

156. As the focus is on the whereabouts of the individual to whom the supply is made, the location of a representative (including an agent) of that individual is not relevant. The presence of a representative in Australia does not alter the fact that the individual is not physically present in Australia. In this regard, item 2 uses the words 'the non-resident who' indicating that it is only the whereabouts of the individual to whom the supply is made that is in question.

157. This means that if a non-resident sole trader carries on business or other activities in Australia through an agent and a supply is made to that non-resident but through an agent in Australia acting on behalf of the individual sole trader who is not physically in Australia when the thing supplied is done, the sole trader is not in Australia. The supply is GST-free under item 2 provided the other requirements of the item are met.

158. There is no distinction made, for the purposes of determining whether an individual recipient of a supply is in Australia, between supplies made to an individual acting in a private capacity and supplies made to an individual carrying on a business. In each case presence in Australia is established by identifying where the individual recipient is located at the relevant time.

Example 6 – representative in Australia acting on behalf of a non-resident individual

159. *A non-resident tourist is injured while visiting Australia and initiates a claim for damages after returning home. The presence of a solicitor in Australia acting on behalf of the injured individual does not mean that the individual is in Australia for the purposes of item 2.*

Example 7 – employee of a non-resident individual in Australia

160. *A non-resident sole trader is receiving legal advice in relation to a possible business opportunity in Australia. An employee is in Australia on behalf of that sole trader to provide information relating to that advice. The presence of the employee in Australia does not make the sole trader in Australia. As long as the sole trader is not physically in Australia, the sole trader is not in Australia for the purposes of item 2.*

Example 8 – presence in Australia of an agent of a non-resident individual

161. *A non-resident sole trader engages a Melbourne solicitor to represent him in an action arising out of a patent infringement in Australia. The solicitor, as agent for the sole trader, briefs a barrister to litigate the matter in an Australian court. The sole trader is not physically in Australia when the legal services of the barrister are performed. The sole trader is not in Australia for the purposes of item 2.*

Example 9 – supply to a managing agent on behalf of a non-resident individual property owner

162. *A non-resident individual owns a residential rental property in Middle Park, Victoria. As he lives in the United Kingdom the property is managed by a Melbourne real estate agent. The agent, on behalf of the non-resident, enters into a contract with a painting contractor for the house to be painted. As the non-resident individual is not physically present in Australia when the thing supplied is done, the individual is not in Australia for the purposes of item 2.*

163. *Even though the supply is directly connected with real property situated in Australia, the supply is GST-free if the non-resident recipient is not registered or required to be registered.* [37]

Alternative view

164. The alternative view is that presence of a non-resident individual in Australia in relation to the supply should take into account the presence of any representative in Australia in relation to the supply such as an agent in Australia.

165. We consider that in the case of non-resident individuals, presence determined on the basis of actual physical presence is the better view. Item 2 does not seem, on the plain words of the section, to contemplate presence of a non-resident individual through a representative. This is to be contrasted with non-resident companies (refer paragraphs 173 to 189) where the presence of its representatives is the only way that presence in Australia can be established.

Item 3 - individuals

166. Item 3 requires that the individual to whom a supply is made is not in Australia when the thing supplied is done and, as explained at paragraphs 147 to 148 above, we consider that the physical presence of an individual establishes whether that individual is in Australia when the thing supplied is done. However, unlike item 2, item 3 may apply whether the recipient of the supply is a resident of Australia or a non-resident.

167. This means that even if the recipient of a supply is an Australian resident individual, the supply may be GST-free under item 3 if the individual is not physically located in Australia when the thing supplied is done and the other requirements of item 3 are met.

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[37] Because the supply is directly connected with real property situated in Australia, it is not GST-free under paragraph (a) of item 2. However, it is GST-free under paragraph (b) of item 2 if the non-resident recipient acquires the thing in carrying on the non-resident's enterprise, but is not registered or required to be registered.

168. If an Australian resident individual satisfies the 'not in Australia' requirement, the effective use or enjoyment of that supply must take place outside Australia for that supply to be GST-free under item 3.

Example 10 – individual not in Australia

169. *An Australian tourist is arrested in Thailand for possession of an illegal substance. While in Thailand waiting for her trial, she receives legal advice from an Australian solicitor. She is not in Australia when the thing supplied is done for the purposes of item 3.*

Application of subsection 38-190(4)

170. Where an Australian resident individual is in Australia when the thing supplied is done, a supply made to that individual may be treated as if the individual is not in Australia if the supply is provided, or the agreement requires it to be provided, to another entity outside Australia.[38]

Non-resident individuals

171. Where a supply is made to a non-resident individual who is not in Australia when the thing supplied is done, item 2 or item 3 may apply. As noted in relation to item 2 at paragraph 149, a non-resident individual may be physically present in Australia when the thing supplied is done, but that presence may be unrelated to the supply. If that individual is in Australia on matters unrelated to the supply, the individual recipient is in Australia but not 'in relation to the supply'.

172. If a non-resident individual is 'not in Australia in relation to the supply', for that supply to be GST-free under item 3, the effective use or enjoyment of that supply must take place outside Australia.

When is a company in Australia?

173. A company is an artificial legal entity that is separate and distinct from its members. Unlike an individual, it does not have a precise physical location. It is therefore necessary to identify the kind of presence that makes a company in Australia.

[38] Subsection 38-190(4). Refer to paragraphs 132 to 143 where this provision is explained in detail.

Item 2 and paragraph (b) of item 4 – non-resident companies

174. Consistent with paragraph 68 of GSTR 2000/31, whether or not a non-resident company is in Australia at the relevant time depends on whether a 'representative' of the company is in Australia at the relevant time.

175. Representative is a term of wide meaning. It refers to one who represents another or others. The representative stands or acts for another or others.

176. The representative of a company may take on a variety of forms and capacities. For example, a company may be represented by anyone from a single employee to a branch of the company. It is necessary, therefore, to establish what level of representation in Australia means that a non-resident company is in Australia.

177. The presence of a non-resident company in Australia is the means by which consumption of the supply in Australia is identified. If the meaning of representative is construed too widely a very minor presence would equate with consumption in Australia in circumstances where this is a harsh result.

178. For example, consider the outcome where a non-resident company with no presence in Australia, sends an employee to Australia to give instructions to, and obtain written advice from, an Australian legal firm, and the employee departs Australia with the advice. On a wide meaning of representative, the presence of the employee in Australia would mean that the non-resident company is in Australia and the 'not in Australia' test is failed. The outcome would be that the supply is treated as a supply that is not for consumption outside Australia and the supply is not GST-free.

179. An alternative is to construe the meaning of representative more narrowly, limiting it to persons who are the directing or controlling mind of the company, such as a director or a senior manager. However, determining who is the very essence of a non-resident company for a particular supply is a difficult test to apply, raising a number of practical problems.[39]

180. This alternative approach can also result in a very minor presence equating with consumption in Australia.

[39] Other issues may arise such as: whether the acts of the individual are contrary to the will of the company, whether the individual has gone outside given authority and the difficulty of determining on the facts whether someone is the controlling mind of the company, for example, an employee has been held to be a controlling mind. See *Tesco Supermarkets Ltd v. Nattrass* [1972] AC 153.

181. If, for example, a non-resident company sent, instead of the employee referred to in paragraph 178 above, a director of the company to Australia to instruct and obtain the legal advice, the presence of the director in Australia would mean that the non-resident company is in Australia and the 'not in Australia' test is failed. Again, the outcome would be that the supply is treated as a supply not for consumption outside Australia and the supply is not GST-free.

182. We need, therefore, to establish presence of a non-resident company in Australia on a basis that is a fair and reasonable proxy for determining the place of consumption.

183. Determining presence of a foreign company[40] in a jurisdiction is an issue that has been faced by the courts in determining whether jurisdiction exists over a foreign company.[41] We have, therefore, considered when a foreign company is present in a jurisdiction according to the jurisdictional case law. The jurisdictional case law recognises that a company is not a natural person who can be physically present. Therefore, the courts have established indicia to assist in determining whether a company is 'present' in a jurisdiction for the purposes of service of originating process such as a writ or enforcing a judgment.

184. At common law, a foreign company is amenable to the jurisdiction of an Australian court if the company carries on business within the court's jurisdiction through its own office or through an agent acting on behalf of the company and that office or agent has a fixed and definite place within the jurisdiction and the business has continued for a sufficiently substantial period of time.[42]

185. We consider that the courts would adopt similar requirements if called on to determine if a non-resident company is in Australia for the purposes of subsection 38-190(1). A presence of this kind, in our view, would be a fair and reasonable proxy test for determining the place of consumption of a supply made to a non-resident company. This approach, in our view, is more likely to produce an outcome under item 2 that is better aligned with the intention to only tax supplies consumed in Australia**.**

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[40] The case law refers to 'foreign company' which is a company that is incorporated outside the relevant jurisdiction (i.e. for an Australian court, a company incorporated outside Australia is a foreign company).

[41] See for example, *Littauer Glove Corporation v. F.W. Millington* (1928) 44 TLR 746; *Sfeir v. National Insurance Co. of New Zealand Ltd* [1964] 1 Ll R 330 and *Vogel v. R.A Kohnstamm Ltd* [1973] 2 QB 133.

[42] See Halsbury's Laws of Australia , 'Conflict of Laws', Chapter 85, paragraph [85-1880].

186. We consider, therefore, that a non-resident company[43] is in Australia for the purposes of item 2 if that company carries on business[44] in Australia through:

(a) a fixed and definite place of its own for a sufficiently substantial period of time; or

(b) an agent at a fixed and definite place for a sufficiently substantial period of time.

187. In addition to producing an outcome that is more aligned with the policy intent to only tax supplies consumed in Australia, this approach also means that guidance on the application of these criteria for presence in Australia of a non-resident company can be found in the jurisdictional case law.

188. This approach is also supported by the broader framework of section 38-190. If a supply is made to a non-resident company that is not in Australia because it does not carry on business in Australia, but the supply is provided to a representative in Australia such as an employee, the presence of that employee in Australia is addressed by means of subsection 38-190(3). That subsection operates to negate the GST-free status that would otherwise apply to an item 2 supply, where that supply is provided to another entity in Australia, such as an employee. Thus, while presence of the non-resident company in Australia is determined by whether or not the company is carrying on business in Australia, another provision takes into account the presence of representatives in Australia where the non-resident company does not carry on business in Australia.

189. Below we consider each of the requirements to determine if a non-resident company is in Australia. If a non-resident company is determined to be in Australia on the basis of these criteria it is then necessary to determine if the company is in Australia 'in relation to the supply'. This is discussed at paragraphs 292 to 317.

Indicators of when a non-resident company is in Australia

190. While the test for determining whether a non-resident company is in Australia is as outlined above at paragraph 186, it is possible to identify some strong indicators that a non-resident company is in Australia for the purposes of item 2 or paragraph (b) of item 4.

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[43] References to a non-resident company should be read to include reference to an unincorporated association that is formed outside Australia. Such an association is treated as a 'foreign company' for the purposes of service of process. (Refer to Halsbury's Laws of Australia, 'Conflict of Laws', Chapter 85, paragraph [18-1850]).

[44] Or other activities which do not amount to the carrying on of a business, such as an isolated business transaction.

191. A company incorporated outside Australia is required to register as a foreign company with Australian Securities and Investments Commission ('ASIC') if it wishes to carry on business in Australia.[45] A supplier can check whether a company is registered by conducting a search of the National Names Index on the ASIC website.[46]

192. We consider that it would be reasonable for a supplier to conclude that a non-resident company is in Australia if:

- the company is registered with ASIC, or
- the company has a permanent establishment in Australia for income tax purposes.

193. However, a non-resident company to which the supplier makes a supply may be able to demonstrate to the supplier that, even though it is registered with ASIC or has a permanent establishment, on application of the test set out in this Ruling (at paragraph 186) to its particular circumstances, it (the non-resident company) is not in Australia.

