


GSTR 2003/7A - Addendum - Goods and services tax: what do the expressions 'directly connected with goods or 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?

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Addendum

Goods and Services Tax Ruling

Goods and services tax: what do the expressions 'directly connected with goods or 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*?

This Addendum amends Goods and Services Tax Ruling GSTR 2003/7 in five respects.

First the Addendum amends GSTR 2003/7 to reflect the amendment to subsection 9-25(5) of the *A New Tax System (Goods and Services) Tax Act 1999* (GST Act) made by the *Tax Laws Amendment (2005 Measures No. 1) Act 2005*. This amendment inserted new paragraph 9-25(5)(c) to ensure that a supply that is made offshore is 'connected with Australia' if it is a supply of a right or option to acquire something, the supply of which would be connected with Australia. In respect of item 1 set out below, the Addendum applies on and from 1 October 2005 (the amendment applies to supplies made on or after 1 October 2005).

Secondly, the Addendum amends GSTR 2003/7 to reflect the amendment to section 38-190 of the GST Act made by the *Tax Laws Amendment (2004 Measures No. 6) Act 2005*. This amendment inserted new subsection 38-190(2A) to remove an anomaly that allowed supplies of certain services made to owners of residential property (for example, non-resident owners) that is situated in Australia to be GST-free if the owner is not in Australia when the thing supplied is done. In respect of items 4, 5, 15, 16, 17, 18 and 20 set out below, the Addendum applies on and from 1 April 2005, (the amendment applies to supplies made on or after 1 April 2005).

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Thirdly, the Addendum amends GSTR 2003/7 to replace paragraphs 143 to 145 with new paragraphs 143 to 145C to clarify the ATO view in respect of supplies of marketing services for real property made by an agent to a non-resident where the agent also has the authority to sign the sale agreement; that is, where the agent markets the property and effects the sale. The explanation of *Malololailai Interval Holidays NZ Ltd v. CIR* (1997) 18 NZTC 13,137 at paragraphs 143 to 145 might mislead the reader to conclude that for the purposes of the Australian GST law such a supply is not directly connected with real property. This conclusion is not consistent with the ATO view as explained in the GST Guide *GST and real estate services for non-resident property owners* ('GST real estate services guide') as published on 15 December 2004. In respect of items 6, 7, 12 and 13 set out below, the Addendum applies on and from its date of issue.

Fourthly, the Addendum updates GSTR 2003/7 to take account of the decision in *Saga Holidays Limited v. Commissioner of Taxation* [2006] FCAFC 191. In respect of items 8, 9, 10, 11 and 21 set out below, the Addendum applies on and from its date of issue.

Fifthly, the Addendum updates references to GSTR 2003/2 which has since been withdrawn and replaced by GSTR 2005/2, and inserts cross references to other GST Rulings since issued. In respect of items 2, 3, 14 and 19 set out below, the Addendum applies on and from its date of issue.

You can rely on this Addendum, for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*, from its date of issue.

GSTR 2003/7 is amended as follows:

1. Paragraph 8

Immediately after the last sentence and before footnote 2 insert:

If the supply is not connected under either of these tests, and the supply is a right or option to acquire another thing and the supply of the other thing would be connected with Australia, the supply of the right or option is connected with Australia.

2. Footnote 4

Omit 'GSTR 2003/2'; substitute 'GSTR 2005/2'.

3. Paragraph 10

At the end of the last dot point insert footnote 4A with the following text:

The operation of this section is addressed in Goods and Services Tax Rulings GSTR 2003/8, GSTR 2004/7, GSTR 2005/6 and GSTR 2007/2.

4. Paragraph 11

In the second sentence, immediately after 'subsections 38-190(2)' insert ', (2A)'.

5. Footnote 7

Immediately after 'Subsections 38-190(2)' insert ', (2A)'.

6. Paragraph 30

In the, last sentence omit '145'; substitute '145C'.

