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'?

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Goods and Services Tax Ruling

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'?

Contents Para

What this Ruling is about 1
Date of effect 7
Legislative context 10
Ruling 19
Explanation (this forms part of the Ruling) 90
Part I – when a supply is made to a non-resident or other recipient 109
Part II – the meaning of 'not in Australia', 'outside Australia' and 'when the thing supplied is done' 180
Part III – when particular entity types are in Australia in relation to the supply 200
Part IV – apportionment 439
Part V – further examples 482
Detailed contents list 509

Preamble

*This document is a ruling for the purposes of section 37 of the **Taxation Administration Act 1953**. You can rely on the information presented in this document which provides advice on the operation of the GST system.*

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 for an entity that is either an individual, company, partnership, corporate limited partnership or trust:

- 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 if 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 considers 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 an entity that is 'not in Australia'.

5. This Ruling does not otherwise address the operation of the provisions of section 38-190.

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 Ruling explains our view of the law as it applied from 1 July 2000. You can rely upon this Ruling on and from its date of issue for the purposes of section 37 of the *Taxation Administration Act 1953*. 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.

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

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

Withdrawal and replacement of paragraph 68 of GSTR 2000/31[2]

9. An Addendum to Goods and Services Tax Ruling GSTR 2000/31 omits paragraph 68 (old paragraph 68) of GSTR 2000/31 and replaces it with a paragraph that refers the reader to this Ruling to determine when an entity is not in Australia for the purposes of items 2 and 3 of subsection 38-190(1). GSTR 2000/31, as amended, applies from 8 July 1999. If, however, you have relied on the old paragraph 68 you are protected in respect of what you have done up to the date of issue of the Addendum. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the date of issue of this Addendum. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Legislative context

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

(a) you make the 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.

11. A supply is GST-free if it is GST-free under Division 38 or under a provision of another Act.[3]

12. 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.

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

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[2] GSTR 2000/31 Goods and services tax: supplies connected with Australia.
[3] Paragraph 9-30(1)(a).

14. 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, provided subsections 38-190(2) or (3) do not negate that GST-free status. 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.

15. 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]

16. 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.

17. Subsection 38-190(4) extends 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.

[4] Refer to paragraphs 41 to 42 and 143 to 150 of GSTR 2003/8 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

18. 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: [emphasis added] (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 [emphasis added] (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.
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**. [emphasis added]

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

Ruling

19. You should refer to the section headed 'Explanation' for a more detailed examination of the issues covered in the Ruling section that follows.

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

20. An important issue in the application of these items is when is a supply made to a non-resident (or other recipient[6] of a supply) who is 'not in Australia' or 'outside Australia' 'when the thing supplied is done'.

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?

21. Item 2 applies to a supply of a thing, other than a supply of goods or real property, which is made to a non-resident.[7]

22. Paragraph (b) of item 4 applies to a supply that is made in relation to rights if that supply is to an entity that is not an Australian resident. 'An entity that is not an Australian resident' is a non-resident.

23. A supply is made to *a non-resident* for the purposes of item 2 and paragraph (b) of item 4 if the supply is made to an entity that is a person who is not a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* (ITAA 1936). A non-resident includes:

- an individual who is not a resident of Australia as defined in subsection 6(1) of the ITAA 1936;[8]
- a company that is not a resident of Australia as defined in subsection 6(1) of the ITAA 1936;
- a partnership the central management and control of which is not located in Australia;
- a corporate limited partnership that is not a resident of Australia as defined in section 94T of the ITAA 1936;[9] and
- a trust of which no trustee is a resident of Australia as defined in subsection 6(1) of the ITAA 1936 and the central management and control of which is not located in Australia.

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[6] Recipient, as defined in section 195-1, means, in relation to a supply, the entity to which the supply was made.
[7] It should be noted that even if the supply is GST-free under item 2, subsections 38-190(2) or (3) may negate the GST-free status of that supply.
[8] Refer to paragraph 115 where the definition is reproduced.
[9] Refer to paragraph 164 where the definition is reproduced.

24. In the case of a trust, the supply is made to a non-resident if the trust is a non-resident, irrespective of whether the supply is expressed as being made to the trust or the trustee of that trust.

25. For further explanation about when a supply is made to a non-resident for the purposes of item 2 and paragraph (b) of item 4, refer to paragraphs 111 to 174 of the Explanation section of the Ruling.

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

26. Item 3 applies to a supply of a thing, other than a supply of goods or real property, which is made to a recipient who is not in Australia when the thing supplied is done.[10]

27. A recipient, in relation to a supply, is the entity to which the supply was made.[11] An entity is defined in subsection 184-1(1) of the GST Act. The definition of entity is reproduced and explained at paragraphs 176 and 177 in the Explanation section of the Ruling.

28. In the case of an entity that is a trust, the supply is made to the trust irrespective of whether the supply is expressed as being made to the trust or the trustee of that trust.

29. Unlike item 2 and paragraph (b) of item 4, item 3 applies to supplies made to entities irrespective of their residency status.

30. For further explanation about when a supply is made to a 'recipient' for the purposes of item 3, refer to paragraphs 175 to 179 of the Explanation section of the Ruling.

The meaning of 'not in Australia' and 'outside Australia' for the purposes of items 2 and 3 and paragraph (b) of item 4

31. The requirement that the non-resident in item 2, or the recipient in item 3, is *not in Australia* when the thing supplied is done is a requirement, in our view, that the non-resident or recipient is *not in Australia in relation to the supply* when the thing supplied is done.

32. The requirement that the non-resident is *outside Australia* when the thing supplied is done in paragraph (b) of item 4 is a requirement, in our view, that the non-resident is *not in Australia in relation to the supply* when the thing supplied is done.

33. For further explanation about the meaning of 'not in Australia' and 'outside Australia' for the purposes of items 2 and 3 and

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[10] If a supply is not GST-free under item 3 because paragraph (a) of item 3 is not satisfied (that is the recipient is in Australia in relation to the supply), subsection 38-190(4) may apply with the effect that the supply is taken for the purposes of item 3 to be a supply made to a recipient who is not in Australia. Refer to paragraphs 186 to 197 where subsection 38-190(4) is discussed in more detail.

[11] Section 195-1.

paragraph (b) of item 4, refer to paragraphs 181 to 185 of the Explanation section of the Ruling.

When is a non-resident not in Australia when the thing supplied is done for the purposes of item 2 and paragraph (b) of item 4?

34. We determine whether the not in Australia requirement is satisfied by determining whether the non-resident entity is in Australia in relation to the supply. If the entity is in Australia in relation to the supply, the entity does not satisfy the not in Australia requirement.

Non-resident individual in Australia in relation to the supply (item 2 and paragraph (b) of item 4)

35. A non-resident individual is in Australia if that individual is physically in Australia. If a non-resident individual is physically in Australia and in contact (other than contact which is only of a minor nature) with the supplier, that presence is in relation to the supply.

36. For further explanation about when a non-resident individual is in Australia in relation to a supply when the thing supplied is done refer to paragraphs 202 to 220 of the Explanation section of the Ruling.

Non-resident company in Australia in relation to the supply (item 2 and paragraph (b) of item 4)

37. A non-resident company is in Australia if that company carries on business (or in the case of a company that does not carry on business, carries on its activities) in Australia:

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

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

38. 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.

39. 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 (at paragraph 37) to its particular circumstances, the non-resident company is not in Australia.

40. 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 (at paragraph 37). Similarly, even if a company does not have

a permanent establishment in Australia for income tax purposes, it may still be in Australia on application of the test to its particular circumstances.

41. A non-resident company is in Australia in relation to the supply if the supply is solely or partly for the purposes of the Australian presence, for example, its Australian branch. If 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 the only involvement is minor.

42. For further explanation about when a non-resident company is in Australia in relation to a supply when the thing supplied is done refer to paragraphs 230 to 332, 347 to 372 and 374 to 379 of the Explanation section of the Ruling.

Non-resident partnership (other than a corporate limited partnership) in Australia in relation to the supply (item 2 and paragraph (b) of item 4)

43. A non-resident partnership is in Australia if that partnership carries on business (or in the case of a partnership that is in receipt of ordinary income or statutory income jointly, other activities which generate that income) in Australia:

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

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

44. A non-resident partnership is in Australia in relation to the supply if the supply is solely or partly for the purposes of the Australian presence, for example, its Australian branch. If the supply is not for the purposes of the Australian presence but that Australian presence is involved in the supply, the partnership is in Australia in relation to the supply, except where the only involvement is minor.

