GSTR 2016/D1 - Goods and services tax: making cross-border supplies to Australian consumers

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Draft Goods and Services Tax Ruling

Goods and services tax: making cross-border supplies to Australian consumers

Contents Para

PROPOSED LEGALLY BINDING SECTION:

Summary – what this ruling is about 1

Ruling 10

Date of effect 104

NOT LEGALLY BINDING SECTION:

Frequently used terms 107

Appendix 1:

***Your comments* 108**

Appendix 2:

***Detailed contents list* 110**

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Summary - what this Ruling is about

Who this Ruling is relevant to

1. This draft Ruling is relevant to you if you are an overseas-based supplier making supplies of services, digital products or rights to Australian consumers[1] that use or enjoy those supplies in Australia.[2]

2. This draft Ruling applies in relation to working out net amounts for tax periods starting on or after 1 July 2017.

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[1] Paragraph 9-25(5)(d) of *A New Tax System (Goods and Services Tax) Act 1999* (GST Act)). All legislative references in this draft Ruling are to the GST Act unless otherwise specified.

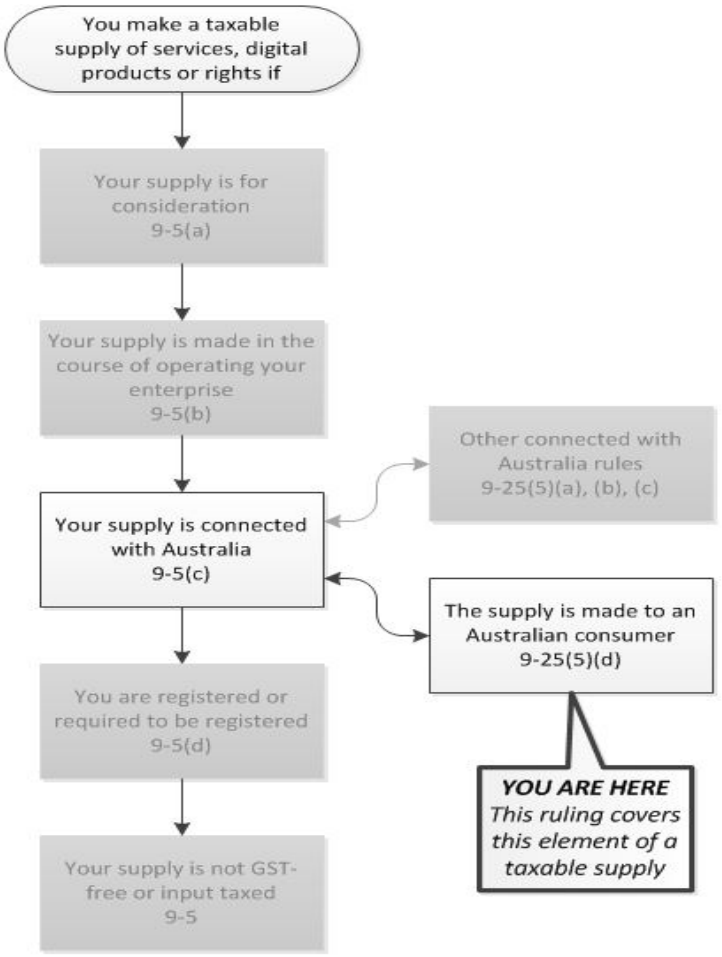
[2] This draft Ruling does not consider supplies that are GST-free under item 3 of the table in subsection 38-190(1). Advice on when supplies are used or enjoyed in Australia is contained in Goods and Services Tax Ruling GSTR 2007/2 *Goods and services tax: in the application of paragraph (b) of item 3 in the table of subsection 38-190(1) of the A New Tax System (Goods and Services Tax) Act 1999 to a supply, when does 'effective use or enjoyment' of the supply 'take place outside Australia'?.*

What this Ruling is about

3. For you to be liable for GST on a taxable supply, the supply must be connected with Australia. This is a draft Ruling to assist you in determining whether you are making supplies to Australian consumers and as such making supplies that are connected with Australia under paragraph 9-25(5)(d). This is so you can work out if you need to account for GST on those supplies, and whether you need to register for GST.

4. In some situations it may be easier to determine that the supply is GST-free instead of determining whether the supply is connected with Australia under paragraph 9-25(5)(d). If you determine that a supply is GST-free and that supply is not made through an enterprise you carry on in Australia, then there is no need to consider if that same supply is connected with Australia. For example, if an Australian resident receives a haircut from a hairdresser in Germany, that supply will be GST-free.

5. The following diagram shows how the provision dealt with in this draft Ruling fits in with the other requirements for a supply to be a taxable supply.



6. There are two aspects to consider in determining whether the person or entity you are supplying to (the recipient) is an Australian consumer:

- their residency, and
- their GST registration status and purpose of acquisition.

These considerations are similar to what is commonly referred to internationally as 'customer location' and 'customer status'.

7. This draft Ruling explains how you decide whether a recipient of a supply is an Australian consumer. It explains what evidence you should have, or what steps you should take to collect evidence, in establishing if the supply is not made to an Australian consumer.