7. Paragraph 46

In the first sentence omit '145'; substitute '145C'.

8. Paragraph 91

At the end of the last sentence insert footnote 19A with the following text:

This view is consistent with the decision in *Saga Holidays Limited v. Commissioner of Taxation* [2006] FCAFC 191 (*Saga Holidays*) where Stone J held that the accommodation component of an Australian tour package supplied by a tour operator gave the tourist a contractual right exercisable over or in relation to land.

9. Footnote 21

Omit the text; substitute:

In *Saga Holidays* [2006] FCAFC 191 Stone J considered it unnecessary to consider whether a supply of hotel accommodation was a licence to occupy land. Stone J (at paragraph 38) was 'satisfied that, at the very least, the contract between Saga and the tourist [for hotel accommodation] can be accurately described as including "a contractual right exercisable... in relation to land" and therefore ... it is not necessary to consider the question of a licence'.

10. Paragraph 96

At the end of the last sentence insert footnote 22A with the following text:

See for example, the *Saga Holidays* [2006] FCAFC 191 where the court held that the supply of the accommodation component was a taxable supply of real property connected with Australia. Stone J (at paragraph 43) found that supplies in addition to the room, such as, the use of furniture and facilities within each room, access to common areas and facilities of the hotels such as pools were part of a single supply of accommodation which is properly characterised as a supply of real property.

11. Paragraph 97

At the end of the last sentence insert footnote 22B with the following text:

The alternative view was argued by the Appellant in *Saga Holidays* [2006] FCAFC 191 and dismissed. Stone J (at paragraph 38) found that the accommodation component was properly characterised as a supply of real property.

12. Paragraph 127

In the last sentence omit '145'; substitute '145C'.

13. Paragraphs 143 to 145

Omit the paragraphs; substitute:

143. In the New Zealand case of *Malololailai* the issue was whether 'marketing services' supplied by Accent Holidays Ltd (AHL) to a related company Malololailai Interval Holidays New Zealand (MIH (NZ)) were 'directly in connection with land situated outside New Zealand or any improvement thereto'. AHL advertised and promoted time-share holidays at a resort in Fiji to the NZ public as agent of MIH (NZ). The purchaser of the time-share holiday obtained a right to one week's accommodation in a bure, at a resort in Fiji for each year up to February 2017 when the scheme ends. AHL negotiated the contract for time-share holidays up to the point where the contract was effected between MIH (NZ) and the purchaser.

144. Neazor J held that the 'marketing services' were not supplied directly in connection with land outside New Zealand. Neazor J stated:

If one of the analogies referred to needs to be chosen I would take that of the publication of advertisements in the Wilson & Horton case. The newspaper proprietor's services facilitated or opened the way to the transactions between vendor and purchaser, and that in my view is what AHL [the supplier of the marketing services] did, although it was more closely involved in the transaction to which the statutory words apply than the publisher of an advertisement would be. Nevertheless the transaction having direct effect was not that of the publisher, or in this case of the sales agent.⁴⁴

145. If the supply of the 'marketing services' by AHL to MIH(NZ) was simply for the purpose of introducing a willing purchaser of the time-share holiday to MIH(NZ), we concur with the findings of Neazor J. Once so characterised, the supply cannot be said to have a direct connection with real property. The transaction that was directly connected with the real property was the contract between the vendor and purchaser that the marketing services helped facilitate.

145A. However, the managing director of AHL had authority to sign, for and on behalf of MIH (NZ), the agreements to purchase time-share holidays and the pooling agreements (which governed administration and maintenance at the resort). AHL also had the authority to reduce the sale price within certain limits. As noted in the case, '[t]he selling of the interval holidays in New Zealand was not conducted with the public by MIH (NZ), but by AHL, the business of which is the selling of interval [time-share] holidays'.^{44A} AHL, as agent of MIH(NZ) completed the sale of an interval holiday and licence to occupy and did not merely supply marketing services to facilitate a sale by MIH(NZ). In these circumstances, we consider that the supply by AHL to MIH(NZ) is properly characterised as the services of selling the property and that supply, therefore, is directly connected with real property.