45. For further explanation about when a non-resident partnership is in Australia in relation to a supply when the thing supplied is done refer to paragraphs 381 to 395 and 398 to 405 of the Explanation section of the Ruling.

Non-resident corporate limited partnership in Australia in relation to the supply (item 2 and paragraph (b) of item 4)

46. We consider that a non-resident corporate limited partnership is in Australia if that partnership carries on business (or in the case of a corporate limited partnership that does not carry on business, carries on its activities) in Australia:

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

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

47. A non-resident corporate limited partnership is in Australia in relation to the supply if the supply is solely or partly for the purposes of the Australian presence, for example, its Australian branch. If the supply is not for the purposes of the Australian presence but that Australian presence is involved in the supply, the partnership is in Australia in relation to the supply, except where the only involvement is minor.

48. For further explanation about when a non-resident corporate limited partnership is in Australia in relation to a supply when the thing supplied is done refer to paragraphs 411 and 413 and 417 to 418 of the Explanation section of the Ruling.

Non-resident trust in Australia in relation to the supply (item 2 and paragraph (b) of item 4)

49. We consider that a non-resident trust is in Australia if a trustee of that trust, acting in its capacity as trustee, carries on business (or in the case of a trustee that does not carry on business, carries on the trust's activities) in Australia:

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

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

50. A non-resident trust is in Australia in relation to the supply if the supply is solely or partly for the purposes of the Australian presence of that trust, for example, its Australian branch. If the supply is not for the purposes of the Australian presence but that Australian presence is involved in the supply, the trust is in Australia in relation to the supply, except where the only involvement is minor.

51. For further explanation about when a non-resident trust is in Australia in relation to a supply when the thing supplied is done refer to paragraphs 421 to 427 and 430 to 433 of the Explanation section of the Ruling.

When is a recipient not in Australia when the thing supplied is done for the purposes of item 3?

52. As mentioned at paragraph 31, we determine whether the not in Australia requirement is satisfied by determining whether the recipient is in Australia in relation to the supply. If the recipient is in Australia in relation to the supply the recipient does not satisfy the not in Australia requirement.

53. Item 3 may apply irrespective of whether the recipient is a resident or non-resident of Australia.

Application of subsection 38-190(4) with respect to item 3

54. If a supply is made to a recipient who fails the 'not in Australia' requirement in paragraph (a) of item 3, it is necessary to consider whether subsection 38-190(4) applies. That subsection extends the scope of item 3 by treating a supply that is made to a recipient who is in Australia in relation to the 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
- the supply is provided, or the agreement requires it to be provided, to another entity outside Australia.

55. A supply that is made under an agreement with an individual, a company or a corporate limited partnership, that is a resident of Australia for income tax purposes, is a supply made under an agreement with an Australian resident.

56. A supply that is made under an agreement with a partnership or trust that is a resident of Australia (as determined in accordance with this Ruling) is a supply made under an agreement with an Australian resident.

57. Subsection 38-190(4), by means of the expression 'provided to another entity', seeks to identify the entity to which the item 3 supply actually flows.

58. For example, if a supply of a service is made to an Australian resident recipient who is in Australia in relation to the service and that service is rendered to or received by another entity at the time it is performed, the supply is provided to that other entity. If that other entity is outside Australia, subsection 38-190(4) treats the supply as being made to a recipient who is not in Australia. For a further example refer to Example 1 at paragraph 196 of the Explanation section of the Ruling.

59. For further explanation about subsection 38-190(4), refer to paragraphs 186 to 197 of the Explanation section of the Ruling.

Individual in Australia in relation to the supply (item 3)

60. A resident individual[12] who is physically in Australia when the thing supplied is done is in Australia in relation to the supply.

61. A non-resident individual who is physically in Australia when the thing supplied is done is in Australia in relation to the supply to the extent that the non-resident is in contact (other than contact which is only of a minor nature) with the supplier while in Australia.

[12] A resident individual is an individual who is a resident of Australia as defined in subsection 6(1) of the ITAA 1936. This is discussed at paragraphs 115 and 116 of the Explanation section of the Ruling.

62. For further explanation about when a recipient individual is in Australia in relation to a supply when the thing supplied is done refer to paragraphs 221 to 228 of the Explanation section of the Ruling.

Subsection 38-190(4)

63. A supply made under an agreement entered into, whether directly or indirectly, with a resident individual who is in Australia in relation to the supply when the thing supplied is done may be treated under subsection 38-190(4) as a supply made to a recipient who is not in Australia for the purposes of item 3 if the supply is provided, or the agreement requires it to be provided, to another entity outside Australia. Refer to paragraphs 186 to 197 and 227 of the Explanation section of the Ruling for a more detailed discussion.

Company in Australia in relation to the supply (item 3)

64. A company is in Australia if it is incorporated in Australia. If the company is not incorporated in Australia, the company is in Australia (irrespective of the residency status of that company) if the company carries on business (or in the case of a company that does not carry on business, carries on its activities) in Australia:

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

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

65. A company is in Australia in relation to the supply if the supply is solely or partly 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. If 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 the only involvement is minor.

66. For further explanation about when a recipient company is in Australia in relation to a supply when the thing supplied is done refer to paragraphs 333 to 379 of the Explanation section of the Ruling.

Subsection 38-190(4)

67. A supply made under an agreement entered into, whether directly or indirectly, with a resident company[13] that is in Australia in relation to the supply when the thing supplied is done, may be treated under subsection 38-190(4) as a supply made to a recipient that is not in Australia for the purposes of item 3, if the supply is provided, or

[13] A resident company is a company that is a resident of Australia as defined in subsection 6(1) of the ITAA 1936. This is discussed at paragraph 122 to 124 of the Explanation section of the Ruling.

the agreement requires it to be provided, to another entity outside Australia. Refer to paragraphs 186 to 197 and 373 of the Explanation section of the Ruling for a more detailed discussion.

Partnership (other than a corporate limited partnership) in Australia in relation to the supply (item 3)

68. A partnership (irrespective of its residency status as determined in accordance with this Ruling) is in Australia if the partnership carries on business (or in the case of a partnership that is in receipt of ordinary income or statutory income jointly, other activities which generate that income) in Australia:

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

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

69. A partnership is in Australia in relation to the supply if the supply is solely or partly for the purposes of the Australian presence. If the supply is not for the purposes of the Australian presence but that Australian presence is involved in the supply, the partnership is in Australia in relation to the supply, except where the only involvement is minor.

70. For further explanation about when a recipient partnership is in Australia in relation to a supply when the thing supplied is done refer to paragraphs 396 to 409 of the Explanation section of the Ruling.

Subsection 38-190(4)

71. A supply made under an agreement entered into, whether directly or indirectly, with a resident partnership[14] that is in Australia in relation to the supply when the thing supplied is done may be treated under subsection 38-190(4) as a supply made to a recipient that is not in Australia for the purposes of item 3, if the supply is provided, or the agreement requires it to be provided, to another entity outside Australia. Refer to paragraphs 186 to 197 and 406 to 409 of the Explanation section of the Ruling for a more detailed discussion.

Corporate limited partnership in Australia in relation to the supply (item 3)

72. If a corporate limited partnership is formed in Australia 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.

[14] A partnership is considered a resident partnership if the central management and control of the partnership is in Australia. This is discussed at paragraphs 146 to 155 of the Explanation section of the Ruling.

73. If a corporate limited partnership is formed outside Australia the partnership (irrespective of its residency status) is in Australia if the partnership carries on business (or in the case of a corporate limited partnership that does not carry on business, carries on its activities) in Australia:

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

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

74. A corporate limited partnership is in Australia in relation to the supply if the supply is solely or partly for the purposes of the Australian presence. If the supply is not for the purposes of the Australian presence but that Australian presence is involved in the supply, the partnership is in Australia in relation to the supply, except where the only involvement is minor.

75. For further explanation about when a recipient corporate limited partnership is in Australia in relation to a supply when the thing supplied is done refer to paragraphs 414 to 419 of the Explanation section of the Ruling.

Subsection 38-190(4)

76. A supply made under an agreement entered into, whether directly or indirectly, with a resident corporate limited partnership[15] that is in Australia in relation to the supply when the thing supplied is done may be treated under subsection 38-190(4) as a supply made to a recipient that is not in Australia for the purposes of item 3, if the supply is provided, or the agreement requires it to be provided, to another entity outside Australia. Refer to paragraphs 186 to 197 and 419 of the Explanation section of the Ruling for a more detailed discussion.