8. Even if your supply is not made to an Australian consumer (and therefore not connected with Australia under paragraph 9-25(5)(d)), you still need to consider if the supply is connected with Australia under other provisions, for example when the supply (thing) is done in Australia or the supply is made by you through an enterprise you carry on in Australia.[3] If the supply is not connected with Australia, you are not liable for GST on the supply. Supplies that are not connected with Australia do not count in determining if you are over the GST registration threshold.

9. Please note, under the GST Act, the 'indirect tax zone' is the area that Australia's GST applies to. However, in this draft Ruling, the 'indirect tax zone' will be referred to as 'Australia'.

Ruling

Supplies to Australian consumers

10. If you supply services, rights or digital products to an Australian consumer the supply is 'connected with Australia' under paragraph 9-25(5)(d).

Meaning of Australian consumer

11. Under subsection 9-25(7), to be an 'Australian consumer' of a supply, an entity must:

[3] Goods and Services Tax Ruling GSTR 2000/31 *Goods and services tax: supplies connected with Australia* and Law Companion Guideline LCG 2016/1 *GST and carrying on an enterprise in the indirect tax zone (Australia)*.

- be an Australian resident for income tax purposes[4], with an exception for residents of external Territories[5] (the 'residency element'), and
- either:
  - not be registered for GST, or
  - if the entity is registered for GST, the entity did not acquire the thing for their enterprise (solely or partly)

  (the 'consumer element').

12. The Commissioner explains when a supply is made to a non-resident in GSTR 2004/7.[6] Although that ruling considers the definition of non-resident for the purposes of subsection 38-190(1), the Commissioner will adopt an equivalent approach for the purposes of determining whether a recipient is an Australian resident for the purposes of the definition of Australian consumer.

Determining if recipient is an Australian consumer

13. Under section 84-100, you can treat the supply as having not been made to an Australian consumer if you:

- have satisfied particular evidentiary requirements, and
- reasonably believe[7] that the recipient is not an Australian consumer.

14. Your reasonable belief can be founded on a belief that:

- the recipient does not satisfy the residency element (paragraphs 18 to 93 of this draft Ruling), or

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[4] Under section 6 of the *Income Tax Assessment Act 1936.*

[5] An entity is not an Australian consumer if the entity is an Australian resident solely because Australia includes the external Territories. Paragraph 9-25(7)(a). The external Territories that are not in the 'indirect tax zone' are:
- Christmas Island
- Cocos (Keeling) Islands
- Territory of Ashmore and Cartier Islands
- Norfolk Island
- Heard Island, and
- McDonald Islands.

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

[7] Paragraphs 84-100(1)(b) and (2)(b).

- the recipient does not satisfy the consumer element (paragraphs 94 to 103 of this draft Ruling).

15. For you to satisfy the evidentiary requirements in section 84-100, you must have either:

- a reasonable basis for forming a reasonable belief about whether your recipient is an Australian consumer, based on your usual business systems and processes[8], (the 'business systems' approach), or
- have taken reasonable steps to obtain information about whether your recipient is an Australian consumer (the 'reasonable steps' approach).[9]

16. In determining if a recipient is not an Australian consumer because of the residency element, we accept that the requirements of section 84-100 are met when you:

- satisfy evidentiary requirements from jurisdictions that we have listed as having a comparable residency element (see paragraphs 86 to 90 of this draft Ruling), or
- collect sufficient evidence to show the recipient does not satisfy the residency element, using automated systems (see paragraphs 91 to 93 of this draft Ruling).

17. There is specific evidence that you must collect to establish a reasonable belief that the recipient does not satisfy the consumer element. You must have information or a declaration from the recipient to show that the recipient is registered for GST, and the recipient's Australian Business Number (ABN), or other prescribed information, has been disclosed to you.

Evidentiary requirements – residency of recipient

Residency element

18. You need to consider various aspects in working out if your recipient satisfies the residency element.[10] Under section 84-100, this can be done either by relying on the business systems approach (paragraphs 19 to 39 of this draft Ruling) or reasonable steps approach (paragraphs 40 to 59 of this draft Ruling).

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[8] Paragraph 84-100(2)(a).
[9] Paragraph 84-100(1)(a).
[10] Paragraph 9-25(7)(a).

Business systems approach

19. Where your usual business systems and processes provide a reasonable basis for forming a reasonable belief about whether the recipient is an Australian consumer, your do not need to take steps to obtain information beyond the information you usually collect about your recipient to make the supply or maintain the commercial relationship.

20. The usual business systems and processes are those systems and processes you normally use for business purposes. It does not matter if the systems and processes you normally use differ from the systems and processes typically used in your industry.

21. Business systems and processes are not limited to automated computer systems that a recipient interacts with. It also includes a business's standard procedures used for interacting with its customers. This includes standard processes for taking orders for supplies over the phone or email.

22. Whether your business systems are usual business systems is tested at the time you receive any of the consideration for the supply, or, if an invoice is issued prior to consideration being received, at the time the invoice is issued.