194. Suppliers should be aware that even if a company is not registered with ASIC, it may still be in Australia on an application of the test set out in this Ruling. Similarly, even if a company does not have a permanent establishment in Australia for income tax purposes, it may still be in Australia on an application of the test set out in this Ruling.

A non-resident company carries on business in Australia at or through a fixed and definite place of its own for a sufficiently substantial period of time

195. We consider that if a non-resident company carries on business at a fixed and definite place of its own in Australia and it has carried on, or intends to carry on, its business from such premises by its servants or agents for a sufficiently substantial period of time, that company is in Australia.

196. Where a non-resident company carries on its business in Australia through a branch, the non-resident company is in Australia.

197. A non-resident company is considered to be carrying on business in Australia even though the activities carried on in Australia

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[45] A company incorporated outside Australia that is registered with ASIC is given an Australian Registered Body Number ('ARBN').
[46] The ASIC website address is: http://www.asic.gov.au/

are not a substantial part of, or are no more than incidental to, the main objects of the company.[47]

Place of its own

198. A non-resident company clearly has a place of business of its own if it leases or owns a place at which it conducts business through it servants or agents. However, a place of its own is not limited to such a place. A non-resident company occupies a place as a place of its own where it has a right to be. Evidence of that right is generally to be found in the fact that the company's employees or agents occupy that place for the purposes of its business.

199. Where a non-resident company carries on a business of leasing real property that it owns in Australia, the leased premises does not constitute a place at or through which the leasing activity is carried out. While the leased premises is the asset on which the leasing activities are based, we do not consider it to be a place at which or through which the activities are carried out for the purposes of determining whether the non-resident company is in Australia.

200. This view is supported by the decision in the United Kingdom VAT Tribunal decision, *W.H. Payne & Co* [1996] BVC 2551 (95/1436) 13,668 ('*Payne*'). In *Payne's* case, the Tribunal had to decide whether a company that leased a flat in London to a tenant had a 'business establishment or some other fixed establishment' in the UK within the meaning of section 9 (of the *Value Added Tax Act* 1994) or had a 'fixed establishment' in the UK to which the services of the appellants were supplied within the meaning of article 9 of the Sixth Directive. On the question of whether or not the flat could be said to be a 'fixed establishment' capable of receiving a service, the Tribunal concluded that the flat was not a fixed establishment. The Tribunal said that the location of an asset (the flat) in the same city as a multiplicity of independent contractors carrying out the instructions of the company does not constitute a 'fixed establishment'.

201. If a rental property in Australia is managed by an agent, the non-resident company owner may carry on business in Australia through that agent. Refer to paragraph 255 where this is discussed further.

Fixed and definite place

202. If a non-resident company does not have a fixed and definite place in Australia at, or through which the business of the non-resident company is carried on in Australia, the company is not in Australia.

[47] See *South India Shipping Corporation v. Bank of Korea* [1985] 1 WLR 585 and the discussion at paragraph 216 of this Ruling.

203. The jurisdiction case of *Littauer Glove Corporation v. Millington* (1928) 44 TLR 746 is an example of where a company did not carry on business through a fixed and definite place in a foreign jurisdiction.

204. In that case a managing director of a UK clothiers' merchant company was in the US to see cloth samples and make purchases. The managing director visited various suppliers in New York and other States, viewing samples and placing orders.

205. While in New York he stayed in a hotel. However, he made some use of the sales office of the Union Mills Corp in New York which was the principal supplier of the UK company. Some of his letters were sent to that sales office. He transacted no business there except what he did with that corporation, seeing samples and buying goods. He was served with a writ in the New York sales office of Union Mills Corp. The court held that there was no residence or definite place within the jurisdiction on the part of the UK company. Therefore, the UK company was not subject to the jurisdiction of the New York court.

206. The word 'fixed' connotes a degree of permanence in the same location. A place may be fixed even if it only exists for a short time. Although 'fixed place' excludes a place that is purely temporary, it does not mean everlasting. It is a geographical place with some degree of permanence.

207. The word 'definite' is used in the sense of a distinct place, i.e. a place that can be pointed to as the place at which the non-resident company's business is carried on.

208. The non-resident company owning, leasing or licensing premises in Australia typically evidences such a fixed and definite place. However, it is immaterial whether the fixed place of business is owned or rented by or is otherwise at the disposal of the non-resident company. A place of business may be situated in the business premises of another entity. This may be the case, for instance, where the non-resident company has at its constant disposal premises or part of premises owned by another entity.

209. In the case of an exhibition hall or market place, it is the actual exhibition hall or market place that is the distinct business premises rather than the location of the stand. A stand may be set up at different locations within an exhibition hall or market place at different times, but the premises is still a fixed and definite place.

Sufficiently substantial period of time

210. For a non-resident company to be considered to be in Australia, the business of the non-resident company must have continued, or be intended to continue, at a fixed and definite place for a sufficiently substantial period of time.

211. If a non-resident company were to announce its intention to carry on its own business in Australia, and were to carry it on, at a certain place in this country for a limited period, the mere fact that it carried on the business for only a limited period of time would not prevent the company from being considered in Australia.

212. Sufficiently substantial period of time simply means that there is a time period sufficient for the business of the non-resident company to be conducted in Australia. In *Dunlop Pneumatic Tyre Company, Limited v. Actien-Gesellschaft Fur Motor Und Motorfahrzeugbau Vorm. Cudell & Co* [1902] 1 KB 342 ('*Dunlop*') business was conducted in the foreign country for only nine days. However, that was sufficient time for the non-resident company to be carrying on its business in the UK. Collins MR said:

> In the case of an exhibition, such as the show in the present case, which is largely resorted to by manufacturers for the purpose of exhibiting a particular class of goods, and by customers desirous of purchasing such goods, as much business in the kind of goods exhibited might probably be done in nine days as in as many months in an ordinary town.[48]

Example 11 - intention to continue business

213. *A non-resident company has a newly opened branch carrying on business in Australia. It is the intention of the company that the business is to be carried on indefinitely. The business meets the test of being carried on for a sufficiently substantial period of time.*

Application of the criteria for determining if a non-resident company is in Australia

214. There are a number of jurisdiction cases which are useful to consider when applying the criteria for determining whether a non-resident company is in Australia. That is, whether the non-resident company carries on business in Australia by its servants or agents at a fixed and definite place of its own for a sufficiently substantial period of time.

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[48] *Dunlop Pneumatic Tyre Company, Limited v. Actien-Gesellschaft Fur Motor Und Motorfahrzeugbau Vorm. Cudell & Co* [1902] 1 KB 342, at 348.

215. In *Anglo Australian Foods Ltd v. Credit Suisse* (1988) 1 ACSR 69 ('*Anglo*') a Swiss bank set up a representative office in Australia for the purpose of promoting the interests of the Swiss bank to large potential corporate borrowers. It was not registered as a foreign company in Victoria. The bank sought an order to set aside a summons that was served on the bank's representative office in Australia. However, the bank's case was dismissed as it was found that the Swiss bank was carrying on a business at its Melbourne office. This is because the office was set up to promote the bank's interest and a significant commercial activity was being carried on there.

216. In *South India Shipping Corporation v. Bank of Korea* [1985] 1 WLR 585 ('*South India*') a Korean bank rented offices in London for its promotional and research purposes. The question at issue was whether the rented offices were a place of business for the purposes of being served with a writ. It was conceded by the Korean bank that it was certainly carrying on a business activity at the office in London. The bank leased the office, employed staff and likely, in the course of promotional and research activities, entered into other contractual obligations. However, the London office did not conclude any banking transactions or have bank dealings with the general public. The court found that the London office was a place of business of the foreign bank even though the business activities carried on at those offices were not a substantial part of, or more than incidental to, the main objects of the Koran bank.

217. In *Actiesselskabet Dampskib 'Hercules' v. Grand Trunk Pacific Railway Company* [1912] 1 KB 222 ('*Grand Trunk*') consideration was given to the extent of the business which has to be carried on to establish a sufficient presence within the jurisdiction.

218. At issue was whether the business of raising loans in the United Kingdom for use by a Canadian company in Canada, to build and manage a railway system in Canada, meant that the Canadian company was carrying on business in the UK. An office in London was used by staff of the company and the name of the company was on the door.

219. Buckley LJ said:

> In the present case the company has a paramount, and also a subsidiary, object: its paramount object is to make and run a railway in Canada, to do which a great many things must first happen: it has a subsidiary object, namely, the raising of money to carry out its paramount object. Is this company so carrying on here that subsidiary object as that the company is carrying on business here? I am of opinion that it is. This company makes contracts in this country for the purpose of raising loan capital; it is here by its agents who make such contracts on its behalf and at a fixed place. The cardinal factors are that the company does acts within the

> jurisdiction which are part of its business as a company, and does them at a fixed place within the jurisdiction. The raising of this loan capital is part of the company's business, and it is done here by a London committee constituted of the directors resident in England. They are the company's agents in this country for that purpose. The result is that the defendant company is resident here and is carrying on business here so as to be capable of being served with a writ.[49]

220. In *Dunlop* the defendant hired premises at the Crystal Palace for the purposes of exhibition and to push sales of their goods. It was argued that the defendant could not be said to have carried on business in the UK because they did not carry on the whole of their business in the UK. It was held that:

> It is clearly not necessary that a company should carry on the whole of its business in this country. A substantial part of the defendants' business was the selling of their manufactures, and that was during the show carried on here. Customers had during that period an opportunity of inspecting the defendants' wares, and prices were quoted, and orders accepted for them by the defendants. Nothing more could have been done with regard to the sale of the defendants' wares at their place of business abroad.[50]

221. In cases like *Dunlop*, that is where the carrying on of the business is at a transitory place such as an exhibition hall or market stand, closer scrutiny is needed in respect of the other requirements – fixed and definite place (see paragraphs 202 to 209) and sufficiently substantial period of time (see paragraph 210 to 213).

Carries on business in Australia through an agent at a fixed and definite place for a sufficiently substantial period of time

222. Where a non-resident company has no fixed and definite place of its own in Australia, it may still carry on business in Australia through an agent from some fixed and definite place.

223. The key issue in this kind of situation is whether the non-resident company is itself carrying on business in Australia through a duly appointed agent, or whether the business being conducted is the agent's own business, the non-resident company merely being one of its customers.

224. In *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929 ('*Adams*'), Slade LJ observed:

> …[T]he cases also show that it may be permissible to treat a foreign corporation as resident in this country so as to be amenable to the

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[49] *Actiesselskabet Dampskib 'Hercules' v. Grand Trunk Pacific Railway Company* [1912] 1 KB 222, at 227.

[50] *Dunlop Pneumatic Tyre Company, Limited v. Actien-Gesellschaft Fur Motor Und Motorfahrzeugbau Vorm. Cudell & Co* [1902] 1 KB 342, at 348.

> jurisdiction of our court even if it has no fixed place of business here of its own, provided that an agent acting on its behalf carries on its business (as opposed to his own business) from some fixed place of business in this country.[51]

225. The question of whether or not the agent is carrying on the non-resident company's business or doing no more than carrying on the agent's own business necessitates an investigation of the functions which the agent performs and all aspects of the relationship between the agent and the non-resident company.[52]

226. In this regard it is necessary to weigh up various factors, including but not necessarily limited to the following, to determine whether a non-resident company can properly be regarded as carrying on business in Australia through an agent:

- Was the fixed place of business from which the agent operates originally acquired for the purposes of enabling the agent to carry on the business of the non-resident company?;
- Does the non-resident company directly reimburse the agent for the cost of accommodation or staff at the fixed place of business?;
- Does the non-resident company make other contributions to the financing of the business carried on by the agent?;
- Is the agent remunerated by reference to transactions, for example, by commission, or by fixed regular payments or in some other way? Commission can be an indicator that the agent is carrying on its own business and not that of the non-resident. However, it is not determinative;[53]
- What degree of control does the non-resident company exercise over the running of the business conducted by the agent?;
- Does the agent reserve part of his or her staff or accommodation for the conducting of business related to the non-resident company?;
- Does the agent display the name of the non-resident company at his or her premises or on stationery and, if

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[51] *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929, at 1009.
[52] *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929, at 1010.
[53] See *Saccharin Corporation Ltd v. Chemische Fabrik von Heyden Aktiengesellschaft* [1911] 2KB 516.

so, does it indicate that he or she is an agent of the non-resident company?;

- What business, if any, does the agent transact as principal exclusively on his or her own behalf?;
- Does the agent make contracts with customers or other third parties in the name of the non-resident company or otherwise in such a manner so as to bind it?; and
- If the agent does make contracts so as to bind the non-resident company, does the agent require specific authority in advance before binding that foreign company to contractual obligations?[54]

The non-resident's business involves making contracts for sale, lease or similar

227. Where the business of a non-resident company involves the making of contracts for sales, leases or similar, the authority of the agent to conclude contracts in Australia on behalf of the non-resident is an important factor in establishing whether the non-resident is carrying on business in Australia.