145B. Therefore, should an issue, with facts similar to that in *Malololailai*, arise for consideration under the Australian GST law, we would conclude that a supply, such as that made by AHL, is directly connected with real property situated outside Australia as the services do all that is required to effect the sale of the property to the purchaser, the marketing of the property being only one aspect of the service. As explained at paragraph 43 of this Ruling, we consider supplies are directly connected with real property if the supply is directly connected with the sale, disposal, acquisition, transfer, surrender, etc of an interest in or right over land.

⁴⁴ (1997) 18 NZTC 13,137 at p13,146.

^{44A} (1997) 18 NZTC 13,137 at p13,139.

145C. This approach is consistent with the view in the GST Guide *GST and real estate services for non-resident property owners – supplied before 1 April 2005*.^{44B} In that guide we state that the service supplied by a real estate agent of selling/auctioning a rental property on behalf of a non-resident where the agent has authority to sign the sale agreement on behalf of the non-resident is a supply directly connected with real property.

14. Paragraph 159

At the end of the last sentence insert footnote 44C with the following text:

Goods and Services Tax Ruling GSTR 2005/6 explains when a supply is provided to another entity under subsection 38-190(3).

15. Paragraph 165

In the row 'Section 38-190 consequences' omit the text in the second column; substitute:

The supply is not GST-free under item 1 because the real property is not situated outside Australia. Nor is the supply GST-free under paragraph (a) of item 2, or item 3 because the supply is directly connected with real property situated in Australia.

If the non-resident is not in Australia when the legal services are performed and acquires the services in carrying on its enterprise, but is not registered or required to be registered, the supply is GST-free under paragraph (b) of item 2.

However, subsection 38-190(2A) may negate the GST-free status of the supply of legal services if the acquisition by the non-resident financial institution of the services of exercising on its behalf a power of sale under the mortgage relates (whether directly or indirectly, or wholly or partly) to the making of an input taxed supply by that financial institution of real property situated in Australia.

^{44B} First published as GST and real estate services for non-resident property owners on 15 December 2004.

16. Paragraph 177

In the row 'Section 38-190 consequences' after the last paragraph of the second column insert the following paragraph:

However, subsection 38-190(2A) may negate the GST-free status of the supply if the acquisition of the land tax advice by the UK individual relates (whether directly or indirectly, wholly or partly) to the making of an input taxed supply by that individual of real property situated in Australia.

17. Paragraph 178

In the row 'Section 38-190 consequences' after the last paragraph of the second column insert the following paragraph:

However, subsection 38-190(2A) may negate the GST-free status of the supply if the acquisition by the UK individual of the services of preparing financial statements and a tax return relates (whether directly or indirectly, wholly or partly) to the making of an input taxed supply by that individual of real property situated in Australia.

18. Paragraph 183

In the row 'Section 38-190 consequences' after the last paragraph of the second column insert the following paragraph:

However, subsection 38-190(2A) may negate the GST-free status of the supply if the acquisition of the debt recovery services by the non-resident company relates (whether directly or indirectly, wholly or partly) to the making of an input taxed supply by that company of real property situated in Australia.

19. Related Rulings/Determinations

Omit:

GSTR 2003/2;

substitute:

; GSTR 2003/8; GSTR 2004/7; GSTR 2005/2; GSTR 2005/6;
GSTR 2007/2

20. Legislative references

Insert:

- ANTS(GST)A99 38-190(2A)

21. Case references

Insert:

- Saga Holidays Limited v. Commissioner of Taxation [2006] FCAFC 191

Commissioner of Taxation

24 April 2007

ATO references

NO: 2006/20258

ISSN: 1443-5160

ATOlaw topic: Goods and Services Tax ~~ International services ~~
supplies used or enjoyed outside Australia