23. That time also generally[11] determines what tax period the GST on a taxable supply is attributed to. Therefore, in this Ruling, that time is referred to as 'the attribution time'. In a practical sense, the 'attribution time' is the time you will need to make your taxing decision for the supply.

What is a reasonable basis for forming a reasonable belief?

24. The evidence required to establish that you have a reasonable basis to form a reasonable belief about whether the recipient is an Australian consumer will depend on the facts of the case.

25. It is not expected that your usual business systems and processes will ordinarily collect information relevant to every part of the residency element. You do not need to consider all aspects of the residency element to establish a reasonable basis for a reasonable belief about whether your recipient is an Australian consumer.

26. Examples of information that the Commissioner will accept to support a conclusion about whether the recipient satisfies the residency element include:

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[11] However, under Division 156, if 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 periodic or progressive component of the supply were a separate supply. See Example 7 of this draft Ruling for an explanation.

- the recipient's billing address
- the recipient's mailing address
- the recipient's banking or credit card details, including the location of the bank or credit card issuer
- location-related data from third party payment intermediaries
- mobile phone SIM or landline country code
- recipient's country selection
- tracking/geolocation software
- internet protocol (IP) address
- place of establishment of the recipient (for non-individual recipients)
- representations and warranties given by the recipient
- the origin of correspondence, and
- locations, such as a Wi-Fi spot, where the physical presence of the person receiving the service at that location is needed.

27. This is not an exhaustive list of evidence that would be relevant to establishing whether a recipient satisfies the residency element.[12] It is also not expected that your usual business systems and processes would necessarily collect all of these types of information. The important factor is that the information that is collected by your usual business systems and processes should be used to support your conclusion.

28. All the information collected through the usual business systems and processes should be considered and must, on balance, support a conclusion about whether the recipient satisfies the residency element.

29. In the event that the information you hold about the recipient does not consistently point to one conclusion about whether the recipient satisfies the residency element, you should assess the quality and reliability of all the available information in determining whether there is a reasonable basis for a reasonable belief about whether the recipient is an Australian consumer. Further information about how to weigh up the different information is in paragraphs 74 to 85 of this draft Ruling.

[12] We accept the examples of evidence in this list as relevant in the context of section 84-100. Most of these examples are not relevant more generally for income tax residency.

Example 1 – residency of an individual

30. *Megan purchases online security software from PC Protect, an online software provider. She pays using her German credit card and provides her German billing address. This is the only information that PC Protect's usual business systems and processes collects which is relevant to determining whether Megan satisfies the residency element.*

31. *PC Protect's usual business systems and processes provide a reasonable basis for a reasonable belief that Megan does not satisfy the residency element. Because the information collected supports a conclusion that Megan resides in Germany, the systems support a conclusion that Megan does not satisfy the residency element. PC Protect does not need to consider other aspects of the residency element to establish a reasonable basis for a reasonable belief that Megan is not an Australian consumer.*

32. Recipients that are not individuals, such as companies or partnerships, may be Australian consumers if they are not registered for GST, or if they are registered for GST but do not make their acquisition solely or partly for the purpose of their enterprise.[13]

Example 2 – residency of an unregistered business

33. *SignDezign provides online business logo design services to businesses. Its online enquiry form collects standard information about its customer's business's name, current business address, industry, year established and place of establishment.*

34. *JWW Ltd (a company that is not registered for GST) makes an enquiry to SignDezign about creating a logo for its new business. It completes the form, noting that its current business address is in Melbourne, and that it was established in Melbourne in 2016.*

35. *SignDezign's usual business systems and processes provide a reasonable basis for a reasonable belief that JWW Ltd satisfies the residency element, because they support a conclusion that JWW Ltd satisfies the residency element.*

[13] Paragraph 9-25(7)(b).

Example 3 – inconsistent information

36. *Continuing from Example 1, Alex also purchases online security software from PC Protect. When Alex signed up for her account with PC Protect, she provided her home address in Australia. However, when paying for her software, Alex pays using her German credit card.*

37. *This is the only information that PC Protect's usual business systems and processes collects which is relevant to determining whether Alex satisfies the residency element.*

38. *Given that the information PC Protect collects does not all consistently point to one conclusion about whether Alex satisfies the residency element, PC Protect should assess the quality and reliability of the available information. Although Alex's account indicated that she had an Australian home address, the fact that she paid with a German credit card supports a conclusion that Alex resides in Germany. The credit card information is more reliable because it is contemporaneous with the attribution time.*

39. *PC Protect's usual business systems and processes provide a reasonable basis for a reasonable belief that Alex does not satisfy the residency element. Therefore, PC Protect does not need to consider other aspects of the residency element to establish a reasonable basis for a reasonable belief that Alex is not an Australian consumer.*

Reasonable steps (to obtain information) approach

40. You are not limited to the business systems approach when deciding whether a recipient satisfies the residency element. You may also decide that an entity is not an Australian consumer by taking other reasonable steps to obtain information about whether their recipient is an Australian consumer.