Trust in Australia in relation to the supply (item 3)

77. A trust (irrespective of its residency status as determined in accordance with this Ruling) is in Australia if a trustee of that trust, acting in its capacity as trustee, carries on business (or in the case of a trustee that does not carry on business, carries on the trust's activities) in Australia:

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

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

[15] A resident corporate limited partnership is a corporate limited partnership that is a resident of Australia as defined in section 94T of the ITAA 1936. This is discussed at paragraphs 158 to 165 of the Explanation section of the Ruling.

78. A trust is in Australia in relation to the supply if the supply is solely or partly for the purposes of the Australian presence of that trust. If the supply is not for the purposes of the Australian presence but that Australian presence is involved in the supply, the trust is in Australia in relation to the supply, except where the only involvement is minor.

79. For further explanation about when a trust is in Australia in relation to a supply when the thing supplied is done refer to paragraphs 428 to 436 of the Explanation section of the Ruling.

Subsection 38-190(4)

80. A supply made under an agreement entered into, whether directly or indirectly, with a resident trust[16] that is in Australia in relation to the supply when the thing supplied is done may be treated under subsection 38-190(4) as a supply made to a recipient that is not in Australia for the purposes of item 3, if the supply is provided, or the agreement requires it to be provided, to another entity outside Australia. Refer to paragraphs 186 to 197 and 434 to 436 of the Explanation section of the Ruling for a more detailed discussion.

The meaning of 'the thing supplied is done'

81. The phrase 'the thing supplied is done' has the same meaning as the expression 'the thing is done' in paragraph 9-25(5)(a).[17] Under that paragraph, a supply is connected with Australia if the thing is done in Australia.

82. For further explanation about the meaning of when the thing supplied is done, refer to paragraphs 198 and 199 of the Explanation section of the Ruling.

Apportionment

83. 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 items 2 or 3.

84. The need to apportion in the context of items 2 and 3 arises if the thing supplied is done over a period of time. For example, apportionment is necessary if 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

[16] A trust is considered a resident if it is a resident trust estate as defined in subsection 95(2) of the ITAA 1936. This is discussed at paragraphs 169 to 172 of the Explanation section of the Ruling.

[17] Refer to paragraphs 61 to 77 of GSTR 2000/31 Goods and services tax: supplies connected with Australia.

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.

85. If there is a supply that is made in relation to rights to which paragraph (b) of item 4 applies, apportionment is only necessary if there is an application of subsection 38-190(2) to negate, in part, the GST-free status of the supply under paragraph (b) of item 4.[18]

86. If 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.

87. For further explanation about apportionment, refer to paragraphs 439 to 481 of the Explanation section of the Ruling.

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

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

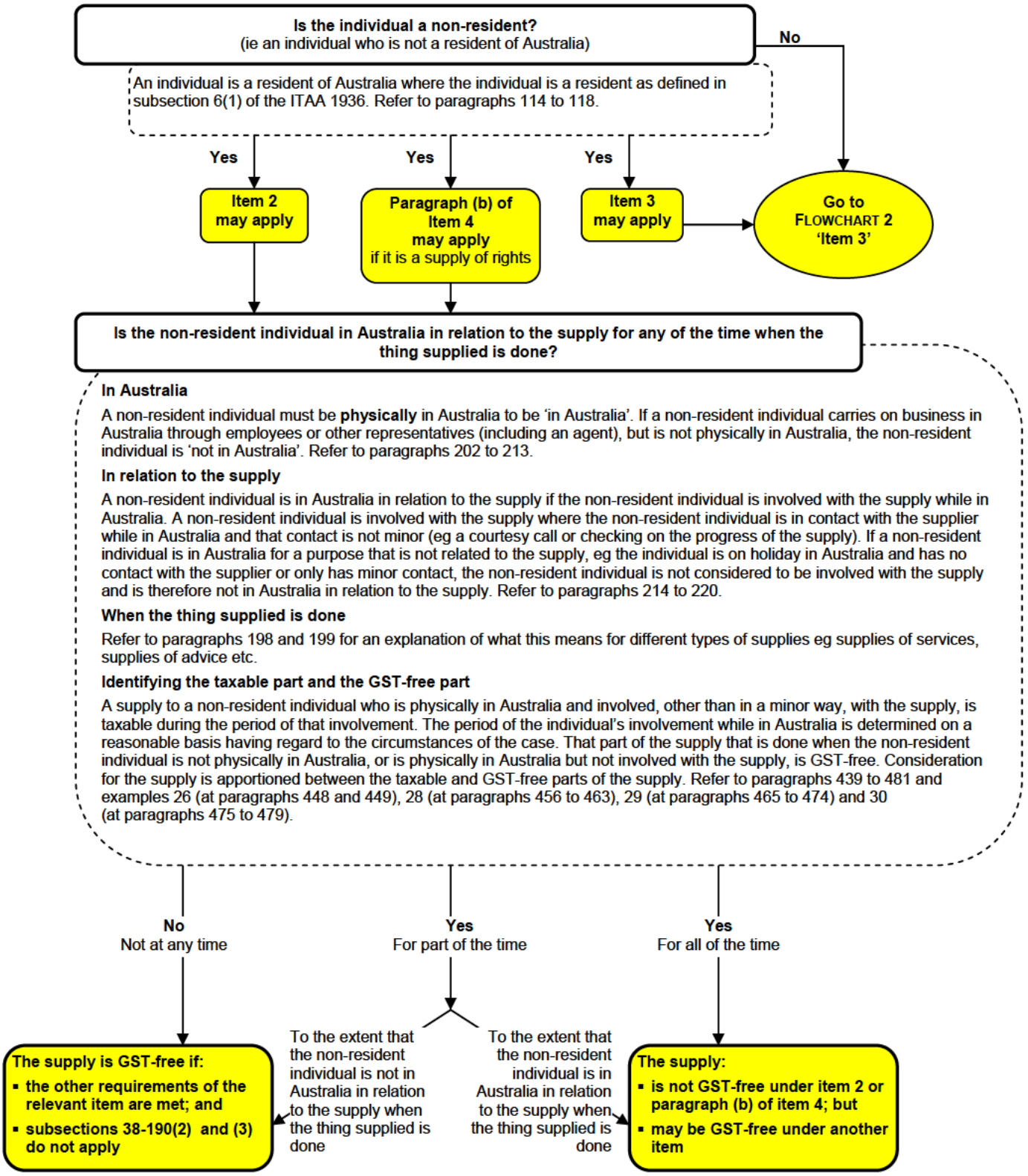
- a supply (other than a supply of goods or real property) that is made to an individual (refer to flowcharts 1 and 2 on pages 17 and 18 respectively);
- a supply (other than a supply of goods or real property) that is made to a company (refer to flowcharts 3 and 4 on page 19 and 20 respectively);
- 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 21 and 22 respectively); and
- a supply (other than a supply of goods or real property) that is made to a trust (refer to flowcharts 7 and 8 on pages 23 and 24 respectively).