228. If an agent has the power to make contracts on behalf of the non-resident company without seeking the company's approval before binding the non-resident to contractual obligations, this is a factor of great importance in establishing that the agent is carrying on the non-resident company's business. While it is not the sole determinative factor, when coupled with other factors such as the agent displaying the name of the non-resident company on the agent's premises, or the non-resident company reimbursing the rent and staff costs of the agent, there will be little difficulty in establishing that the agent is carrying on in Australia the business of the non-resident. In these circumstances, the non-resident company has, in effect, adopted the agent's place of business as its own, and the non-resident company is in Australia.

229. The following three jurisdiction cases illustrate this.

230. In *Thames and Mersey Marine Insurance Company v. Societa Di Navigazone A Vapore Del Lloyd Austriaco* [1914-15] All ER Rep ('*Thames*') a firm, acting as general agents, issued tickets and made contracts for the carriage of passengers and their luggage and goods by steamers belonging to the Austrian Lloyd company. Also, on behalf of and in the name of the Austrian Lloyd company, the agents insured luggage or goods and advertised in England the sailing of the

[54] These important factors are consistent with those identified by Slade J in *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929, at 1014.

Austrian Lloyd steamers. This was done for 10 years. The defendants also had ticket agencies with limited authority as agents to issue tickets as distinguished from the general agency. The general agents earned a 5% commission on tickets sold by them and 2% on tickets sold by other passenger agencies in England. The general agents were also paid a lump sum of £480 a year for rent, clerks and office expenses.

231. The general agents were held to be carrying on the business of the Austrian company in the UK. The agents had the power to contractually bind the principal without referring each time to the Austrian company for approval. While the agents were paid by way of commission, the agents were also paid an annual lump sum to cover rent, clerks and office expenses.

232. The *Thames* case can be contrasted with *The Lalandia* [1932] All ER Rep 391 ('*Lalandia*').

233. In *Lalandia*, a firm of English shipping agents booked freight and sold passenger tickets in England for a foreign company on a commission basis. Beyond the ordinary duties of shipping agents, the firm transacted no business and had no authority to transact business or enter into any contracts on behalf of the defendant foreign company. The rates of freight and fares were fixed by the defendant. The defendant company had no interest or concern in the agent's offices, the rent for which was paid by the agents. All the staff were servants of the agent. The only remuneration received by the agents was the customary agent's commission.

234. Langton J, in deciding that the agent was carrying on its own business rather than that of the foreign company, contrasted this case with *Thames*. His Honour said:

> …it is important that [the agents in *Thames*] receive a salary for rent and clerks and expenses, whereas [the agents in this case] receive nothing of the kind, and are merely brokers carrying on their own business and receiving a commission for work done from the defendant company and other companies.[55]

235. In *Saccharin Corporation Ltd. v. Chemishe Fabrick Von Heyden Aktiengesellschaft* [1911] 2 KB 516 ('*Saccharin*') the defendants carried on business in Germany and for the purposes of selling their goods in England they employed an agent. That agent took orders for goods and had the power to enter into contracts of sale on behalf of the defendants without having to send them to Germany for their sanction of each sale. The defendants sent some of their goods to be stored at the agent's fixed place. The agent fulfilled contracts made by him for the defendants by delivery of the goods. The agent was paid by way of commission and he did not act

[55] *The Lalandia* [1932] All ER Rep 391 at 397.

exclusively for the defendants. He in fact sold other goods for another principal which competed with the defendant's goods.

236. The issue in this case was whether there was sufficient evidence to show that the defendants occupied the premises as their own or whether the occupation is solely that of the agent. One factor relied upon strongly by the plaintiffs as evidencing that the defendants occupied the premises as a place of their own (that is a place where the defendants have a right to be) was the fact that the defendants sent goods to be stored there.

237. Fletcher Moulton LJ found on the evidence that '…every trade operation is done by [the agent] for the defendants at this fixed address.'[56] Fletcher Moulton J also noted that '…if any one desired to communicate by telegraph or telephone with the defendants in London they would do so by wiring or speaking to [the agent's] office.'[57] It was held that the foreign company was in the UK through the agent who carried on the company's business in the UK.

238. The above three jurisdiction cases illustrate that regard must be had to the overall factors even where the agent has the requisite power to bind. That is, the power to bind the principal without seeking the company's prior approval, on a habitual basis for a sufficiently substantial period of time, is not an exclusive or conclusive test of presence in a foreign jurisdiction. Other factors such as those outlined above at paragraph 226 must also be considered to determine whether the agent's fixed place of business is the non-resident's place of business.

239. This is consistent with the judgement of Slade J in *Adams* where His Honour said:

> We would agree… that the existence of a power in the resident agent to bind the foreign corporation to contracts can be neither an exclusive nor conclusive test of the residence of the corporation itself. …. there are many cases in which the corporation has been held *not* to be carrying on business at the agency notwithstanding the existence of authority of this kind: see eg *The Princess Clementine* [1897] P 18, *The Lalandia* [1933] P 56, [1932] All ER Rep 391 and *The Holstein* [1936] 2 All ER 1660.[58]

240. While it is also relevant to consider other factors where an agent does not have the power to bind the non-resident without seeking the company's approval before binding the non-resident, apart from one case (discussed at paragraphs 247 to 255 below), there does

[56] *Saccharin Corporation Ltd. v. Chemishe Fabrick Von Heyden Aktiengesellschaft* [1911] 2 KB 516, at 525.
[57] *Saccharin Corporation Ltd. v. Chemishe Fabrick Von Heyden Aktiengesellschaft* [1911] 2 KB 516, at 524.
[58] *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929, at 1013.

not appear to be any reported jurisdiction case where it has been held that a foreign corporation the business of which involves making contracts for sale, lease or the like is in the jurisdiction by means of an agent unless the agent has the power to bind the corporation without referring each time to the foreign corporation for approval.

241. Therefore, we consider that if the agent does not have the power to bind the non-resident company without seeking the company's approval before binding that company, it is most unlikely that the agent is doing any more than carrying on the agent's own business. The agent is not carrying on the non-resident company's business in Australia and the non-resident is not in Australia.

242. In the following three jurisdiction cases there was an absence of a power to bind the foreign corporation without its prior approval and the agent was found not to be in the jurisdiction.

243. *Okura & Co Ltd v. Forsbacka Jernverks Aktiebolag* [1914] 1 KB 715 ('*Okura')* involved a Swedish company that employed a firm in London to be its agent. This firm also acted as agents for other firms and also carried on their own business. The agent had no general authority to enter into contracts, but it obtained orders and submitted them to the Swedish company for approval. If the Swedish company confirmed that the agent should accept the orders on its behalf, the agent signed the contracts as agent for the company in London and the goods were shipped directly from the Swedish company to the purchaser.

244. The court held that obtaining orders and submitting them for approval was not enough, the agent had no general authority to enter contracts on behalf of its principal, so the Swedish company could not be found to be carrying on business in the UK and was not present in the jurisdiction for the purpose of serving a writ. (We note also that in this case the agents were the lessees of their offices and they paid the rent themselves. The defendants had no right of access to those offices and never used them. Also, the defendant's name did not appear on the agent's letter paper or other printed documents.)

245. In *Vogel v. R & A Kohnstamm Ltd* [1973] 1 QB 133 ('*Vogel*') an English company had an agent in Israel to seek customers and act as a go-between for any proposed order. As the agent had no power to conclude contracts on behalf of the English company, the presence of the agent did not give the company a presence in Israel.

246. In *National Commercial Bank v. Wimborne* (1979) 11 NSWLR 156 ('*Wimborne*'), Holland J focussed on the fact that the local bank did not make any contracts on behalf of the foreign bank in concluding that the foreign bank was not present in Australia.

247. *The World Harmony* [1965] 2 All ER 139 ('*The World Harmony*') is the only jurisdiction case that we have found in relation to a company the business of which involves making contracts for sale, lease or the like where an agent that has no power to make contracts without submitting the contracts to the non-resident for approval or signature was found to be carrying on the business of the foreign corporation.

248. That case involved a Liberian shipping company and a company in England that managed ships in its business as shipping brokers. The Liberian company owned various ships including The World Harmony and appointed the English shipping brokers, as subagents, to attend to the day-to-day management and operation of the ships, exclusive of operations in the United States. The shipping brokers had offices in London which they paid for themselves. The activities of the shipping brokers were not restricted to ships owned by the Liberian company, but extended to ships owned by nine or ten other corporations.

249. The shipping brokers were not given complete control of these ships. In the performance of their duties they had to conform to such regulations, instructions and directions as might be given by the head agents.

250. Subject to that limitation the shipping brokers were given full power to act, exclusive of the United States, in respect of any ship mentioned in the schedule to the agency agreement. Among other things this included: the collection of compensation due for use of any of the ships; authority to man and provision them; authority to contract for all necessary repairs to maintain them in a seaworthy condition and also to incur and make all payments necessary for the operation, upkeep and maintenance of the ships, including insurance, wages, bunkers, stores, repairs, replacements, pilotage, port fees and so on. The agents also had authority to select offices and crew; to designate brokers, underwriters, docks and so on and approve all prices and fees. For these and other services, which fully appear in the agreement, the shipping brokers were to receive fees annually.

251. While the shipping brokers had no general authority to bind the Liberian company, Hewson J considered the shipping brokers had extremely wide powers. His Honour found that:

> They were in no sense just a ticket or freight office, nor did they act simply as an accommodation address. They attended to the day-to-day management of the World Harmony, among other ships, exclusive of operations in the United States. It has not been suggested that any other corporation did so. ...It is difficult to find who did, except for the [shipping brokers].[59]

[59] *The World Harmony* [1965] 2 All ER 139, at 146.

252. Hewson J acknowledged that the shipping brokers paid their own rent and that the work in relation to the Liberian company was only a fraction of their activities.

253. Hewson J referred to a number of jurisdiction authorities but noted that those cases are only helpful in a very limited degree:

> …none of them really touches the present situation in which there is no evidence of active running of the ship elsewhere in the Western Hemisphere than here in [London].[60]

254. Hewson J commented that if the day-to-day business of operating and controlling this ship was not in fact carried out by the shipping brokers, 'I know not who did. If the [shipping brokers] did so for nine or ten other companies, well, so be it, …'.[61] He concluded:

> In my view, on all the facts of this particular case, the real place in which the business of the [Liberian company] was carried on was, as I have already said, at the [shipping brokers] office in [London], and I find that the [Liberian company's] place of business was in truth here.[62]

255. Having regard to the decision in *The World Harmony* we consider that if, for example, a rental property managing agent attends to the day to day management and operation of a residential rental property in Australia owned and leased by a non-resident company, the agent is carrying on the business of the non-resident company in Australia. This is the case irrespective of whether the agent has the power to conclude leasing contracts on behalf of the non-resident owner In these circumstances, the presence of the agent makes the non-resident company in Australia.[63]

The non-resident's business does not involve making contracts for sales, leases or similar

256. Where the business of the non-resident company does not involve making contracts for sales, leases or similar, we consider that a non-resident company is in Australia if the agent carries on a material part of the non-resident's business.