41. The requirement to take reasonable steps to obtain information about whether an entity is an Australian consumer is an objective test that will depend on the circumstances in which you make the supply to the recipient and the relationship between you and the recipient.[14] However the requirement to take reasonable steps to obtain information will not be satisfied where no steps are taken.

[14] *Australian Securities and Investments Commission v Healey and Others* [2011] FCA 717; (2011) 278 ALR 618; (2011) 83 ACSR 484; [2011] ALMD 4492; [2011] ALMD 4493; (2011) 196 FCR 291 at [143].

Example 4 – reasonable steps not taken

42. *Mark purchases software from BGL Software by redeeming a face value voucher (Division 100 voucher)*[15] *that was given to him after being purchased online. The supplier does not collect any information relevant to whether Mark satisfies the residency element. The voucher does not give any indication as to whether Mark satisfies the residency element, and BGL Software does not take any other steps that could be used to determine if Mark satisfies the residency element.*

43. *In this example, BGL Software has not taken any steps to determine whether Mark satisfies the residency element. Therefore, BGL Software has not taken reasonable steps.*

44. The requirement in section 84-100 is not one of 'all reasonable steps.' Instead, section 84-100 requires consideration of whether the steps actually taken in totality are reasonable.

45. Additionally, the requirement to take reasonable steps to obtain information does not mean that you must always obtain the information that you have sought to obtain. You should consider, in all the circumstances, if it is reasonable to rely on the information you have received. If not, you should seek further information.

46. The requirement to take reasonable steps may require you to take steps to obtain information beyond the minimum information you need about your recipient to make the supply.

47. Relevant circumstances to be considered in determining what steps are reasonable include:

- the level of interaction you have with the recipient in making the supply or in maintaining the commercial relationship
- the type of personal information that a recipient will usually share, or usually be willing to share with you in the course of making a supply or in maintaining the commercial relationship, taking into account the type of supply, the value of the supply, and the nature of the commercial relationship between you and the recipient
- the difficulty and costs involved for you in taking steps to obtain information about whether an entity is an Australian consumer of a supply (including both direct and indirect costs), and

[15] Under Division 100, the attribution time is on redemption for vouchers that satisfy section 100-5. Broadly, these vouchers are ones that entitle the holder to supplies up to a stated monetary value.

- the expected reliability of the information about whether an entity is an Australian consumer.

48. No single factor listed in paragraph 47 of this draft Ruling will be determinative. It will depend on the overall context of the supply and the relationship between you and the recipient.

49. The level of interaction you have with the recipient in making the supply or in maintaining the commercial relationship needs to be considered as this represents the 'minimum' steps you actually take to find out information about your recipient. It provides useful context to the inquiry about reasonable steps by setting out what steps are already being taken so as to assess the difficulty and expense of taking additional steps.

50. The type of personal information that a recipient will usually share, or usually be willing to share, with certain types of suppliers is relevant again for setting context. This helps to define the limits around what information you can reasonably ask a recipient to provide. A recipient will typically share more personal information with you where there is an interactive commercial relationship (as opposed to an automated interaction) and in cases where the supply is of a high value. A recipient will also typically share, or be willing to share, more personal information with a supplier that acts in a professional advisory relationship such as a lawyer or financial adviser.

51. In considering the third factor listed in paragraph 47 of this draft Ruling, your direct and indirect costs of taking steps to obtain information about whether an entity is an Australian consumer of a supply comprises:

- actual costs incurred by the entity in taking steps to obtain information relevant to this query, and
- costs attributable to lost sales which occur, or are likely to occur, as a result of asking for additional information.

52. It is prudent for you to consider how the expected reliability of information sought will allow you to demonstrate a 'reasonable belief' as to whether the recipient is an Australian consumer, discussed further below.

Example 5 – reasonable steps

53. *Steven uses WebEA, an online personal assistant service based in the United Kingdom (UK) to assist him with his personal administration. Steven uses the service regularly, but the value of each supply made to Steven is modest.*

54. *Steven is a former senior Australian public servant and his membership of a public sector superannuation fund means he is an Australian resident for taxation purposes, and satisfies the residency element of the Australian consumer definition in subsection 9-25(7), even though he resides in the UK.*

55. *When Steven signs up to the service, a WebEA representative telephones Steven to ask for his country of residence (to determine what time zone the customer is in), his credit card number, billing address, and what types of administration services he is likely to need. However, WebEA representatives can use different methods or procedures to interact with their clients.*

56. *Steven's details are used for each supply of online personal assistant services that WebEA makes to him, although on occasion, WebEA requested further personal details depending on the administrative service being performed.*

57. *By asking Steven which country he resides in and for additional information which can corroborate that answer, WebEA has taken reasonable steps to obtain information about whether Steven satisfies the residency element. It is relevant that:*

- *WebEA is not providing professional advisory services to Steven*
- *the value of the supplies made is modest*
- *it would be unusual for a service provider like WebEA to request further information about a customer's income tax residency status, and*
- *it is reasonable to expect that many customers would choose to find an alternative provider rather than provide further information about their income tax residency.*

58. *Therefore, WebEA does not need to ask any more information about Steven's income tax residency status to have taken reasonable steps.*

59. *Even if WebEA had asked for information about Steven's income tax residency status and determined that the supply was connected with Australia under paragraph 9-25(5)(d), the supply would be GST-free as Steven is not in Australia when accessing this online personal assistant service.* [16]

[16] See item 3 of the table in subsection 38-190(1). GSTR 2007/2 considers this provision.