89. The flowcharts highlight 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.

[18] Refer to GSTR 2003/8 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

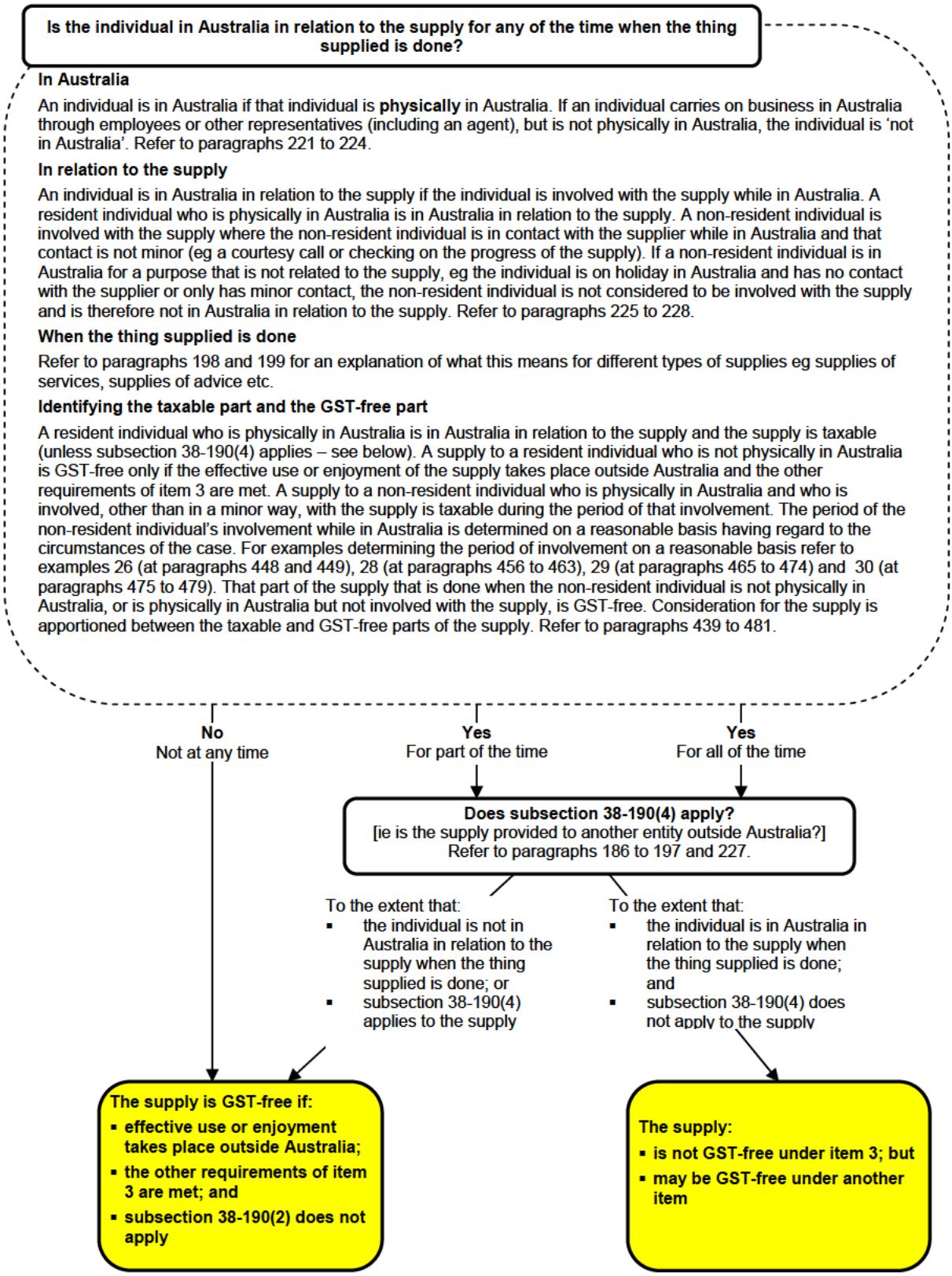
FLOWCHART 1 – Supply made to a non-resident individual

Item 2 and paragraph (b) of item 4



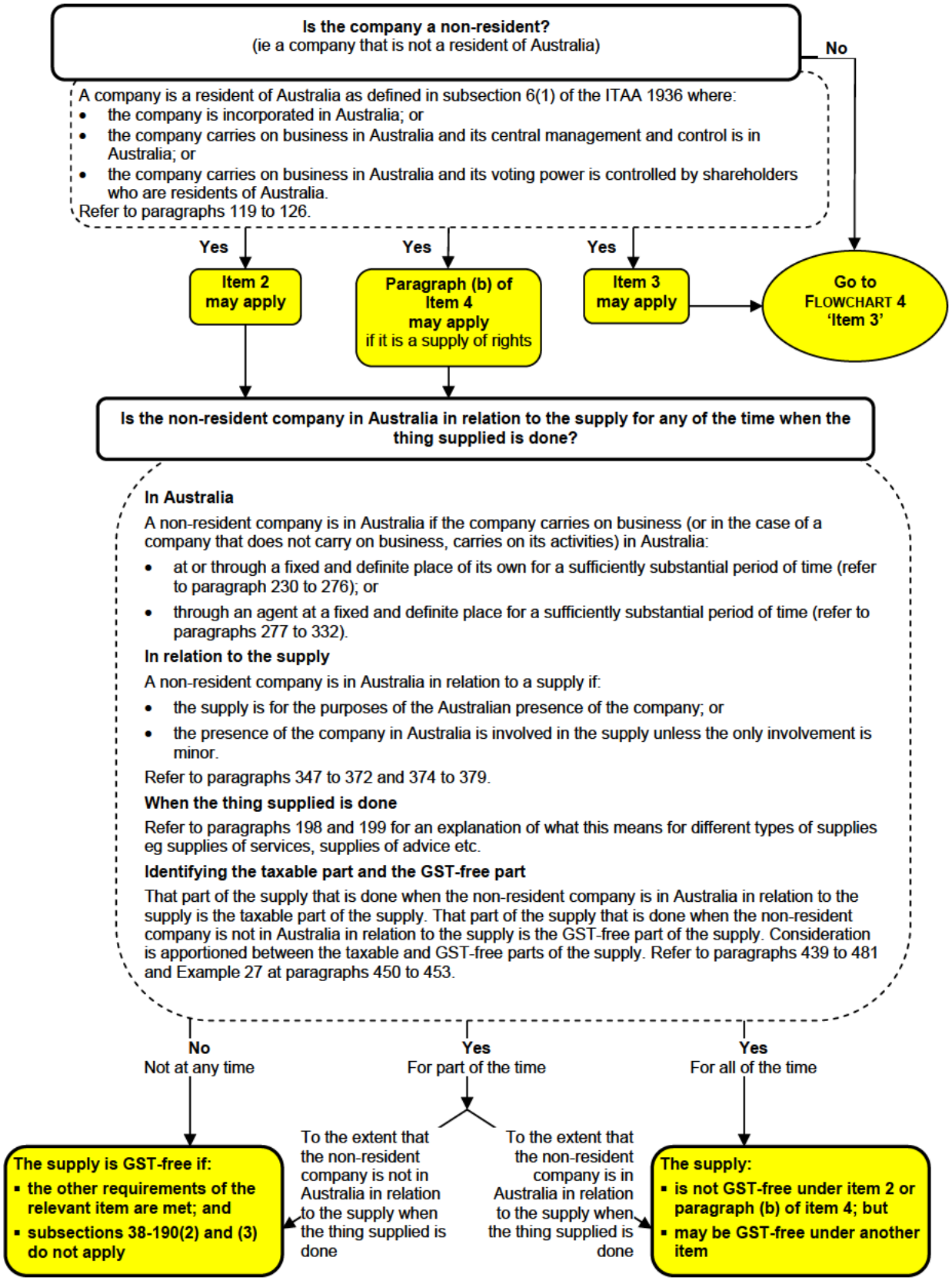
FLOWCHART 2 – Supply made to an individual including a non-resident individual