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[60] *The World Harmony* [1965] 2 All ER 139, at 149.
[61] *The World Harmony* [1965] 2 All ER 139, at 149.
[62] *The World Harmony* [1965] 2 All ER 139, at 149.
[63] As Slade J commented in *Adams v. Cape Industries plc* [1991] 1 All ER, at 1013 'If in any given case all other factors indicate that the business carried on by the representative of a corporation in a particular country was clearly the business of the corporation (rather than that of its representative), it could make no difference that the corporation required him to take its instructions before he actually concluded contracts on its behalf; the existence of such a requirement would not by itself prevent the corporation from being in the country concerned and thus from being amenable to the jurisdiction of its courts.'

257. This is illustrated by the jurisdiction case of *BHP Petroleum Pty Ltd v. Oil Basins Ltd* [1985] VR 725 ('*BHP*').

258. In *BHP* it had to be decided whether, in engaging the services of certain accounting and legal firms in Australia, a foreign company was

> …merely employing solicitors and accountants to carry out certain work for reward or whether, in fact, the work carried out by the solicitors and accountants form[ed] a part and a material part of the defendant's business as a trustee.[64]

259. Murray J found that

> …much of the work done is of the very essence of the defendant's business, namely the receipt of the royalty payments, the ascertainment of the appropriate taxation retention, the apportionment of the payments, the transmission of payments to Weeks Petroleum and to other persons beneficially entitled.[65]

260. The non-resident company's sole purpose was to simply hold and administer, as trustee, various royalties. Therefore, Murray J came to the conclusion that the work carried out by the accountants and solicitors constituted the business of the defendant.

261. In *BHP*, the business of the non-resident did not involve concluding contracts. As Murray J said:

> It is not to the point in my opinion in the present case to say that the solicitors have no independent discretion and no authority to do anything but to carry out the distribution in accordance with instructions received. For that matter, …nor has the defendant itself any such discretion.[66]

262. In these circumstances the power of the agent to conclude contracts in Australia was not relevant.

263. What constitutes a material part of the non-resident's business is a question of fact and degree to be decided on the facts of each case.

Australian subsidiary of non-resident company

264. Where a non-resident company has a subsidiary in Australia, the mere presence of that subsidiary does not mean that the non-resident company is carrying on a business in Australia. The fact that the non-resident company owns or controls a majority shareholding in a subsidiary does not make that company present in Australia.

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[64] *BHP Petroleum Pty Ltd v. Oil Basins Ltd* [1985] VR 725, at 733.
[65] *BHP Petroleum Pty Ltd v. Oil Basins Ltd* [1985] VR 725, at 733.
[66] *BHP Petroleum Pty Ltd v. Oil Basins Ltd* [1985] VR 725, at 733.

265. However, if the subsidiary is acting as agent of the non-resident parent company and carrying on the business of the non-resident company in Australia at some fixed place of business for a sufficiently substantial period of time, the non-resident company is 'in Australia'.

266. The UK VAT case *Customs and Excise Commissioners v. DFDS A/S* (Case C-260/95) [1997] BVC 279 is an example of where a wholly owned subsidiary of a foreign company was held to be a mere auxiliary organ of its parent. An agreement between the two companies designated the subsidiary as a 'general sales and port agent' for the parent company. It was found that the foreign parent company had established its business in the UK by virtue of its agency arrangement with the subsidiary.

267. A jurisdiction case concerning a subsidiary acting as agent is *Commonwealth Bank v. White; ex parte Lloyd's* [1999] VSC 262 ('*White*').

268. In *White*, the Society of Lloyd's (Lloyd's) a UK company had power and authority to regulate and direct the business of insurance in the Lloyd's market. Through its subsidiary, Lloyd's Australia Ltd (Lloyd's Australia), Lloyd's opened a representative office in Australia.

269. The court was satisfied that Lloyd's had a sufficient presence in Australia for the following reasons:

- Lloyd's had an office in Australia for its Australian representatives, Lloyd's Australia;
- both Lloyd's and Lloyd's Australia held out Lloyd's Australia as being the agent of Lloyd's in Australia with authority including that of handling enquiries relating to and promoting Lloyd's business in Australia and handling enquiries from present and prospective members whose continuing interest was vital to the business of Lloyd's;
- there was no evidence that Lloyd's Australia was carrying on any business independently of its Lloyd's function;
- part of the business of Lloyd's Australia involved promoting the Lloyd's insurance market in Australia and representing the business interests of that market with local regulatory authorities. As the business of Lloyd's was not that of buying or selling, the fact that the agent (Lloyd's Australia) did not have the power to bind it by contract is of less significance; and

- Lloyd's had adopted the course of advertising, at least on the internet, that it had established a business presence in Australia through Lloyd's Australia.[67]

Division 57 agents

270. Where a non-resident makes taxable supplies or importations or creditable acquisitions or importations through a resident agent, the special rule in Division 57 applies. Under Division 57, the resident agent is liable to pay the GST on the taxable supplies or importations and is entitled to input tax credits on the creditable acquisitions or importations.

271. The mere existence of a Division 57 agent does not necessarily mean that the non-resident for which it acts is in Australia. However, if the agent is carrying on the business of a non-resident entity other than an individual (including an individual acting in the capacity of trustee of a trust), at a fixed and definite place for a sufficiently substantial period of time, then the non-resident is in Australia for the purposes of subsection 38-190(1).[68]

Example 12 – Division 57 resident agent not carrying on business of the non-resident company

272. *A non-resident shipping company appoints an Australian resident agent to acquire stevedoring services from Australian stevedoring companies on its behalf. The resident agent has the power to enter into binding contracts for these services. Under Division 57, the resident agent is entitled to the input tax credit entitlements for the acquisitions it makes on behalf of the non-resident.*

273. *The place of business from which the agent conducts business is staffed and paid for by the agent. The agent receives a fee for making the creditable acquisitions on behalf of the non-resident entity. The non-resident company has no influence over the running of the agency business. The agent provides agency services to a number of other clients. The agent does not attend to the day to day management and operation of the ships.*

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[67] *Commonwealth Bank v. White; ex parte Lloyd's* [1999] VSC 262, at paragraphs 32 to 36.

[68] Note that the fact that an agent carries on the business of an individual (including an individual in the capacity of trustee of a trust) in Australia does not make that individual in Australia. Refer to paragraphs 156 to 165.

274. *The non-resident company's shipping business is about entering into contracts to transport goods to many destinations around the world. The resident agent does not carry on any part of this business. The resident agent does not have authority to conclude transport contracts on behalf of the foreign entity. The acquisition of stevedoring services by the agent does not amount to the agent carrying on the non-resident company's transport business. The non-resident company is not, therefore, in Australia.*

Supply of agency services by an agent to a non-resident

275. Where an agent carries on the business of a non-resident company in Australia at a fixed and definite place for a sufficiently substantial period of time, that company is in Australia. However, the supply by such an agent of its agency services, that is the supplies that the agent makes to the non-resident company in the course of its own business, may still be GST-free.

276. For supplies of agency services made by the agent to the non-resident, even if the non-resident is in Australia through the agent, that presence is not in relation to the supply[69] of agency services. There is no connection between that supply and the presence of the non-resident. This is because that supply is made because of the absence of any presence.

277. If the other requirements of item 2 are met, the supply of services and other things made by the agent in the course of its own business (agency services) to a non-resident company is a GST-free supply.

278. This treatment of agency services also applies where the entity receiving the services is an entity other than a company, e.g. a partnership.

Example 13 - supply of agency services

279. *Ausage acts as agent in Australia for NZ Co and is carrying on the business of NZ Co in Australia. NZ Co is therefore in Australia. In carrying on the business of NZ Co in Australia, Ausage enters into a contract with Aus Store, an Australian storage company, to secure storage services for stock held in Australia by Ausage on behalf of NZ Co. The supply of storage services to NZ Co is not GST-free as NZ Co is in Australia in relation to the supply.*

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[69] Refer to paragraphs 149 to 155 (individuals), 292 to 317 (companies), 339 to 346 (partnerships) and 361 to 362 (corporate limited partnerships) where 'in relation to the supply' is discussed.

280. *Ausage also charges NZ Co a monthly fee for the agency services it provides to NZ Co in carrying on the business of NZ Co in Australia. Even though NZ Co is in Australia in relation to the supply from Aus Store, it is not in Australia in relation to the supply of the agency services supplied by Ausage. Therefore, the supply of agency services from Ausage to NZ Co is GST-free, provided the other requirements of item 2 are met.*

Item 3 - companies

281. A supply may be GST-free under item 3 where the supply is made to a company that is not in Australia in relation to the supply when the thing supplied is done, whether the company is a resident or a non-resident.

282. To determine whether a company is 'in Australia' for the purposes of item 3 it is necessary to distinguish between companies that are incorporated in Australia and those that are not.

Companies incorporated in Australia

283. By definition,[70] a company incorporated in Australia is a resident of Australia. This means that a supply to a company incorporated in Australia does not come within the scope of item 2 or paragraph (b) of item 4. However, a supply to a company that is incorporated in Australia may be GST-free under item 3 if the requirements of the item are met. The effective use or enjoyment of the supply must take place outside Australia.

284. It is generally accepted that a company is always present in the jurisdiction in which it is incorporated. This inference can be drawn from the comments of Phillimore LJ in *Okura*. Although this case was about whether a Swedish company was in the United Kingdom for the purposes of being served with a writ, Phillimore LJ, at 722, made the following comments about a 'locally situated' corporation:

> I take it that every corporation is prima facie locally situated in the territory of the sovereign power from which it derives its origin; apart from that a corporation has physically no place or attributes of locality, though it may for the purposes of its business occupy a place outside the country of its origin.

285. In Australia, the Corporations Act provides the basis for a national system for the regulation of companies. A company comes into existence as a separate legal entity on registration under the Corporations Act.[71]

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[70] Definition of 'a resident of Australia' in subsection 6(1) of the ITAA 1936.
[71] Section 119 of the Corporations Act.

286. Bodies corporate can be incorporated under legislation other than the Corporations Act. For example the Associations Incorporation Act provides for associations that are formed for certain specified purposes to be incorporated. Associations that incorporate under this Act are not required to register with the ASIC unless they wish to establish an office or carry on business in another state.

287. We consider that a company that is incorporated in Australia is in Australia by virtue of its incorporation in Australia and that an unincorporated association[72] that is formed in Australia is in Australia by virtue of its formation in Australia.

Companies incorporated outside Australia

288. Item 3 may apply where a company that is the recipient of the supply is incorporated outside Australia irrespective of whether the company is a resident of Australia or a non-resident.[73]

289. The test that applies for determining whether a company that is incorporated outside Australia is in Australia for the purposes of item 3 is the same test that applies for determining whether a non-resident company is in Australia for the purposes of item 2 and paragraph (b) of item 4.

290. Therefore, a company is in Australia for the purposes of item 3 if that company carries on business in Australia through:

(a) a fixed and definite place of its own for a sufficiently substantial period of time; or

(b) an agent at a fixed and definite place for a sufficiently substantial period of time.

Indicators of when a non-resident company is in Australia

291. Indicators of when a non-resident company is in Australia for the purposes of item 2 and paragraph (b) of item 4, as discussed at paragraphs 190 to 194, are equally applicable for the purposes of item 3.

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[72] The definition of 'company' in both the GST Act and the ITAA 1997 includes both a body corporate and any unincorporated association or body of persons, but does not include partnerships or non-entity joint ventures.

[73] A company that is incorporated outside Australia is a resident where it carries on business in Australia, and has either its central management and control in Australia or its voting power controlled by shareholders who are residents of Australia. (Refer to the definition of 'resident of Australia' in subsection 6(1) of the ITAA 1936 which is reproduced at paragraph 63 above).

Is the company in Australia in relation to the supply?

292. Even if a company is in Australia, it may not be in Australia in relation to the supply and so can still satisfy the 'not in Australia' requirement in item 2, item 3 and paragraph (b) of item 4. The following principles, which explain when a company is in Australia in relation to the supply, apply to all companies whether they are incorporated in Australia or outside Australia and whether they are residents of Australia or non-residents.