Reasonable belief that the recipient is not an Australian consumer – residency element

60. Regardless of whether you rely on the business systems or the reasonable steps approach, you must also reasonably believe that the recipient is not an Australian consumer for section 84-100 to apply.[17]

61. The fact that you may only have access to limited information does not make your belief unreasonable.

62. Where you make the tax decision through a wholly automated system, we consider you can still hold a reasonable belief, as long as your belief is based on a system that takes into account all relevant information you have on hand about the recipient.[18]

63. In forming your belief in respect of the residency element, you should consider all the relevant information that you have on hand about the recipient at the attribution time. This includes any relevant information that the supplier holds about the recipient at the attribution time, beyond what information you have gained from taking reasonable steps to obtain information, or from your usual business systems and processes. This may include unsolicited information given to you by the recipient.

64. Where you hold sufficient information at the attribution time to form a reasonable belief as to whether the recipient satisfies the residency element, you do not need to take into account other information received after the attribution time.

65. However, where a supply is made for a period or on a progressive basis, Division 156 deems each progressive or periodic component to be a separate supply for attribution purposes. In these situations, each separate supply has its own 'attribution time' and therefore there is a separate taxing decision for each separate supply.[19]

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[17] *George v Rocket* (1990) 170 CLR 104; (1990) 64 ALJR 384; (1990) 48 A Crim R 246; (1990) 93 ALR 483; [1990] HCA 26, *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; (2006) 80 ALJR 1549; (2006) 91 ALD 516; (2006) 63 ATR 409; (2006) 43 AAR 151; [2007] ALMD 2793; (2006) 229 ALR 187; (2006) 228 CLR 423.

[18] Paragraph 1.61 of the Explanatory Memorandum to the Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016.

[19] Section 156-15.This is similar to the approach taken for attributing GST on taxable supplies under Division 156 for supplies that could be GST-free under section 38-190. See paragraph 518 in GSTR 2007/2.

Example 6 – supplier becomes aware of additional information after transaction for the supply is finalised

66. *ABC sells software to SDF.*[20] *At the attribution time for the supply of the software to SDF, ABC holds SDF's credit card details and IP address which both indicate that SDF has its business address in the USA. Those details support a conclusion that SDF is not an Australian consumer, and ABC reasonably believes that SDF is not an Australian consumer.*

67. *Two months after the sale, SDF is having problems with the software. It contacts one of ABC's employees for troubleshooting assistance. In the course of that troubleshooting advice, SDF provides an Australian phone number, a work email address ending in '.au', and advises ABC to only call during Australian business hours.*

68. *The information ABC receives from SDF as part of the troubleshooting service would support a conclusion that SDF satisfies the residency element. However, ABC has still satisfied the requirement in section 84-100 that they hold a reasonable belief that SDF is not an Australian consumer. This was appropriately tested at the attribution time for the supply.*

Example 7 – supplier becomes aware of additional information after initial transaction for a progressive or periodic supply is finalised

69. *ABC sells a two year licence to use various software programs and charges customers on a monthly basis. Jane is an Australian resident who travels regularly to the United Kingdom where she previously resided. Jane is in London on holiday when she purchases a month to month licence to use a particular software program from ABC.*

70. *When signing up for the software program, Jane uses her English credit card which supports a conclusion that Jane is not an Australian consumer.*

71. *After Jane returns to Australia, she changes her billing details with ABC and commences to make the monthly payments with her Australian credit card.*

[20] This example does not consider whether SDF is not an Australian consumer based on the 'consumer element'. Business entities that are unregistered for GST will satisfy the 'consumer element' – see paragraph 32 and from paragraph 94 of this draft Ruling.

72. *As the supply of the licence and the payments are on a periodic or progressive basis, Division 156 applies to treat each monthly component of the licence as a separate supply for attribution purposes, and therefore attribution occurs on a monthly basis. At the attribution time for each monthly supply, ABC needs to consider whether Jane is an Australian consumer or not.*

73. *When Jane commences paying with her Australian credit card, the information held by ABC at the attribution time now supports a conclusion that Jane is an Australian consumer. ABC ceases to satisfy the requirement in section 84-100 that they hold a reasonable belief that Jane is not an Australian consumer.*

Inconsistent information

74. In the event that the information you hold about the recipient does not consistently point to one conclusion about whether the recipient satisfies the residency element, you should weigh up all the available information in determining whether you 'reasonably believe the other entity is not an Australian consumer'.