Item 3



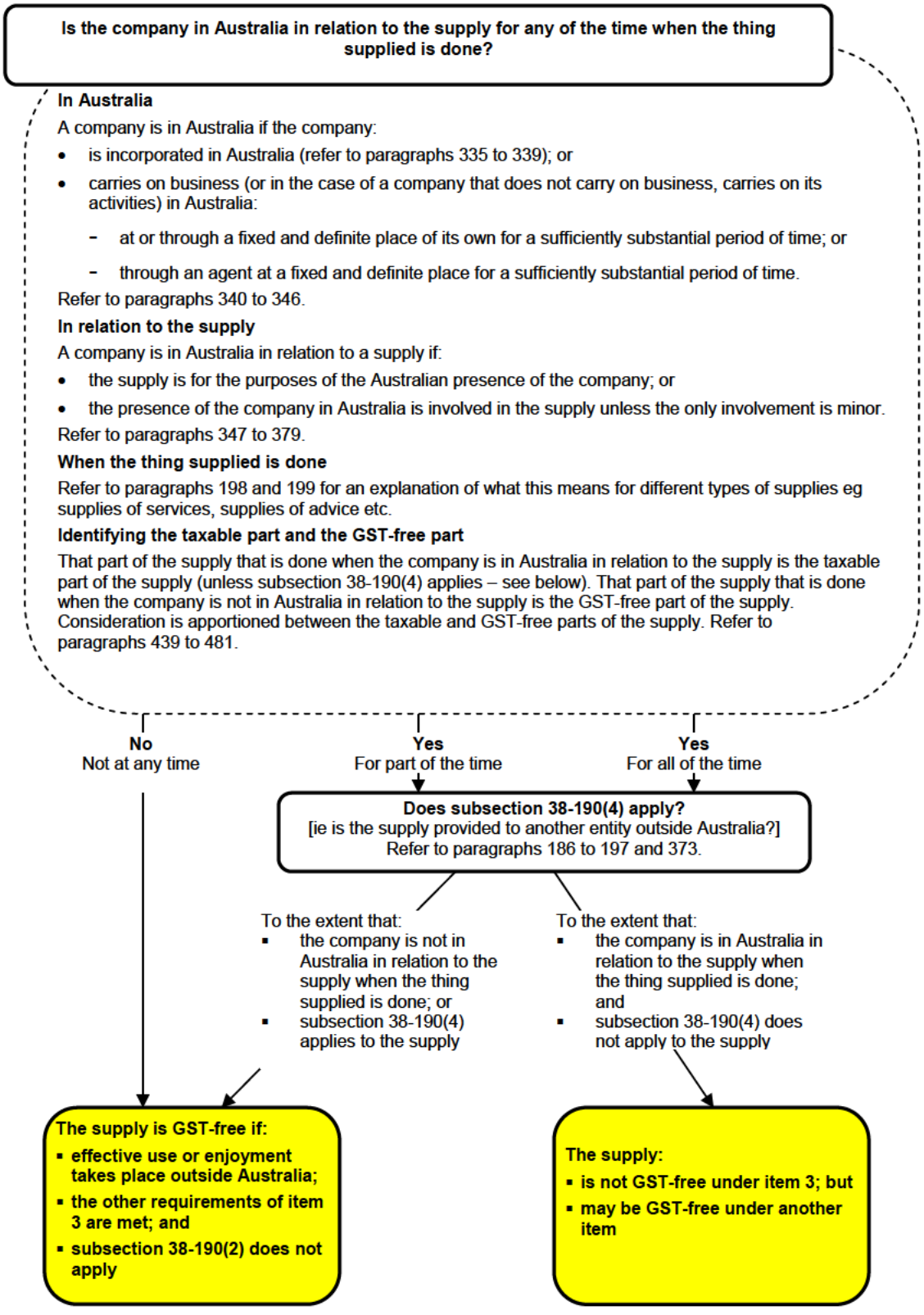
FLOWCHART 3 – Supply made to a non-resident company

Item 2 and paragraph (b) of item 4



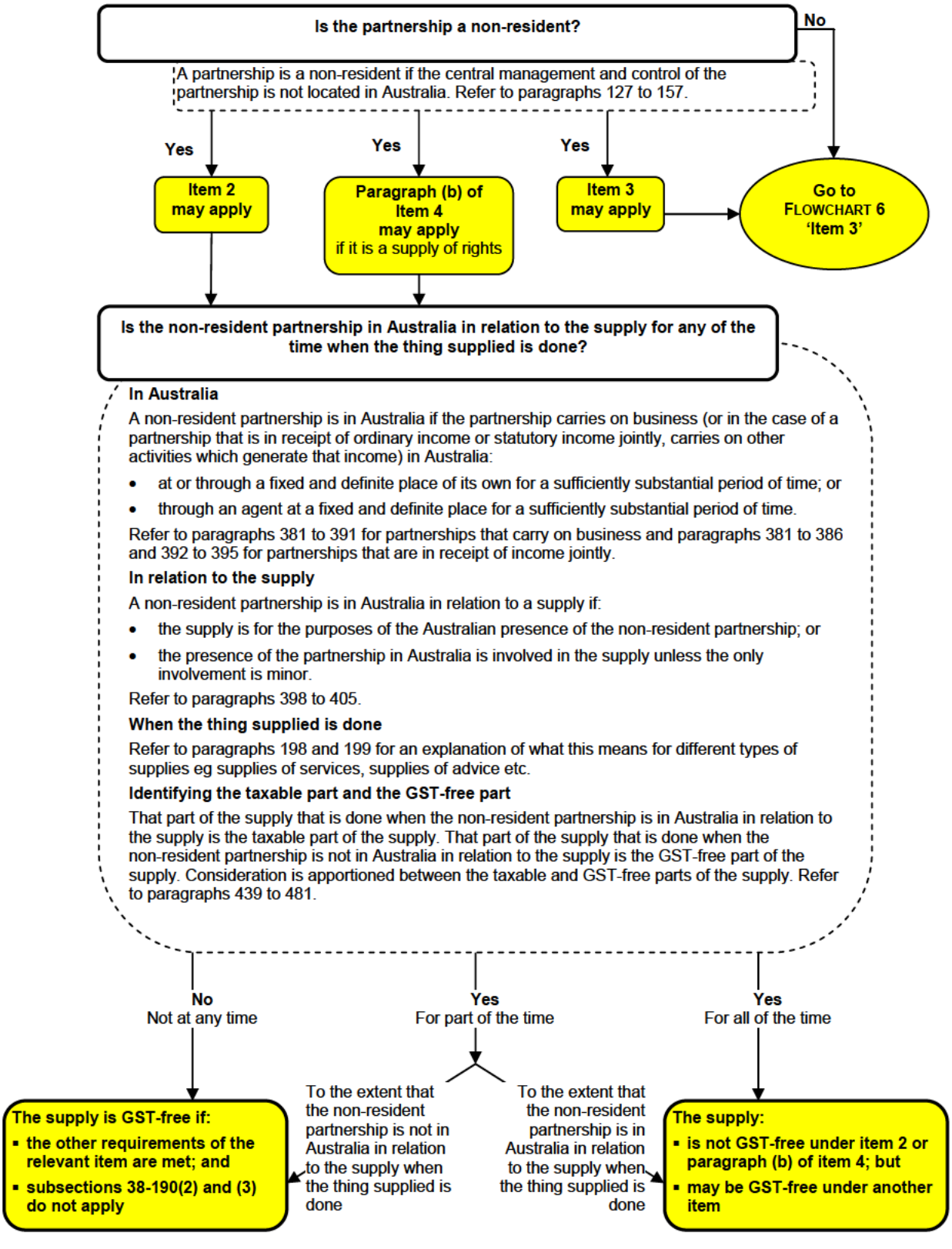
FLOWCHART 4 – Supply made to a company including a non-resident company

Item 3



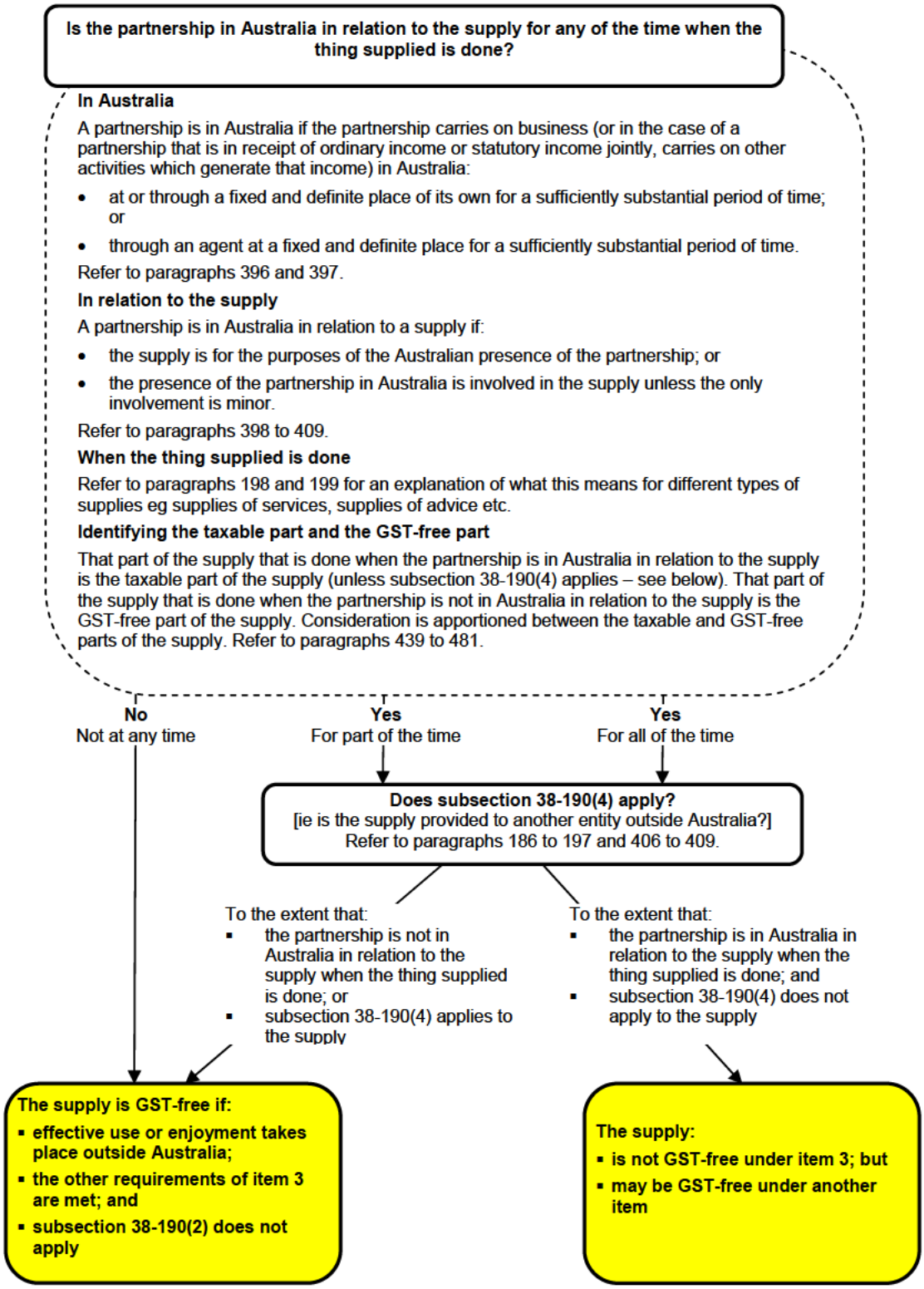
FLOWCHART 5 – Supply made to a non-resident partnership (other than a non-resident corporate limited partnership)