293. To work out whether a company is in Australia in relation to the supply, it is necessary to examine the role the presence of the company in Australia plays in relation to the supply.

294. Clearly if the supply to a company is for the purposes of the Australian presence, for example its Australian branch, representative office or agent if it is a non-resident company, or the Australian head office if it is an Australian incorporated company, the company is in Australia in relation to the supply. There is a connection between the supply and the presence in Australia that is not a minor connection.

295. Where the supply is not for the purposes of the Australian presence, but that Australian presence is involved in the supply, the company is 'in Australia in relation to the supply', except where that involvement is minor.

296. If the involvement of the Australian presence is limited to the carrying out of simple administrative tasks on behalf of the company, as a matter of administrative convenience, that involvement is minor. The connection between the supply and presence is so minor in nature that it is reasonable to conclude that the presence of the company in Australia is not in relation to the supply.

297. Tasks of a simple administrative nature include:

- payment of, or arranging for payment of, the supplier's invoice;
- passing on an e-mail;
- being a point of phone contact to pass on messages;
- being a mailing address or delivery contact;
- being a point of contact for a visiting representative of the company; and
- on-forwarding information.

298. It is recognised that this approach may not always deliver a GST-free outcome for supplies that are clearly for consumption outside Australia. However, items 2, 3 and paragraph (b) of item 4 are formulated in a way that requires the location of the recipient to be identified at the relevant time. Within the legislative framework, the

only limitation that is put on the location of the recipient in Australia is that any presence in Australia must be in relation to the supply.

Example 14 – branch in Australia but not in Australia in relation to the supply

299. *Europe Airways is a non-resident passenger and cargo carrier. It has a number of sales branches in Australia. Europe Airways contracts with Aussie Line, an Australian airline company, to carry goods from Sydney to Melbourne. These freight arrangements are not made through the branches in Australia, and are undertaken solely for the purposes of the overseas Head Office, not for any purposes of the branches.*

300. *Europe Airways is in Australia. The non-resident company carries on business in Australia through a number of branches. However that presence in Australia is not in relation to the supply. The supply of freight services is not for the purposes of any Australian branch and there is no involvement of any branch in that supply.*

Example 15 - branch in Australia but not in Australia in relation to the supply

301. *A Singapore company ('Sing Co') is not a resident of Australia. It has a branch in Australia. Sing Co is considering setting up a joint venture in Australia with a Malaysian company. Sing Co engages an Australian legal firm, Aus Legal, to provide, in writing, legal advice.*

302. *Sing Co requests Aus Legal to deliver the advice to the Australian branch so that it can translate it before forwarding it on. Sing Co is in Australia but not in relation to the supply of legal services. The involvement of the Australian branch is limited to carrying out an administrative task on behalf of Sing Co, as a matter of administrative convenience.*

303. *The fact that the Australian branch translates it into Malay after it is received and before on-forwarding it, does not make Sing Co in Australia in relation to the supply.*

Example 16 - branch in Australia in relation to the supply

304. *A United States company ('US Co') has a branch in Australia. US Co engages a legal firm in Australia ('Aus Legal') to represent it in legal action against an Australian company. US Co sends a director to Australia to provide information to Aus Legal. The director uses an office at the Australian branch, and uses employees*

of the branch to liaise with Aus Legal and to supervise the legal proceedings generally.

305. *The involvement of the branch in Australia in relation to the supply is not limited to administrative tasks of a minor mature. US Co is in Australia in relation to the supply.*

Example 17 – supply for the purposes of an offshore branch of an Australian company - in Australia but not in Australia in relation to the supply

306. *Global Finance Ltd, an Australian based financial institution has a branch in Singapore which operates independently in its routine day to day transactions. Mr Singh, an expatriate of Melbourne currently working in Singapore approached the Singapore branch of Global Finance for a loan. The Singapore branch acquires information from a Melbourne credit rating agency. The head office in Australia does not have any involvement in the supply. The supply of information by the Melbourne agency is a supply to a recipient who is in Australia but not in relation to the supply. Therefore, paragraph (a) of item 3 is satisfied.*

Example 18 – representative office in Australia in relation to the supply

307. *A United Kingdom company ('UK Co') has a representative office in Australia at which it carries on business. UK Co engages Aus Finance, an Australian company, to give advice on the possible acquisition of shares in an Australian company. UK Co instructs its representative office in Australia to give responses to the questions posed by Aus Finance and any other information that may be of assistance to Aus Finance. Some information is supplied in writing, and at other times the information is supplied at meetings held between Aus Finance and the Australian representative office of UK Co.*

308. *The role of the representative office in Australia is not limited to administrative tasks of a minor nature. UK Co is in Australia in relation to the supply.*

Example 19 – supply for the purposes of the branch in Australia

309. *Program Aus contracted to supply a customer-specific computer program to Asia Co, a non-resident company which has a branch in Australia.*

310. *The computer program is for use by Asia Co, including its branch in Australia. As the supply is for the purposes of the Australian branch of Asia Co, Asia Co is in Australia in relation to the supply. It makes no difference whether Program Aus sends the program to the branch directly or whether Program Aus sends the program to Asia Co and then Asia Co sends it on to the branch. It is not relevant whether the program is also for use by the head office or other branch operations outside Australia.*

Example 20 – branch in Australia in relation to the supply of rights

311. *Ausmusic Co grants a licence to reproduce musical compositions to Pacific Distributors Ltd ('PD Ltd'), a company incorporated in New Zealand. PD Ltd carries on business in Australia through a branch in Sydney. The licence is to be exploited by PD Ltd in New Zealand and in Australia through its branch. For the purposes of paragraph (b) of item 4, PD Ltd is in Australia in relation to the supply because the supply is for the purposes of the branch in Australia. The supply is not GST-free under paragraph (b) of item 4.*[74]

Example 21 – supply to off-shore branch of an Australian company - in Australia but not in relation to the supply

312. *ABC Pty Ltd is incorporated in Australia and the registered office is in Brisbane. It operates diamond mines in South Africa. One of the directors of the company resides in Australia and all of the others including the managing director reside in South Africa.*

313. *All ABC Pty Ltd's business activities are conducted through its operations in South Africa. This South African branch obtains the services of an Australian consulting geologist.*

314. *Because the company is incorporated in Australia, it is in Australia for the purposes of item 3. However, ABC Pty Ltd is not in Australia in relation to the supply of the services of the Australian consulting geologist for the purposes of item 3.*

[74] The supply is GST-free under paragraph (a) of item 4 to the extent that the rights are for use outside Australia. Refer to GSTR 2003/7 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4 and subsection 38-190(2).

Example 22 – supply to off-shore branch of Australian company - in Australia but not in relation to the supply

315. *Aus Co has a branch in Vanuatu. The branch engages an Australian management consultant to provide advice to it in Vanuatu. The head office of Aus Co pays the consultant's fees but has no other contact with him. The consultant deals directly with the personnel in Vanuatu. Aus Co is in Australia but not in relation to the supply*.

Example 23 –supply to off-shore branch – head office engaging the supplier does not make the company in Australia in relation to the supply

316. *If, in the example above, the head office of Aus Co had engaged the consultant to provide advice to its branch in Vanuatu, this fact alone does not make Aus Co in Australia in relation to the supply. If all other contact apart from tasks of a minor administrative nature is with the branch, Aus Co is in Australia but not in relation to the supply.*

317. *However, if Aus Co engages the Australian management consultant to give advice to its branch in Vanuatu and the head office in Australia liaises with the consultant, providing detailed briefings on the operations in Vanuatu, Aus Co is in Australia in relation to the supply*.

Application of subsection 38-190(4) to supplies to companies

318. Even where a company is in Australia in relation to the supply when the thing supplied is done, a supply to the company may be treated as if the company is not in Australia for the purposes of item 3 if the supply is provided to another entity outside Australia. Subsection 38-190(4) applies only if the supply is made under an agreement entered into, whether directly or indirectly, with an Australian resident. Refer to paragraphs 132 to 143 where this is discussed in detail.

When is a partnership (other than a corporate limited partnership) in Australia?

Item 2 and paragraph (b) of item 4 – non-resident partnerships

319. A supply to a partnership is GST-free under item 2 or paragraph (b) of item 4 if all the partners are non-residents and the partnership is in not in Australia in relation to the supply when the thing supplied is done and the other requirements of the item are met. Paragraphs 94 to 102 above explain the requirement for all the

partners to be non-residents for the purposes of the application of item 2 and paragraph (b) of item 4 to supplies to partnerships.

320. To establish an appropriate way of testing for presence of a partnership in Australia, it is necessary to consider the nature of partnerships. As with a company, a partnership does not have a precise physical presence as does an individual. Although a partnership is not a legal entity separate from its members as is a company, it is treated for GST purposes, as if it were a separate entity.[75]

321. A supply, acquisition or importation made by (or on behalf of) a partner of a partnership in the capacity as a partner is taken to be a supply, acquisition or importation made by the partnership.[76]

322. To be consistent with the way partnerships are treated for GST purposes, it is necessary to determine whether the partnership entity, rather than the partners of the partnership, is in Australia at the relevant time.

323. As partnerships are separate entities for GST purposes, we consider that a test that mirrors the test for determining whether non-resident companies are in Australia is an appropriate basis on which to assess whether a partnership is in Australia.

324. As explained at paragraphs 174 to 189 above, the test for determining presence of non-resident companies in Australia achieves an outcome consistent with the policy intention, as evidenced by the heading to the table in subsection 38-190(1), to treat as GST-free, supplies of things (other than goods or real property) that are for consumption outside Australia.

325. Therefore, we consider that a partnership is in Australia for the purposes of item 2 and paragraph (b) of item 4 if that partnership carries on business in Australia through:

(a) a fixed and definite place of its own for a sufficiently substantial period of time; or

(b) an agent at a fixed and definite place for a sufficiently substantial period of time.

[75] Section 184-1.
[76] Section 184-5.

326. This is the same test that is used to determine whether a non-resident company is in Australia.[77] The explanation of the various elements of the test for companies is also relevant for applying the test to partnerships. The paragraphs discussing the various elements are as follows:

- paragraphs 195 to 197 – carries on business through its own fixed and definite place for a sufficiently substantial period of time;
- paragraphs 198 to 201 – place of its own;
- paragraphs 202 to 209 – fixed and definite place;
- paragraphs 210 to 213 –sufficiently substantial period of time; and
- paragraphs 222 to 274 – carries on business through an agent.

Example 24 – partnership not in Australia

327. *CR Enterprises, a Middle Eastern camel racing partnership of three individuals and a company, engages an Australian agent to call for expressions of interest for the supply of camels. The Australian agent does not have further involvement with the supplies. Abdullah, a partner in the partnership, visits Australia to negotiate the purchases with the suppliers. The presence of Abdullah does not make the partnership in Australia as the partnership does not carry on business in Australia at a place of its own for a sufficiently substantial period of time.*

328. *Neither does the extent of activities undertaken by the agent amount to the agent carrying on the business of the non-resident partnership. The partnership is not in Australia and the supply is GST-free under item 2 if the other requirements of the item are met.*

[77] It is noted that determining presence of a partnership for jurisdiction purposes is achieved by Rules of Court that bring partnerships within the jurisdiction if they manifest their presence by carrying on business in the jurisdiction. These rules stipulate that, where a partnership carries on business in the jurisdiction, the partners can be sued in the firm's name by serving one of the partners who is within the jurisdiction or a person with the management or control of that business.

Example 25 – partnership not carrying on business at a fixed and definite place

329. *A Hong Kong woollen garment manufacturing partnership sends its personnel to Australia twice a year to undertake purchase negotiations and conduct visual inspections of the wool bales before placing an order. During these visits, the personnel use the hotel at which they stay as their point of contact in Australia. As the partnership does not carry on business at a fixed and definite place in Australia for a sufficiently substantial period of time, it is not in Australia*.

Partnerships that carry out activities that do not amount to carrying on business

330. The definition of partnership in section 195-1 refers to the definition of a partnership in section 995-1 of the ITAA 1997. Under this definition, a partnership is:

> an association of persons carrying on business as partners or in receipt of ordinary income or statutory income jointly, but does not include a company.