75. In weighing up all the available information, you should consider:

- the expected reliability of the information, including whether:
  - the provision of the information is necessary for the commercial transaction to proceed or if the information provided is only necessary for your compliance purposes
  - the recipient has an incentive to provide conflicting or false information and the ease with which such information could be provided, and
- whether the majority of the information points towards one conclusion over another.

76. Information that is necessary for the commercial transaction to proceed (for example, compulsory fields in web-based forms) will generally be more reliable than information that is only necessary for your compliance purposes. Where the recipient has an incentive to provide incorrect information and it is relatively straightforward to provide incorrect information, the information may be less reliable. Incentives which are either related or unrelated to tax need to be considered, such as whether a recipient has an incentive to provide false information to access a wider range of supplies which are limited on a geographic basis.

Example 8 – Customer provides false residency declaration

77. *Donna is an Australian resident for income tax purposes who resides in Adelaide. She is not registered for GST. She often shops at KeyOrder, an online store which sells goods as well as digital products to customers around the world. When she signed up for her account with KeyOrder, Donna provided her Australian mailing address.*

78. *Donna purchases an app from KeyOrder. She is asked during the checkout process whether she is an Australian resident for income tax purposes. KeyOrder requests this information for the purposes of determining whether GST will apply to the sale. When she selects yes, Donna notices the price goes up by 10 per cent, so she selects no instead. She completes the transaction using a third party payment intermediary, which she always uses when shopping at KeyOrder. The payment intermediary does not pass on any information to KeyOrder which would indicate whether Donna satisfies the residency element.*

79. *KeyOrder does not treat Donna as an Australian consumer for the supply of the app to her, and does not charge GST. Section 84-100 does not apply to KeyOrder. Although Donna incorrectly declared that she was not an Australian resident for income tax purposes, KeyOrder should have used her other account information, such as her Australian mailing address, as the relevant indicator to determining if Donna satisfied the residency element. This is despite the information being provided for the purpose of Donna's account rather than the actual supply of the app.*

80. *Even though information about Donna's income tax residency is very closely correlated to the residency element, KeyOrder should have considered this information less reliable than the other information Donna has previously provided when signing up for her account. The information about Donna's income tax residency status is less reliable because it is only required for KeyOrder's compliance purposes, and Donna has an incentive to incorrectly declare her residency status to avoid the additional GST cost.*

81. *Because Donna is an Australian consumer under subsection 9-25(7) and section 84-100 does not apply, the supply by KeyOrder to Donna is connected with Australia under paragraph 9-25(5)(d). If the other requirements in section 9-5 are met, KeyOrder will be liable for GST on the supply.*[21]

[21] The Commissioner may impose a penalty on a recipient that misrepresents their status as an Australian consumer: paragraph 284-75(4)(b) in Schedule 1 to the *Taxation Administration Act 1953*.

Example 9 – Customer relocates to another country

82. *Katherine is an Australian resident for income tax purposes who resides in Brisbane. Katherine moved permanently back to Australia from the UK 12 months ago where she had lived and worked for a number of years. While living in the UK, Katherine subscribed to a website OneRun where she views and downloads clothing patterns. When she signed up for her account she used her UK address and credit card. As Katherine still travels to the UK for holidays, she has maintained her UK bank accounts and still pays for her subscription from that account.*

83. *When Katherine accesses OneRun after her move back to Australia, OneRun identifies Katherine's current location (Brisbane) which it uses as one factor to help predict patterns that Katherine will be most interested in, based on the season.*

84. *In supplying clothing patterns, OneRun does not treat Katherine as an Australian consumer. Although her location is now consistently in Australia, OneRun relies on Katherine's account address and credit card which provide a reasonable basis for forming a reasonable belief that Katherine is not an Australian consumer. OneRun have considered all the information collected in their usual business systems and processes (credit card, address, and current location), assessed its reliability, and reached the conclusion that the totality of the information supports their reasonable belief that Katherine is not an Australian consumer. Even though Katherine is an Australian consumer, OneRun has correctly determined that Katherine is not an Australian consumer under section 84-100.*

85. *Although Katherine is not an Australian consumer, while Katherine is in Australia the supply may be connected with Australia under other limbs under subsection 9-25(5).*

Acceptable approaches from other comparable jurisdictions – residency element

86. Subject to paragraphs 87 to 90 of this draft Ruling, we will accept that you have satisfied the evidentiary and reasonable belief requirements for determining that your recipient is not an Australian consumer under section 84-100 where you have:

- set up your systems to comply with an overseas jurisdiction's comparable evidentiary requirements for determining residency, usual residence, permanent address or similar term for VAT or GST purposes, and
- your systems indicate that your recipient's residency, usual residence, permanent address (or similar term) is outside Australia.

87. We consider the following jurisdictions have comparable evidentiary requirements for determining residency, usual residence, permanent address or similar term, in relation to the supplies in which their rules apply:

- countries within the European Union
- New Zealand, and
- Norway.

88. The evidentiary requirements for determining residency, usual residence, permanent address or similar term must be publicly available.

89. For countries within the European Union and Norway, their requirements currently only apply to certain types of supplies including digital supplies.