Item 2 and paragraph (b) of item 4



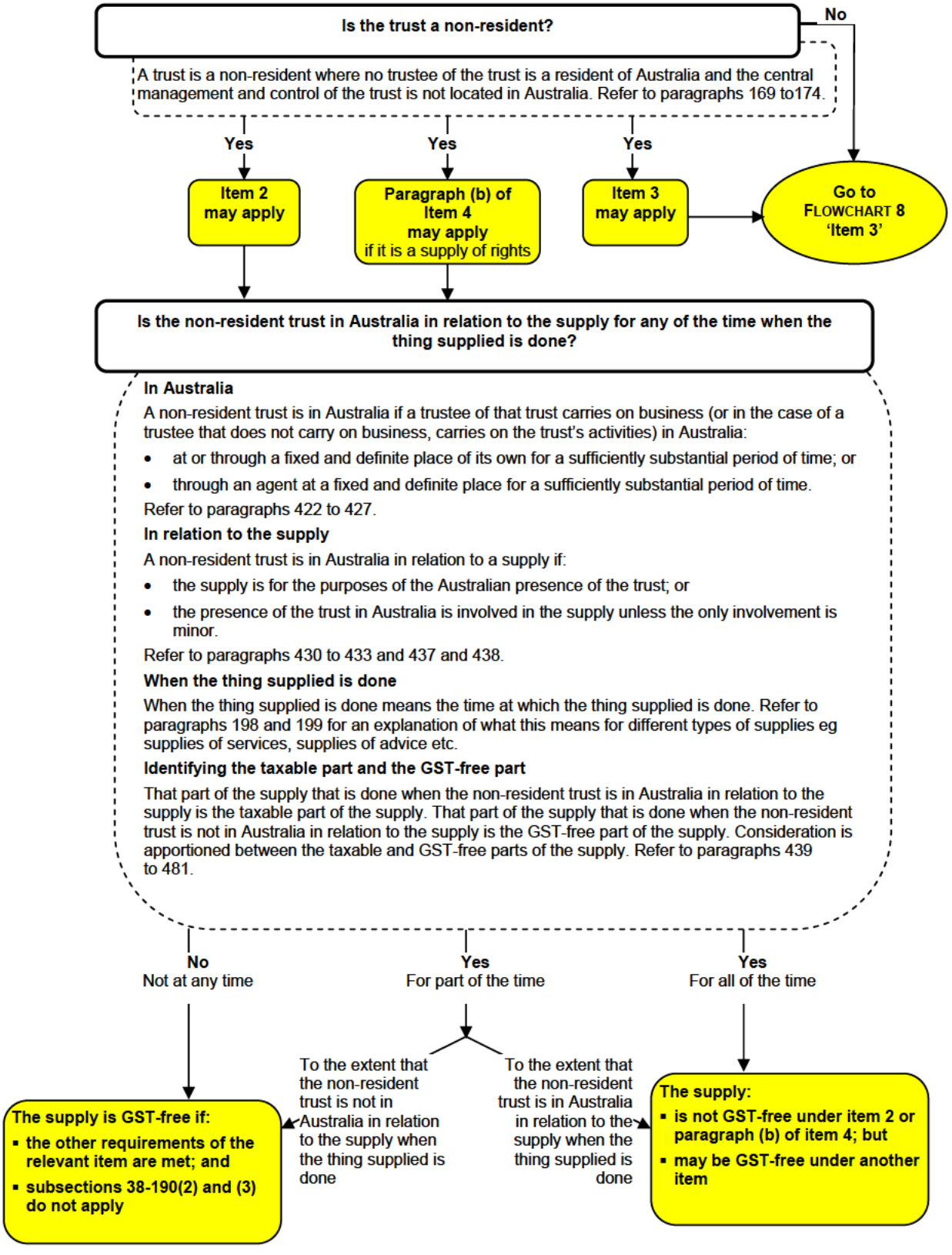
FLOWCHART 6 – Supply made to a partnership (other than a corporate limited partnership) including a non-resident partnership

Item 3



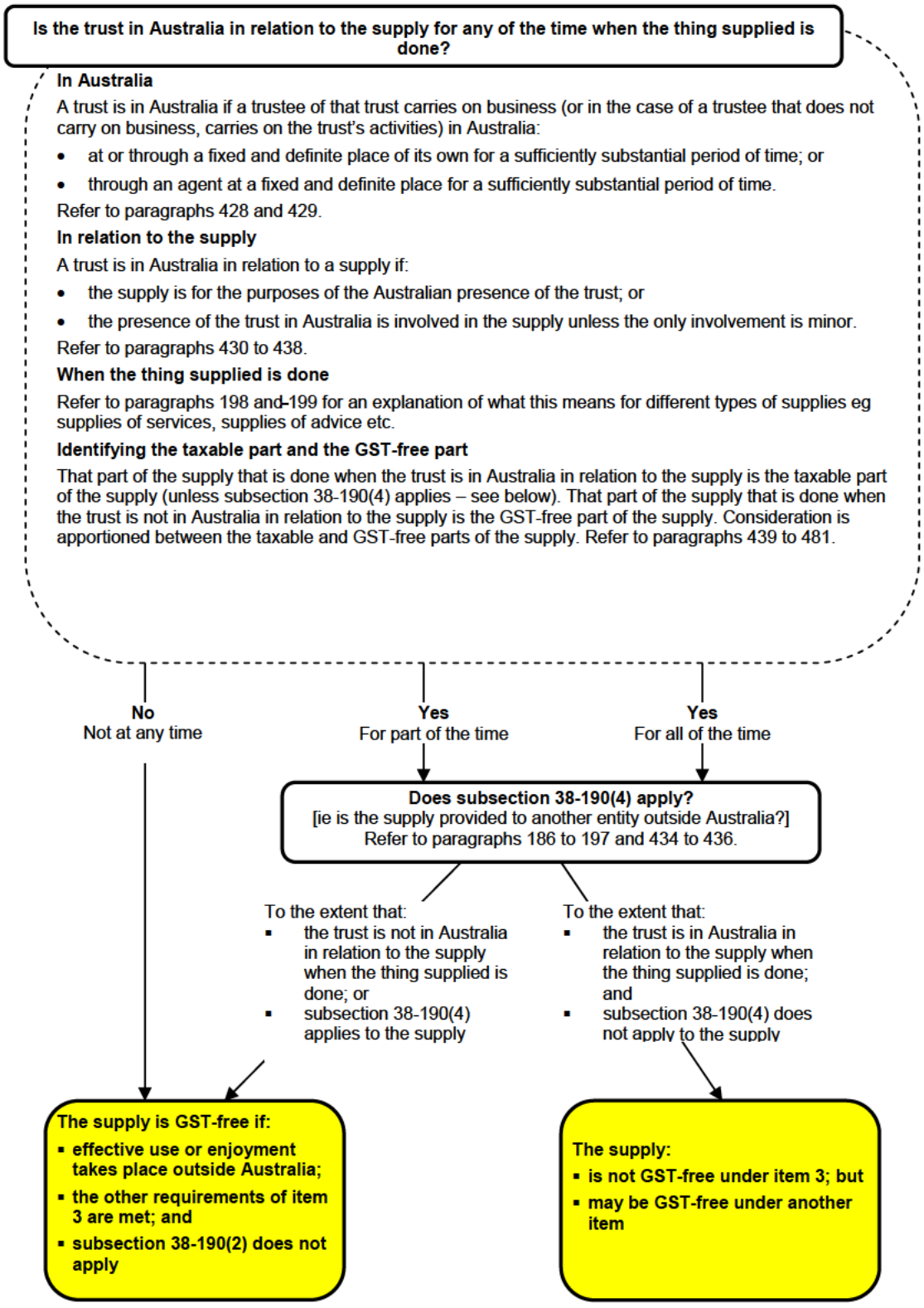
FLOWCHART 7 – Supply made to a non-resident trust