331. Thus, under the extended income tax definition of partnership, it is not necessary that persons carry on a business for their association to be treated as a partnership for income tax purposes. They need only to be in receipt of income jointly.

332. It is, therefore, necessary to determine when a partnership that exists under the extended definition is in Australia. We consider that a partnership of this kind is in Australia where the ordinary income or statutory income that is received jointly is derived from activities that the partnership carries on in Australia through:

(a) a fixed and definite place of its own for a sufficiently substantial period of time; or

(b) an agent at a fixed and definite place for a sufficiently substantial period of time.

333. An example is owning and renting out a residential rental property in Australia where those activities do not amount to carrying on business. The leased premises would not constitute a place at or through which the partnership activities are carried out. However, if an agent, for example, a property managing agent carries out activities comprising the day to day management and operation of the residential rental property in Australia on behalf of the partnership, the partnership is in Australia.

Item 3 – partnerships

334. Provided the other requirements of item 3 are met, a supply may be GST-free under item 3 where the supply is made to a partnership that is not in Australia when the thing supplied is done regardless of whether one or more of the partners in the partnership is an Australian resident. For a supply to a partnership to be GST-free under item 3, the effective use or enjoyment of the supply must take place outside Australia.

Partnerships where one or more of the partners is a resident of Australia

335. A supply that is made to a partnership of which one or more of the partners is a resident does not meet the requirements of item 2 or paragraph (b) of item 4 as it is not a supply to a non-resident. However, it may be GST-free under item 3 if the requirements of that item are met.

336. Whether such a partnership is in Australia is determined by applying the same test that applies to determine whether a non-resident partnership is in Australia. Refer to paragraph 325 above where there is an association of persons carrying on business as partners and paragraph 332 where there is an association of persons in receipt of ordinary income or statutory income jointly.

Non-resident partnerships – all partners are non-residents

337. The test that applies for determining whether a non-resident partnership is in Australia for the purposes of item 3 is the same test that applies for determining whether a non-resident partnership is in Australia for the purposes of item 2 and paragraph (b) of item 4.

338. Therefore, a non-resident partnership is in Australia for the purposes of item 3 if that partnership carries on business in Australia, (or is in receipt of income jointly from activities carried on) through:

(a) a fixed and definite place of its own for a sufficiently substantial period of time; or

(b) an agent at a fixed and definite place for a sufficiently substantial period of time.

Is the partnership (other than a corporate limited partnership) in Australia in relation to the supply?

339. Even if a partnership is in Australia for the purposes of item 2, item 3 or paragraph (b) of item 4, it may not be in Australia in relation to the supply. To work out whether a partnership is in Australia in relation to the supply, it is necessary to examine the role that the presence of the partnership in Australia plays in relation to the supply.

340. At paragraphs 292 to 317 above, we explain when a company is in Australia in relation to the supply. The principles outlined in those paragraphs also apply to determine whether a partnership is in Australia in relation to the supply.

Example 26 –non-resident partnership in Australia but not in relation to the supply

341. *Cyberian Systems is an information technology business operated by two individuals in partnership. The partners, a husband and wife, are residents of the United States where the business is based. It has a branch in Australia that offers software development services in Australia, staffed by personnel from the US and Australia.*

342. *The US office engages an Australian based computer engineer to work on a special project for one of the partnership's US customers. The Australian office of the partnership has no involvement in the supply.*

343. *Item 2 may apply to the supply of engineering services as the partnership is a non-resident, the two partners being non-resident individuals. The partnership is in Australia because it carries on business in Australia through a place of its own in Australia for a sufficiently substantial period of time. However, the partnership is not in Australia in relation to the supply for the purposes of item 2.*

Example 27 – partnership in Australia but not in relation to the supply

344. *Assume the same facts as in example 26 above except that Cyberian Systems has three partners one of whom is an Australian resident individual. This partner runs the partnership's office in Australia.*

345. *The partnership is in Australia for the purposes of item 3 because it carries on business in Australia at a place of its own for a sufficiently substantial period of time. Note that item 2 cannot apply because not all the partners are non-residents.*

346. *However, the partnership is not in Australia in relation to the supply of services by the computer engineer. The supply is GST-free under item 3 if the other requirements of the item are met.*

Application of subsection 38-190(4) to supplies to partnerships

347. Where a partnership is in Australia in relation to the supply when the thing supplied is done, a supply to the partnership may be treated as if the partnership is not in Australia for the purposes of item 3 if the supply is provided to another entity outside Australia. Subsection 38-190(4) applies only if the supply is made under an agreement entered into, whether directly or indirectly, with an Australian resident.

348. As partnerships do not come within the definition of Australian resident, it might be argued that subsection 38-190(4) has no application to supplies made to them. However, we consider that subsection 38-190(4) can have application where the recipient of the supply is a partnership that has at least one partner that is an Australian resident.

349. A supply made to a partnership may be made under an agreement entered into with:

- a partner in the capacity of a partner of the partnership; or
- the partnership in the name of the partnership firm.

350. We consider that where a supply is made under an agreement entered into with an individual or company in the capacity as partner in a partnership, this is an agreement entered into, directly or indirectly, with an Australian resident for the purposes of subsection 38-190(4) if:

- that partner is an individual or a company who is an Australian resident; or
- any of the partners is an individual or a company who is an Australian resident.

351. We consider that, where a supply is made under an agreement entered into with a partnership in the name of the partnership firm and one or more of the partners is an individual or a company who is an Australian resident, this is an agreement entered into indirectly with an Australian resident for the purposes of subsection 38-190(4).

352. Therefore, subsection 38-190(4) may apply to treat a partnership as being 'not in Australia' if a supply that is made to the partnership is provided to another entity outside Australia.

When is a corporate limited partnership in Australia?

353. 'Partnership' in the GST Act has the meaning given by section 995-1 of the ITAA 1997 and does not include a company. A corporate limited partnership is treated as a company, not a partnership for the purposes of the income tax law. [78]

354. Accordingly, a corporate limited partnership is not a partnership as defined for GST purposes. As the definition of company in section 195-1 includes any other unincorporated association or body of persons excluding a partnership, a corporate limited partnership is a company for GST purposes.

355. We consider, therefore, that it is appropriate to determine whether a corporate limited partnership is in Australia in relation to the supply when the thing supplied is done in the same way as you determine whether a company is in Australia in relation to the supply when the thing supplied is done.

Item 2 and paragraph (b) of item 4 – corporate limited partnerships

356. We consider that a non-resident corporate limited partnership is in Australia for the purposes of item 2 or paragraph (b) of item 4 if that partnership carries on business[79] in Australia through:

(a) a fixed and definite place of its own for a sufficiently substantial period of time; or

(b) an agent at a fixed and definite place for a sufficiently substantial period of time.

357. At paragraphs 174 to 274 above, we explain when a non-resident company is in Australia. The principles outlined in those paragraphs also apply to determine whether a non-resident corporate limited partnership is in Australia.

Item 3 – corporate limited partnerships

358. A supply may be GST-free under item 3 where the supply is made to a corporate limited partnership that is not in Australia when the thing supplied is done, whether the partnership is a resident or a non-resident.

359. If the corporate limited partnership is formed in Australia we consider that the partnership is in Australia by virtue of its formation in Australia in the same way that a company is in Australia by virtue of its incorporation in Australia.

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[78] Division 5A of the ITAA 1936.

[79] Or other activities which do not amount to the carrying on of a business, such as an isolated business transaction.

360. Where the corporate limited partnership is formed outside Australia the test that applies for determining whether that partnership is in Australia for the purposes of item 3 is the same test that applies for determining whether a non-resident corporate limited partnership is in Australia for the purposes of item 2 and paragraph (b) of item 4. Refer to the test in paragraph 356 above.

Is the corporate limited partnership in Australia in relation to the supply?

361. Even if a corporate limited partnership is in Australia for the purposes of item 2, item 3 or paragraph (b) of item 4, it may not be in Australia in relation to the supply. To work out whether a corporate limited partnership is in Australia in relation to the supply, it is necessary to examine the role that the presence of the partnership in Australia plays in relation to the supply.

362. At paragraphs 292 to 317 above, we explain when a company is in Australia in relation to the supply. The principles outlined in those paragraphs also apply to determine whether a corporate limited partnership is in Australia in relation to the supply.

Application of subsection 38-190(4) to supplies to corporate limited partnerships

363. Even where a corporate limited partnership is in Australia in relation to the supply when the thing supplied is done, a supply to the partnership may be treated as if the partnership is not in Australia for the purposes of item 3 if the supply is provided to another entity outside Australia. Subsection 38-190(4) applies only if the supply is made under an agreement entered into, whether directly or indirectly, with an Australian resident.

When is a trustee of a trust in Australia in relation to the supply?

364. A trust and the trustee of a trust are both entities for the purposes of the GST Act.[80] However, it is the trustee of the trust that is the legal person who makes the supplies and acquisitions for the trust and upon whom the rights and obligations under the GST Act are conferred or imposed. It is therefore the trustee that is the relevant entity in determining whether the 'not in Australia' requirement is satisfied for the purposes of items 2, 3 and paragraph (b) of item 4.

365. The trustee of the trust may be either an individual or a company. Therefore, in determining whether the trustee is in

[80] See paragraph 184-1(1)(g) and subsection 184-1(2).

Australia it is necessary to consider whether the individual trustee or corporate trustee is in Australia.

Individual acting in the capacity of trustee of a trust

Item 2 and paragraph (b) of item 4 – non-resident individual acting in the capacity of trustee of a trust

366. Whether a non-resident individual is in Australia for the purposes of item 2 and paragraph (b) of item 4, is discussed above at paragraphs 147 to 148.

367. A non-resident individual acting in the capacity as trustee of a trust is in Australia where the individual is physically present in Australia. The location of the trust property, the business (if any) being carried on by the trust or the beneficiaries is irrelevant in determining whether item 2 or paragraph (b) of item 4 applies.

In relation to the supply

368. Whether a non-resident individual is in Australia in relation to the supply is discussed above at paragraphs 149 to 155 and is equally applicable to determining whether a non-resident individual acting in the capacity of trustee of a trust is in Australia.

369. Where the non-resident individual trustee is physically present in Australia when the thing supplied is done, that presence may be unrelated to the supply being made. Where the non-resident individual's physical presence in Australia is unrelated to the supply being made to the non-resident individual in the capacity as trustee of the trust, the non-resident individual trustee is not in Australia in relation to the supply.

370. For example, if an individual is in Australia on holidays and has no contact with a supplier who is making a supply to the individual as trustee of a trust, the non-resident individual is not in Australia in relation to the supply when the thing supplied is done.

Item 3 – individual acting in the capacity of trustee of a trust

371. With respect to whether an individual is in Australia for the purposes of item 3, this is discussed above at paragraphs 166 to 172 and applies equally to an individual acting in the capacity of trustee.

Company acting in the capacity of trustee of a trust

Item 2 and paragraph (b) of item 4 – non-resident company acting in the capacity of trustee of a trust

372. Whether a non-resident company is in Australia for the purposes of item 2 and paragraph (b) of item 4, is discussed above at paragraphs 174 to 274 and is equally applicable to a company acting as trustee of a trust.

373. A non-resident company will therefore be in Australia in its capacity as trustee of the trust if that non-resident company carries on business in Australia in its capacity as trustee through:

- a fixed and definite place of its own for a sufficiently substantial period of time (see paragraphs 195 to 221); or
- an agent at a fixed and definite place for a sufficiently substantial period of time (see paragraphs 222 to 274).

374. It should be noted that the test to determine whether a company is in Australia as trustee of a trust must be applied to the company acting in its trustee capacity of a particular trust rather than in its own capacity or as trustee of any other trust.

375. This approach is consistent with subsection 184-1(3) which provides that a legal person (such as a company) can have a number of different capacities in which it does things and in each of those capacities it is taken to be a different entity.