90. The Commissioner may also add other jurisdictions to this list upon being satisfied that they have comparable evidentiary requirements.

Automated systems approach for determining residency element

91. Where you make supplies using fully automated systems, it is accepted that there is minimal scope for you to collect additional information beyond those systems which would alter your belief about whether your recipient is an Australian consumer because of their residency.

92. We will accept that your supplies are made to recipients that are not Australian consumers under section 84-100 if:

- the supplies do not ordinarily[22] involve any human interaction by you (or on your behalf) with the recipient in real time in entering the transaction for the supply, and
- your usual business systems provide at least two pieces of non-contradictory evidence which support a conclusion that the recipient has their residency, usual residence, permanent address or similar term at a particular place or jurisdiction outside Australia.

93. The following evidence can be used for the purposes of paragraph 92 of this draft Ruling:

- the recipient's billing address is an address outside of Australia

[22] Supplies that involve limited human interaction can still use this approach, such as assisting a recipient through the standard automated process.

- the recipient's mailing address is an address outside of Australia
- the recipient's banking or credit card details, including the location of the bank or credit card issuer being outside of Australia
- the recipient's web-based country selection is for a country other than Australia
- the recipient's location detected through tracking/ geolocation software that shows the recipient is outside of Australia
- the recipient's IP address of the device used to make the purchase indicates that the recipient is outside of Australia
- the recipient provides a mobile phone or landline country code that is for a country other than Australia, and
- other commercially relevant information which is relevant to establishing a person's residency.

Reasonable belief that the recipient is not an Australian consumer – consumer element

94. Under subsection 9-25(7) an entity that is registered for GST will not be an Australian consumer, unless the entity is making the acquisition for a purpose other than the enterprise it carries on.[23]

Evidentiary requirements

95. Subsection 84-100(3) specifies that if you believe that the recipient is not an Australian consumer because the recipient is registered for GST, your belief is only reasonable if:

- the recipient's ABN (or other prescribed information) has been disclosed to you, and
- the recipient has provided a declaration or other information which indicates that they are registered for GST.

[23] Other than an individual it would be unusual for a registered entity to make an acquisition for a purpose other than the enterprise carried on by it.

96. This test sets the standard for the information suppliers must obtain to form a reasonable belief that the recipient is not an Australian consumer due to the recipient not being a consumer. However, it does not require information about whether the recipient's acquisition of the thing supplied is for the purpose of an enterprise the recipient carries on.

97. An ABN alone is not evidence of whether a recipient is registered for GST. A recipient may have an ABN without being registered for GST.[24]

ABN

98. Section 84-100 requires the recipient's ABN or other prescribed information to be disclosed to you for the section to apply. It does not matter who discloses the ABN to you – for example, disclosures may be made by the Australian Business Registrar by you checking information publicly available on the Australian Business Register (see paragraph 100 of this draft Ruling).

99. We expect that you would take reasonable steps to ensure that the ABNs disclosed to you are likely to be valid and belong to the recipient.

100. These steps will vary depending on your commercial arrangements, business practices, and the size and scale of your operations. These steps may include:

- using ABN Lookup where the Australian Business Registrar makes information publicly available for searching one record at a time [25]
- ensuring the ABN provided is in the correct format[26]
- using the ABN Lookup tool which allows third parties to integrate ABN Lookup validation and data into their own applications. This service can be used to carry out bulk searches[27], and
- ensuring that there are no duplicate ABN entries in your system for different recipients.

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[24] Practice Statement Law Administration PS LA 2011/9 *The registration of entities in the ABR*.
[25] http://abr.business.gov.au
[26] http://softwaredevelopers.ato.gov.au/ABNformat
[27] http://abr.business.gov.au/UserGuideAbnLookupTool.aspx

Declaration about GST registration status

101. In addition to you obtaining the recipient's ABN, to rely on section 84-100, the recipient must also provide you with a declaration or other information that indicates that they are registered for GST. This information must be provided by the recipient. You can facilitate this by asking recipients to confirm if they are registered for GST through your normal business systems or processes.

Where ABN and declaration not collected

102. If you subjectively believe that your recipient is not an Australian consumer because they do not satisfy the consumer element, but you have not collected the recipient's ABN and declaration as required in subsection 84-100(3), you do not have a reasonable belief for the purposes of section 84-100. This means section 84-100 does not apply, and you will instead need to determine if your supply is connected with Australia under paragraph 9-25(5)(d), considering the definition of Australian consumer in subsection 9-25(7).

Relevant penalty provision for consumers that misrepresent status

103. The Commissioner may also impose a penalty on recipients that misrepresent their status as an Australian consumer.[28]

Date of effect

104. When the final Ruling is issued, it is proposed to apply to arrangements begun to be carried out from 1 July 2016.

105. Although the commencement date for subsection 9-25(7) and section 84-100 is 1 July 2016, those sections only apply to working out net amounts for tax periods starting on or after 1 July 2017.[29]

[28] Paragraph 284-75(4)(b) in Schedule 1 to the *Taxation Administration Act 1953.*
[29] Item 38 of Schedule 1 to the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016.*

106. Also, special transitional rules apply for periodic or progressive supplies that are attributable to tax periods commencing before 1 July 2017.[30] Supplies made for a period or progressively over a period of time are treated as being supplied continuously over that period. To the extent the supply is taken to be made after 1 July 2017, the tax payable on that portion of the supply is included in the net amount for the first tax period commencing after 1 July 2017.