Item 2 and paragraph (b) of item 4



FLOWCHART 8 – Supply made to a trust including a non-resident trust

Item 3



Explanation (this forms part of the Ruling)

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

90. Section 38-190 is headed '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 if certain requirements are met.

91. The policy intention, as evidenced by the headings to both section 38-190 and the table in subsection 38-190(1), is to treat supplies of services or things other than goods or real property as GST-free supplies if consumption of those supplies occurs outside Australia.[19]

Item 2

92. 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' is discussed at paragraphs 111 to 174. The requirement that the recipient is not in Australia when the thing supplied is done (the 'not in Australia' requirement) is discussed at paragraphs 181 to 185 and 198 and 199.

93. 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.

94. 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.[20]

95. 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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[19] Refer to the Explanatory Memorandum relating to the Indirect Tax Legislation Amendment Bill 2000 at paragraph 3.30.

[20] For further guidance on these concepts refer to GSTR 2003/7 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*?

Subsections 38-190(2) and (3)

96. Subsections 38-190(2)[21] and (3) negate, in certain circumstances, the GST-free status that would otherwise apply to a supply covered by item 2.

Item 3

97. Item 3 applies to a supply that is made to 'a recipient[22] who is not in Australia when the thing supplied is done'.

98. 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. Further, 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.[23]

99. 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 if a supply is made, for instance, to an Australian resident.

100. 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 at paragraphs 119 to 126 regarding the meaning of 'non-resident') may still be GST-free under item 3 if the other requirements of that item are met.

Subsection 38-190(4)

101. Subsection 38-190(4) extends the scope of item 3 by treating certain supplies that would otherwise fail the 'not in Australia' requirement as if they are made to recipients who are not in Australia when the thing supplied is done. The subsection provides that a supply is taken to be a supply made to a recipient who is not in Australia if the supply is made under an agreement with an Australian resident and the supply is provided, or the agreement requires it to be provided, to another entity outside Australia. Subsection 38-190(4) is discussed in Part II at paragraphs 186 to 197.

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[21] For further guidance on subsection 38-190(2) refer to GSTR 2003/8 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

[22] '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.

[23] See above, at note 19.

Subsection 38-190(2)

102. Subsection 38-190(2)[24] negates, in certain circumstances, the GST-free status that would otherwise apply to a supply covered by item 3.

Paragraph (b) of item 4

103. 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.

104. 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 only applies to supplies made to non-residents. When a supply is made to a 'non-resident' is discussed at paragraphs 111 to 174.

105. 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 description 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 181 to 185 is relevant, therefore, for the purposes of applying paragraph (b) of item 4.[25]

Subsection 38-190(2)

106. Subsection 38-190(2)[26] negates, in certain circumstances, the GST-free status that would otherwise apply to a supply covered by item 4.

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[24] See above, at note 21.
[25] For further guidance on item 4 refer to GSTR 2003/8 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).
[26] See above, at note 21.

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

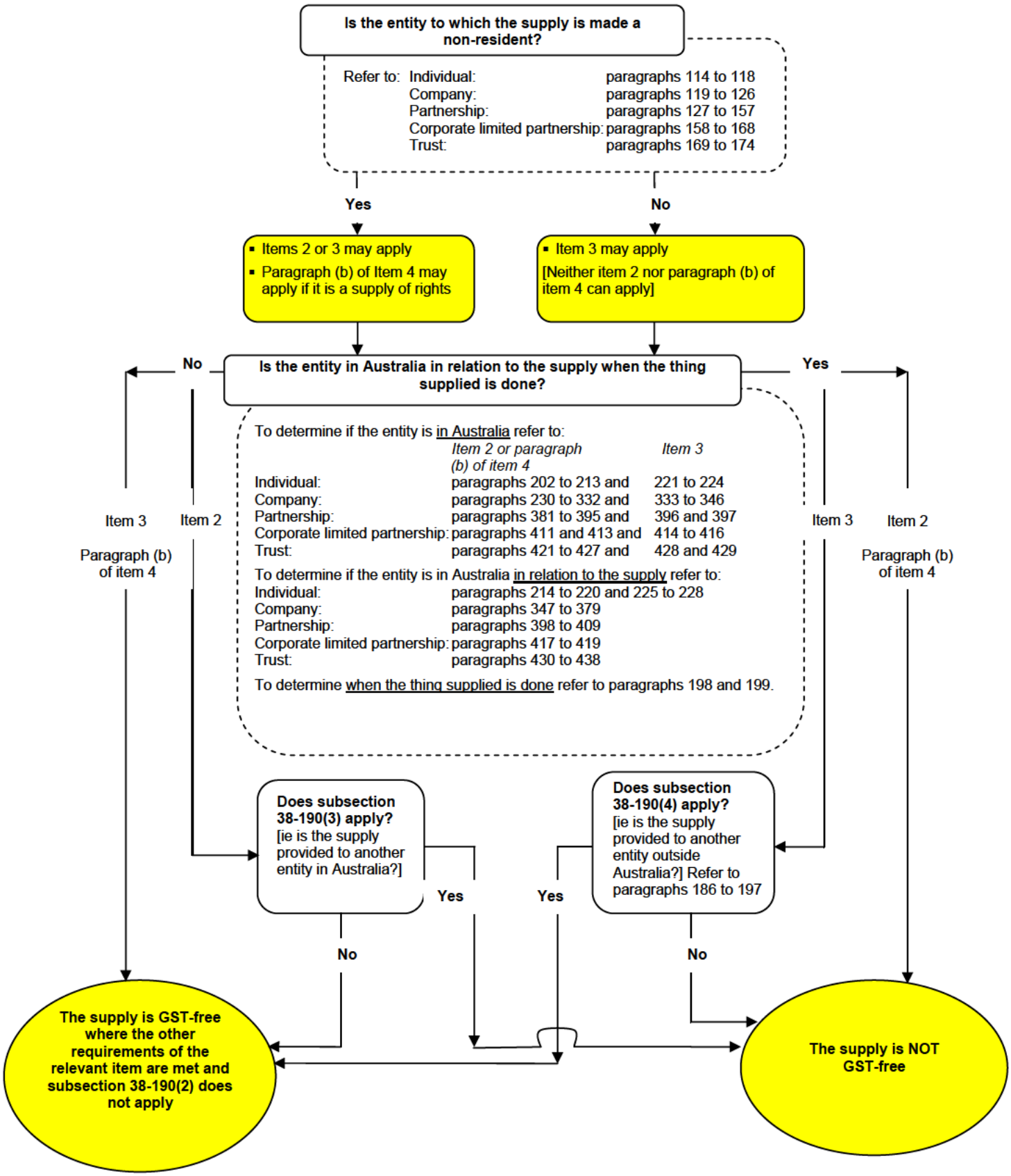
107. We have divided the Explanation section which follows into five parts:

Part #		Paragraph references
Part I	When a supply is made to a non-resident or other recipient	109 to 179
Part II	The meaning of 'not in Australia', 'outside Australia' and 'when the thing supplied is done'	180 to 199
Part III	When particular entity types are in Australia in relation to the supply	200 to 438
Part IV	Apportionment	439 to 481
Part V	Further examples	482 to 508

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

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

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



Part I – when a supply is made to a non-resident or other recipient

109. In this Part, 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.

110. 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.

In particular we discuss…	**at paragraphs**
When is a supply made to a non-resident for the purposes of item 2 and paragraph (b) of item 4?	111 to 174
- A supply is made to an individual who is a non-resident	114 to 118
- A supply is made to a company that is a non-resident	119 to 126
- A supply is made to a partnership (other than a corporate limited partnership) that is a non-resident	127 to 157
- A supply is made to a corporate limited partnership that is a non-resident	158 to 168
- A supply is made to a trust that is a non-resident	169 to 174
When is a supply made to a recipient for the purposes of item 3?	175 to 179

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

111. The term 'non-resident' is defined in section 195-1 to mean 'an entity that is not an Australian resident'.

112. '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'.