376. It is therefore possible that a company may be in Australia in its own capacity but not in Australia when acting in its capacity as trustee of a trust. Alternatively, the reverse may be true. The company may be in Australia when acting in its capacity as trustee of a trust but not in Australia in its own capacity.

377. Further, a company that is trustee of a number of different trusts may also be here for the purposes of some trusts but not other trusts.

Item 3 – company acting in the capacity of trustee of a trust

378. Whether a company is in Australia for the purposes of item 3 is discussed above at paragraphs 281 to 291 and is equally applicable to a company acting as trustee of a trust.

379. A company will therefore be in Australia in its capacity as trustee of a trust where:

- the company is incorporated in Australia; or

- the non-resident company carries on business in its capacity as trustee in Australia through a fixed and definite place of its own for a sufficiently substantial period of time (see paragraphs 195 to 221); or
- the non-resident company carries on business in its capacity as trustee in Australia through an agent at a fixed and definite place for a sufficiently substantial period of time (see paragraphs 222 to 274).

In relation to the supply

380. Whether a company is in Australia in relation to the supply, is discussed above at paragraphs 292 to 317 and is equally applicable to a company acting in the capacity of trustee of a trust.

381. Where a company acting as trustee of a trust is in Australia when the thing supplied is done, that presence may be unrelated to the supply being made and so can still satisfy the 'not in Australia' requirement of items 2, 3 or paragraph (b) of item 4.

Trusts with multiple trustees

382. If a trust has more than one trustee the 'not in Australia' requirement for the purposes of items 2, 3 or paragraph (b) of item 4 will not be satisfied where any one of the trustee entities is in Australia in relation to the supply. That is, in order to satisfy the 'not in Australia' requirement all trustee entities must not be in Australia or, if in Australia, must not be in Australia in relation to the supply.

Application of subsection 38-190(4) to supplies to trustees

383. Where a trustee is in Australia in relation to the supply when the thing supplied is done, a supply to the trustee may be treated as if the trustee is not in Australia in relation to the supply for the purposes of item 3 if the supply is provided to another entity outside Australia. Subsection 38-190(4) applies only if the supply is made under an agreement entered into, whether directly or indirectly, with an Australian resident.

384. Where a supply is made under an agreement entered into with the trustee of a trust and the trustee is an Australian resident individual or an Australian resident company, this is an agreement entered into with an Australian resident for the purposes of subsection 38-190(4).

Trusts with multiple trustees

385. If a trust has more than one trustee the requirement in subsection 38-190(4) that a supply is made under an agreement with an Australian resident is satisfied if at least one of the trustees is an Australian resident.

Apportionment

When apportionment is necessary

386. Section 9-5 provides that a supply is a taxable supply except to the extent that it is GST-free or input taxed. This creates a general apportionment rule for the GST Act.[81] A supply may be partly GST-free under item 2, item 3 or paragraph (b) of item 4 to the extent that the requirements of the relevant item are met. If the 'not in Australia in relation to the supply' requirement for the non-resident or other recipient of the supply is met for only part of the time when the thing supplied is done, the supply is only partly GST-free under the relevant item.

387. Where a supply consists of a taxable part and a GST-free part, it is necessary to apportion the consideration between these parts to work out the GST payable on the taxable part of the supply. We discuss how this apportionment is done at paragraphs 391 to 414 below.

388. The need to apportion in the context of items 2 and 3 arises where the thing supplied is done over a period of time. For example, apportionment is necessary where the recipient of a supply of services is in Australia in relation to the supply for part of the time over which the services are performed. That part of the supply that is done when the recipient is in Australia in relation to the supply is the taxable part of the supply. That part of the supply that is done when the recipient is not in Australia in relation to the supply is the GST-free part of the supply, provided the other requirements of the item are met.

389. Where the thing supplied is done at a particular point in time (e.g. an instantaneous supply of advice),[82] apportionment is not necessary.

390. Where there is a supply that is made in relation to rights to which paragraph (b) of item 4 applies, apportionment is not necessary except where there is an application of subsection 38-190(2). This is because the supply occurs when the right is created, granted, assigned,

[81] See GSTR 2001/8 Goods and Services Tax: apportioning the consideration for a supply that includes taxable and non-taxable parts at paragraphs 82 to 91 for a discussion of the general rule of apportionment.

[82] Refer to paragraph 145 and GSTR 2000/31 Goods and Services Tax: supplies connected with Australia.

transferred or surrendered.[83] The recipient of the supply is either in Australia in relation to the supply or not in Australia in relation to the supply when the thing supplied is done, i.e. when the right is created, granted, assigned, transferred or surrendered. However, if subsection 38-190(2) applies because the supply is a right or option to acquire something the supply of which would be connected with Australia and would be GST-free in part only, the supply of the right is only partly GST-free and apportionment is required.

Apportionment method

391. Where a supply is partly GST-free and partly taxable under item 2 or item 3[84] because the recipient of the supply is in Australia in relation to the supply for part of the time when the thing supplied is done, the supplier is required to apportion the consideration between the GST-free and taxable parts of the supply.

392. To work out the value of the taxable part of the supply, the consideration has to be apportioned to each of the parts to find the consideration for the taxable part. The supplier can use any reasonable method that is supportable in the particular circumstances to apportion the consideration. The supplier should keep records that explain the method used.[85]

Example 28 –non-resident individual is in Australia in relation to the supply for part of the time when the thing supplied is done

393. *A non-resident individual engages a legal firm in Australia to provide legal services for a 12 week period. The non-resident individual visits Australia for 4 weeks during the 12 week period over which the services are performed. Of the 4 weeks, 1 week is spent with legal counsel and the remaining 3 weeks is spent holidaying in Australia.*

394. *The supply is GST-free to the extent that the non-resident individual is not in Australia in relation to the supply i.e. for 11 weeks out of the 12 week period. The supply is taxable to the extent that the non-resident individual is in Australia in relation to the supply i.e. for one week out of the twelve weeks. Note that although the non-resident individual was in Australia for 4 weeks, he was in Australia in relation to the supply for only one week. The supplier of the legal*

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[83] Refer to paragraph 145 and GSTR 2000/31 Goods and Services Tax: supplies connected with Australia.

[84] Or where a supply is partly GST-free under paragraph (b) of item 4 because of the operation of subsection 38-190(2).

[85] Refer to GSTR 2001/8 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts at paragraphs 25 to 30 and 116 to 117.

services is required to apportion the consideration for the supply between the GST-free and taxable parts of the supply.

Example 29 – non-resident company in Australia in relation to the supply for part of the time when the thing supplied is done

395. *A non-resident company has a branch in Australia. For part of the time when the thing supplied is done, the branch has no involvement with the supply made by the Australian supplier to the non-resident parent company (and the supply is not for the purpose of the branch). The thing supplied is done over a twelve month period. Six months into that supply period, the branch becomes involved with the supply and that involvement is not minor involvement. The non-resident company is in Australia in relation to the supply for only part of the time when the thing supplied is done, i.e. from the time the branch became involved with the supply.*

Periodic or progressive supplies

396. Under Division 156, where a taxable supply is made for a period or on a progressive basis and the consideration is provided on a periodic or progressive basis, the GST payable is attributed as if each progressive or periodic component of the supply were a separate supply.[86]

397. Where a supply is made for a period with consideration to be provided on a periodic basis and the recipient of the supply will be in Australia in relation to the supply for part of the time when the thing supplied is done, it may not be possible for the supplier to identify the taxable part of the supply at the beginning of the period over which the thing supplied is to be done. This is because there may be no way for the supplier to determine in advance whether and to what extent the recipient of the supply will be in Australia in relation to the supply during the whole period over which the thing supplied is done. However, it will be possible for the supplier to identify the taxable part of the periodic components of the supply. Accordingly, we consider that this is the basis on which GST payable on the supply (and input tax credits on the creditable acquisition) is attributable to tax periods.

[86] Section 156-25 provides that Division 156 does not apply to a supplier who accounts on a cash basis.

Example 30 – recipient of a supply for a period is in Australia for part of the time when the thing supplied is done

398. *Sylvia is a New Zealand resident who owns a chain of health food stores in New Zealand. She has a one year contract with an Australian company, Aus Computers under which the company is to provide services including:*

- *building and maintaining customized software;*
- *on-line and telephone support services; and*
- *training as required.*

The contract provides for charges to be calculated on an hourly basis ($100/hour plus GST (if any)) and invoices are to be issued on a monthly basis. Aus Computers does not account for GST on a cash basis. It has one month tax periods.

399. *It is agreed that Aus Computers staff will travel to Auckland to discuss Sylvia's business requirements at various times throughout the course of the supply and that Sylvia will come to Australia if necessary. In March, Aus Computers requests Sylvia to come to Sydney to receive training and to discuss systems modifications with Aus Computers systems designers (total of ten hours). She also spends some time in Sydney on other business and private matters.*

400. *Aus Computers charges for the first three months of the supply including the GST treatment are as set out below:*

Invoice date	*Amount*	*Hours*
4 March 2003 (for services performed in February)	*$3,000 (no GST payable)*	*30*
6 April 2003 (for services performed in March)	*$5,100 (including $100 GST)*	*50*
5 May 2003 (for services performed in April)	*$2,000 (no GST payable)*	*20*

Explanation

401. *The supply is GST-free under item 2 to the extent that Sylvia was not in Australia in relation to the supply during the time the services were performed.*

402. *There is no GST payable for the tax period ending 31 March 2003 because the supply is GST-free to the extent that Sylvia was not in Australia i.e. for the whole of the time to which the relevant consideration relates.*

403. *To work out the GST payable that is attributable to the tax period ending 30 April 2003, it is necessary to identify the taxable part of the supply. The supply is taxable to the extent that Sylvia was in Australia in relation to the supply. To work out the value of the taxable part of the supply, it is necessary to apportion the consideration on a reasonable basis. The circumstances surrounding this supply are such that a time basis would be a reasonable basis on which to apportion the consideration i.e. using the hours Sylvia was in Australia in relation to the supply (10 hours) as a proportion of the total hours billed (50 hours) to work out the value of the taxable part of the supply.*

404. *The GST attributable to the tax period ending 30 April 2003 is calculated as follows:*

Consideration for the taxable part:	*(10 ÷ 50) × $5,000 = $1,000*
GST payable:	*$1,000 x 10% = $100*
Total amount payable:	*$5,000 + $100 = $5,100*

Supplier accounts on a cash basis

405. Where a supplier, who accounts on a cash basis, makes a supply for a period or on a progressive basis and the consideration is provided on a periodic or progressive basis, similar issues may arise to those referred to at paragraph 397 above. The following example illustrates how to attribute GST payable in that case.