Commissioner of Taxation
21 December 2016

[30] Item 39 of Schedule 1 to the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016.*

Frequently used terms

107.

Attribution time

The time the supplier receives any of the consideration for the supply, or, if an invoice is issued prior to consideration being received, at the time the invoice is issued.

Business systems approach

One of the evidentiary requirements under section 84-100 which requires a supplier to have a reasonable basis for forming a reasonable belief about whether their recipient is an Australian consumer, based on their usual business systems and processes

Consumer element

One of the requirements to be an Australian consumer under subsection 9-25(7), being that the recipient is either:

- not registered for GST, or
- if the entity is registered for GST, that they did not acquire the thing for their enterprise (solely or partly).

Reasonable steps approach

One of the evidentiary requirements under section 84-100 which requires a supplier to take reasonable steps to obtain information about whether an entity is an Australian consumer.

Residency element

One of the requirements to be an Australian consumer under subsection 9-25(7), being that the recipient is an Australian resident for income tax purposes, but is not an Australian resident solely because Australia includes the external Territories.

Appendix 1 – Your comments

108. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

109. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments, and
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**17 February 2017**
Contact officer:	**Jo Drum**
Email address:	**Jo.Drum@ato.gov.au**
	AustraliaGST@ato.gov.au
Telephone:	**+61 (03) 8792 1469**

Appendix 2 – Detailed contents list

110. The following is a detailed contents list for this Ruling:

	Paragraph
Summary – what this ruling is about	**1**
Who this Ruling is relevant to	1
What this Ruling is about	3
Ruling	**10**
Supplies to Australian consumers	10
Meaning of Australian consumer	11
Determining if recipient is an Australian consumer	13
Evidentiary requirements – residency of recipient	18
Residency element	18
Business systems approach	19
What is a reasonable basis for forming a reasonable belief?	24
Example 1 – residency of an individual	30
Example 2 – residency of an unregistered business	33
Example 3 – inconsistent information	36
Reasonable steps (to obtain information) approach	40
Example 4 – reasonable steps not taken	42
Example 5 – reasonable steps	53
Reasonable belief that the recipient is not an Australian consumer – residency element	60
Example 6 – supplier becomes aware of additional information after transaction for the supply is finalised	66
Example 7 – supplier becomes aware of additional information after initial transaction for a progressive or periodic supply is finalised	69
Inconsistent information	74
Example 8 – Customer provides false residency declaration	77
Example 9 – Customer relocates to another country	82
Acceptable approaches from other comparable jurisdictions – residency element	86
Automated systems approach for determining residency element	91
Reasonable belief that the recipient is not an Australian consumer – consumer element	94

Evidentiary requirements 95
ABN 98
Declaration about GST registration status 101
Where ABN and declaration not collected 102
Relevant penalty provision for consumers that misrepresent status 103
Date of effect **104**
Frequently used terms **107**
Appendix 1 – Your comments **108**
Appendix 2 – Detailed contents list **110**

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

GSTR 2000/31; GSTR 2004/7; GSTR 2007/2; LCG 2016/1; TR 2006/10

Legislative references:

- ANTS(GST)A 1999
- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-25(5)
- ANTS(GST)A 1999 9-25(5)(d)
- ANTS(GST)A 1999 9-25(7)
- ANTS(GST)A 1999 9-25(7)(a)
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- ANTS(GST)A 1999 38-190(1)
- ANTS(GST)A 1999 84-100
- ANTS(GST)A 1999 84-100(1)(a)
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- ANTS(GST)A 1999 Div 156
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- ITAA 1936
- ITAA 1936 6
- TAA 1953
- TAA 1953 Sch 1 284-75(4)(b)
- Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016. Item 38 of Sch 1
- Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016 Item 39 of Sch 1

Cases relied on:

- Australian Securities and Investments Commission v Healey and Others [2011] FCA 717; (2011) 278 ALR 618; (2011) 83 ACSR 484; [2011] ALMD 4492; [2011] ALMD 4493; (2011) 196 FCR 291
- George v Rocket (1990) 170 CLR 104; (1990) 64 ALJR 384; (1990) 48 A Crim R 246; (1990) 93 ALR 483; [1990] HCA 26
- McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 80 ALJR 1549; (2006) 91 ALD 516; (2006) 63 ATR 409; (2006) 43 AAR 151; [2007] ALMD 2793; (2006) 229 ALR 187; (2006) 228 CLR 423

Other references:

- Explanatory Memorandum to Tax and Superannuation Laws Amendment (2016 Measures No. 1) Bill 2016, [1.61].
- PS LA 2011/9

ATO references

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