Example 31 – supply of legal services

406. *William, an English tourist, was injured while on holidays in Australia. While in Australia recovering from his injuries, William engaged Simon, a solicitor, to seek compensation.*

407. *The case took three months to be finalised. During this time, William returned home to England but he travelled to Australia to attend a mediation conference on 20 June. William met with Simon prior to and after the conference. These meetings and the conference took a total of five hours. The matter was settled as a result of the conference.*

408. *Simon's hourly rate is $200 (plus GST (if any)) and he bills clients on a monthly basis for work done during the month. He accounts for GST quarterly and on a cash basis.*

409. *Simon receives the following payments for his services to William:*

Payment date	*Amount*	*Hours*
5 May 2003	*$800 (no GST payable)*	*4*
7 June 2003	*$600 (no GST payable)*	*3*
10 July 2003	*$2,100 (including $100 GST)*	*10*

Explanation

410. *The supply is GST-free under item 2 to the extent that William was not in Australia in relation to the supply when the services were performed.*

411. *GST payable on the supply is attributable to tax periods to the extent that consideration is received in those tax periods.*

412. *There is no GST payable on the supply for the quarterly tax period ending 30 June 2003. The consideration received in that tax period is for services that were performed when William was not in Australia in relation to the supply.*

413. *There is GST payable on the supply for the quarterly tax period ending 30 September 2003. The consideration received in that tax period includes consideration for services that were performed when William was in Australia in relation to the supply for part of the time. The supply is taxable to the extent that William was in Australia in relation to the supply. To work out the value of the taxable part of the supply, it is necessary to apportion the consideration on a reasonable basis. The circumstances surrounding this supply are such that a time basis would be a reasonable basis on which to apportion the consideration i.e. using the hours William was in Australia in relation to the supply (5 hours) as a proportion of the total hours billed (10 hours) to work out the value of the taxable part of the supply*

414. *The GST attributable to the tax period ended 30 September 2003 is calculated as follows:*

Consideration for the taxable part: (5 ÷ 10**) × $2,000*** = $1,000*

GST payable: $1,000 x 10% = $100

Total amount payable $2,000 + $100 = $2,100

* *Number of hours in Australia in relation to the supply*

** *Number of hours to which the consideration relates*

*** *Consideration received in the tax period*

Part IV – further examples

Non-resident company in Australia in relation to the supply

Example 32 – supply to non-resident company with an Australian branch office

415. *A non-resident company, NZ Photo Co, is expanding its overseas business of selling framed photographic images. NZ Photo Co sends two employees to Australia to establish a branch office in Melbourne. Premises are leased for 2 years with an option for a further 2 years. It is considered that the leased premises will serve the business needs for at least 4 years. The Melbourne office promotes and sells a wide range of photographic products. The business has been running smoothly for 3 months.*

416. *The non-resident company is carrying on business in Australia at a fixed and definite place and intends to continue that business for a sufficiently substantial period of time. NZ Photo Co is in Australia.*

417. *Aus Transport, an Australian resident company, contracts with NZ Photo Co to supply the Australian branch with freight services to various destinations in Australia. As the supply is for the purposes of the Australian branch, NZ Photo Co is in Australia in relation to the supply. The supply is not GST-free under item 2.*

Example 33 – non-resident company with an Australian subsidiary

418. *Aus Co is an Australian company in which a non-resident company, Hong Kong ('HK') Co, holds a majority share holding. Aus Co and HK Co enter into an agency agreement for the next three years. The agreement provides that Aus Co is to enter into contracts on behalf of HK Co for the supply of goods to various customers of HK Co in Australia. Aus Co does not require any further authority in advance before binding the non-resident.*

419. *HK Co directly reimburses Aus Co for the cost of accommodation, administration expenses and staff that are attributable to the sale of goods by Aus Co on behalf of HK Coy. Aus Co signs the contracts as agent for HK Co, and is able to negotiate the price charged for the goods.*

420. *The business of HK Co is about buying and selling goods and Aus Co enters into contracts on behalf of HK Co. The above facts point to Aus Co carrying on the business of HK Co as its agent, even*

though Aus Co is a subsidiary of HK Co. The business of HK Co is carried on in Australia through an agent at a fixed and definite place and it is intended that the business is carried on for a sufficiently substantial period of time. HK Co is in Australia.

421. *Aus Co enters into an advertising agreement with an Australian advertising agency on behalf of HK Co to promote the Australian business of HK Co. The supply made by the advertising agency to HK Co is not GST-free under item 2. HK Co is in Australia in relation to the supply when the advertising services are performed.*

Non-resident company in Australia but not in relation to the supply

Example 34 – supply to a non-resident company with an Australian branch

422. *Interpret Aus, an Australian company, has a contract with UK Chemicals, a non-resident company, to analyse data and provide a written report for the purposes of the UK operations. Interpret Aus has never dealt with UK Chemicals before and asks UK Chemicals if it has any business presence in Australia. UK Chemicals advises that it has a branch in Western Australia, which supplies agricultural chemicals in that State. Interpret Aus checks the ASIC website and notes that UK Chemicals is registered as a foreign company. UK Chemicals is in Australia.*

423. *However, the Australian branch of UK Chemicals has no involvement in the supply from Interpret Aus. The Australian branch does not negotiate, discuss, give information, or have any other involvement in the supply. Also the supply is not for the purposes of the Australian branch. Accordingly, UK Chemicals is not in Australia in relation to the supply and the supply is GST-free under item 2 provided the other requirements of that item are met.*

Non-resident company not in Australia

Example 35 – non-resident company with an Australian agent

424. *Aus Co operates an Australia-wide retail chain. It also acts as an agent for an overseas manufacturer, Foreign Co. Under the agreed terms of the arrangement with Foreign Co:*

- *Aus Co has the right to sell the products of Foreign Co in Australia;*
- *For items above a certain value, the customer purchases directly from Foreign Co; and*

- *Aus Co is not authorised to bind Foreign Co to any agreement with another party or accept purchase orders on behalf of the manufacturer without submitting either to Foreign Co for approval.*

425. *Aus Co displays a sign on the entrance to its Head Office that it is the Australian agent for Foreign Co. Various promotional materials also advertise that Aus Co is the Australian agent for Foreign Co. The fixed place of business from which Aus Co operates was not originally acquired for the purposes of enabling Aus Co to act on behalf of Foreign Co. Aus Co also acts as agent for other manufacturers. Foreign Co does not directly reimburse Aus Co for the cost of accommodation, staff or make any other contributions to the running of the representative office. Apart from Foreign Co requiring Aus Co to act at all times in a fit and proper manner so as not to bring the name of Foreign Co into disrepute, Foreign Co does not exercise any control over the running of the business conducted by Aus Co as representative for Foreign Co.*

426. *Aus Co receives a commission when it sells the products of Foreign Co. It does not exclusively sell Foreign Co products, but also sells the products of other manufacturers. Foreign Co has control over all high priced items.*

427. *On these facts, Foreign Co does not carry on business in Australia through an agent. Foreign Co is not in Australia*.

Example 36 – non-resident company with an Australian subsidiary

428. *Recruit Australia, an Australian company, provides recruitment and consulting services to non-resident companies. NZ Co is a non-resident management consultant firm which engages Recruit Australia to recruit a new manager for its Pacific operations based in New Zealand. NZ Co has a subsidiary in Australia. The subsidiary conducts its own consulting business in Australia. It does not do any consulting business on behalf of NZ Co.*

429. *A director of the Australian subsidiary undertakes various activities in the selection process on behalf of the NZ Co. Recruit Australia e-mails and telephones the director of the Australian subsidiary to discuss the requirements of NZ Co. The director also interviews some prospective candidates for the New Zealand position and then advises the results of the interviews to Recruit Australia and provides recommendations*.

430. *In these circumstances it could not be said that the activities of the subsidiary formed a material part of the business of NZ Co. Also many of the factors referred to in paragraph 226 are absent. NZ Co is not carrying on business in Australia. The fact that the director of the*

Australian subsidiary is available to answer questions and undertake some of the interviewing does not make NZ Co in Australia.

Example 37 – non-resident company with an Australian agent

431. *NZ Co, a New Zealand company which is not a resident of Australia, conducts a business of selling farm equipment. It engages Jack Smith, a marketing agent, to:*

- *promote NZ Co and its activities in Australia;*
- *introduce potential purchase and sales opportunities to NZ Co from within Australia; and*
- *provide a liaison role in contract negotiations when required and resolve the administration of any contract difficulties.*

432. *Jack acts on behalf of fifteen companies, leases an office in Sydney and is an employer of six staff. He receives 10% of any sales that he arranges for NZ Co. Jack has no authority to determine pricing or contractual terms or to negotiate or administer contracts on behalf of NZ Co. NZ Co maintains control over all aspects of any business that the agent introduces to it.*

433. *These facts point to the agent having acted in the ordinary course of his business. The agent is not carrying on the business of the non-resident in Australia. NZ Co is not in Australia.*

Example 38 –employees of a non-resident company trained in Australia

434. *Training Oz Style is an Australian company. Asia Tech is a Singapore based company. Asia Tech contracts with Training Oz Style to provide computer training in Australia for five employees of Asia Tech. Asia Tech does not carry on business in Australia at a branch office or through an agent.*

435. *Asia Tech is not in Australia. The fact that five employees visit Australia to receive training does not mean that Asia Tech is in Australia.*

436. *However, it is noted that the supply of training made to Asia Tech is provided to another entity in Australia, the employees, and subsection 38-190(3) applies to that supply.*

Example 39 – executive of a non-resident company visiting Australia

437. *US Finance Inc is not a resident of Australia and has no branch, office or agent in Australia. An executive from the US investment bank comes to Australia to investigate the possibility of acquiring shares in an Australian company. While in Australia, the executive meets with an Australian legal firm and issues instructions on behalf of US Finance. The Australian legal firm provides a letter of advice to the executive prior to his departure from Australia.*

438. *US Finance is not in Australia. The presence of the executive, whether he has the authority to issue instructions on behalf of the non-resident company or not, does not mean that US Finance is in Australia. This is because US Finance does not carry on business within Australia through a place of its own or through an agent.*

Example 40 – subsidiary established in Australia after advice is obtained on formation in Australia

439. *Foreign Co engages Aust Co to research and advise Foreign Co on the practicalities of establishing an Australian subsidiary. Foreign Co subsequently establishes an Australian subsidiary.*

440. *As Foreign Co does not have a subsidiary in Australia at the time the advice is supplied it is not necessary to consider whether the subsidiary is carrying on the business of Foreign Co in Australia. Foreign Co is not in Australia when the advice is supplied. Note that the mere existence of a subsidiary in Australia does not mean that the non-resident company is in Australia (refer to paragraphs 264 to 269 above).*

Example 41 – Australian company selling goods for a non-resident company

441. *Clean Co, an Australian company, sells a wide range of domestic and commercial vacuum cleaners. Japan Co, a resident of Japan, contracts with Clean Co to sell a high quality commercial line of vacuum cleaners on a commission basis. Clean Co has the power to bind Japan Co without seeking the company's prior approval. As part of the arrangement, Clean Co is required to maintain a high level of product knowledge – undertaking annual visits to Japan funded by Japan Co, and adhere to guidelines Japan Co distributes regarding the sale of its product. The commission payable to Clean Co factors in these requirements. Clean Co receives a commission based on the number of vacuum cleaners sold.*

442. *Clean Co leases its own premises and Japan Co has no right of access to these premises. It employs its own staff. The name of Japan Co is not displayed at Clean Co's premises. Based on these facts, Japan Co does not carry on business in Australia at a place of its own or through an agent. Clean Co conducts its own business of selling vacuum cleaners. It does not carry on the business of Japan Co. Japan Co is not in Australia.*

Non-resident individual not in Australia

Example 42 – Australian barrister supplies legal services to a non-resident individual

443. *Jan, a non-resident individual engages an Australian solicitor to represent her in legal proceedings in Australia. The solicitor, as agent for the non-resident, engages the services of an Australian barrister. Jan is not physically in Australia at any time when the services of the solicitor or the barrister are performed. Jan is therefore, not in Australia when the services are performed for the purposes of item 2. The fact that Jan has an agent in Australia does not mean that she is in Australia when the services are performed.*

Non-resident individual in Australia for part of the time

Example 43 – Australian barrister supplies legal services to a non-resident individual

444. *Following on from example 42, if Jan is required to give evidence in Australia, she is in Australia in relation to the supply of the barrister's services for the time she is in contact with the supplier preparing for the litigation and giving evidence. The consideration for the supply is to be apportioned on a reasonable basis (eg. a time basis) to work out the value of the taxable part of the supply.*

Supply provided to another entity outside Australia

Example 44 – supply to Australian company and provided to employees of off-shore branch

445. *Railway Co, based in Australia, enters into a contract with Austrain for the delivery of technical training to Railway Co's employees. This training is to be delivered at a specialised training facility in Japan.*

446. *Railway Co is in Australia in relation to the supply but the training services are provided to another entity, being the employees. Subsection 38-190(4) applies to treat the supply as being made to a recipient who is not in Australia when the services are performed. To*

be GST-free under item 3 the effective use or enjoyment of the supply must take place outside Australia.

Your comments

447. We invite you to comment on this draft Goods and Services Tax Ruling. Please forward your comments to the contact officer(s) by the due date.

Comments by Date: 28 February 2004

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Commissioner of Taxation
19 December 2003

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