113. We discuss below when an entity that is an individual, company, partnership, corporate limited partnership or a trust is a resident of Australia for the purposes of the ITAA 1936.

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

114. 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, for Australian income tax purposes.

115. An individual is a 'resident of Australia' as defined in subsection 6(1) of the ITAA 1936 if that individual is:

(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;

(ii) 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

(iii) 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 sub-subparagraph (A) or (B).

116. 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[27] provides guidance on determining residency status under the income tax definition.

117. 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.

118. Paragraph (b) of item 4 applies to a supply that is made in relation to rights if that supply is to a non-resident individual who is outside Australia when the thing supplied is done.

[27] Income tax: residency status of individuals entering Australia.

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

The meaning of company

119. The term 'company' is not found in the definition of entity in subsection 184-1(1). For the purposes of this Ruling a company is an entity that is a body corporate or any other unincorporated association or body of persons but does not include a partnership or a non-entity joint venture as those terms are defined in section 195-1. This is consistent with the definition of company in section 195-1.

120. A body corporate includes a company incorporated under an Australian law (for example, a company incorporated under the *Corporations Act 2001*) or a company incorporated elsewhere under a foreign law. An unincorporated association or body is not a legal person. Unlike a body corporate it has no separate legal identity. It consists of the aggregate of its members at any particular time and does not have perpetual succession.

A company that is a non-resident

121. A supply that is made to a company is a supply to a non-resident if the company is not a resident of Australia, as defined in subsection 6(1) of the ITAA 1936, for Australian income tax purposes.

122. As defined in that subsection a company is a resident if 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.

123. Thus if, for example, a company is incorporated in Australia under the *Corporations Act 2001,* it is a resident of Australia.

124. Bodies corporate can be incorporated under legislation other than the *Corporations Act 2001.* For example, the *Associations Incorporation Act 1981* (Qld) provides for associations that are formed for certain specified purposes to be incorporated. If bodies incorporate under this Act, or a similar Australian Act, they are residents of Australia for the purposes of this Ruling.

125. 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.

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

A supply is made to a partnership (other than a corporate limited partnership)[28] that is a non-resident

The meaning of partnership

127. 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.[29] 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.[30]

128. 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, includes 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*.

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

129. The GST Act in section 195-1 defines a 'non-resident' to mean an entity that is not an 'Australian resident'. It defines Australian resident to mean 'a person who is a resident of Australia for the purposes of the ITAA 1936'.

130. The GST Act definition of 'non-resident' refers to 'entity' and a partnership is an entity for GST purposes. However, the definition of Australian resident in the GST Act refers to a 'person' who is a resident of Australia for the purposes of the ITAA 1936. Person, for the purposes of the GST Act or the ITAA 1936, includes an individual (according to its ordinary meaning) and is also defined to include a company. Company is defined in the GST Act to mean a body corporate or an unincorporated association or body of persons but specifically excludes a partnership or a non-entity joint venture. Therefore, neither the GST Act nor the ITAA 1936 includes a partnership as a 'person'.

131. Additionally, the ITAA 1936 does not provide a definition of resident that is applicable generally to partnerships.

132. On a strict literal interpretation of the definition of 'non-resident in the GST Act it could be said that not only is an individual or a company a non-resident if the individual or company is not a 'resident of Australia' for the purposes of the ITAA 1936 but so too are other entity types such as partnerships, that are not persons, and therefore, not included in the definition of 'resident of Australia' in subsection 6(1) of the ITAA 1936.

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[28] A corporate limited partnership is an entity that meets the requirements of section 94D of the ITAA 1936.
[29] The definition of 'entity' in subsection 184-1(1) is reproduced at paragraph 176.
[30] Section 184-5.

133. On this interpretation 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), would be non-residents. This is not consistent with the purpose of item 2 which is to make GST-free only those supplies made to non-residents outside Australia.

134. Alternatively it could be said that as the only entity types mentioned in the definition of 'resident of Australia' in subsection 6(1) of ITAA 1936 are individuals and companies, it is only an individual or company that is capable of being a non-resident for the purposes of the GST Act.

135. On this view, a partnership could not be considered a non-resident and therefore a supply to a partnership would not 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.

136. The adoption of either of these approaches also produces absurd or unreasonable outcomes for other provisions of the GST Act that have application if an entity is a non-resident. In particular, problems arise with regard to both Divisions 57[31] and 83.[32]

Division 57

137. 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[33] 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.

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

139. 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 on all supplies and entitled to input tax credits on all acquisitions made on behalf of the partnerships. We consider that this is not the intended application of Division 57.

[31] Resident agents acting for non-residents.
[32] Non-residents making supplies connected with Australia.
[33] Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 at paragraph 6.54.

140. 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, that is, partnerships.

Division 83

141. Division 83 allows a non-resident supplier and the recipient of a supply by the non-resident supplier to agree that the GST liability is to be borne by the recipient where certain requirements are met.[34]

142. 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 presence in Australia and may have practical difficulties in providing details necessary for registration.[35]

143. Given the difficulties that arise in taking the approach that all partnerships are non-residents, or all partnerships are residents of Australia, we have not adopted either of these interpretations.

Should the residence of a partnership be determined by the residence of the partners?

144. As the GST Act refers to a *person* who is a resident of Australia for the purposes of the ITAA 1936 to determine who is a resident of Australia, and ultimately who is a non-resident, it could be argued that for GST purposes Parliament intended the residence of a partnership to be determined by reference to the persons comprising the partnership, that is, the individual and/or corporate partners.

145. However, as the partnership is the relevant entity for GST purposes, we consider that a Court, if required to determine the residence status of a partnership for GST purposes, would be unlikely to take this approach.

Our approach – for determining the residence of a partnership

146. We consider it more likely that a court would consider that, since the GST Act does not provide a definition of resident of Australia for a partnership, the Court would need to determine the residence of the partnership having regard to any relevant authorities.

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[34] These requirements are set out in section 83-5.

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

147. The High Court of Australia in both *Koitaki Para Rubber Estates Ltd v. Federal Commissioner of Taxation*[36] ('*Koitaki*') and *North Australian Pastoral Co Ltd v. Federal Commissioner of Taxation*[37] ('*Napco*') considered the meaning of 'resident' in the context of a company. The definition of 'resident' or 'resident of Australia' in subsection 6(1) of the ITAA 1936 was not relevant to the issue in those cases. In both cases the issue was whether a company was a 'resident' of a particular territory within Australia (the Northern Territory in the case of *Napco*) or, to which the Act extended (Papua in the case of *Koitaki*).

148. In the later case, *Waterloo Pastoral Company Limited v. The Federal Commissioner of Taxation* [38] ('*Waterloo*'), Williams J again made the point that the definition of resident of Australia in subsection 6(1) of the ITAA 1936 is expressly confined to residents of Australia and that there was no indication of any intention in the Act to make it applicable to residents of a particular territory.[39]

149. With respect to determining the residence of a company, Dixon J stated in *Napco*, that:

> …it is well to remember that the basal principle is that a company resides where its real business is carried on and that it is for the purpose of ascertaining where that is that the subsidiary principle is invoked that the place where the superior direction and control is exercised determines where the real business is carried on.[40]

150. Dixon J made this comment having had regard to earlier decisions of the House of Lords and the earlier High Court case of *Koitaki*.

151. In *Waterloo* Williams J referred back to what was said in his honour's earlier judgment in *Koitaki:*

> ... the crucial test is to ascertain where the real business of the company is carried on, not in the sense of where it trades but in the sense of from where its operations are controlled and directed. It is the place of the personal control over and not of the physical operations of the business which counts.[41]

152. Although the decisions in *Koitaki*, *Napco* and *Waterloo* all pertain to the residence of a company the principle is, in our view, one that is capable of application to a partnership.

153. We also consider that determining the residence of a partnership according to central management and control achieves appropriate outcomes for Divisions 57 and 83. If the central management and control of the partnership is located in Australia it is

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[36] (1941) 64 CLR 241.
[37] (1946) 71 CLR 623.
[38] (1946) 72 CLR 262.
[39] *Waterloo Pastoral Company Limited v. The Federal Commissioner of Taxation* (1946) 72 CLR 262, at 266.
[40] *North Australian Pastoral Co Ltd v. Federal Commissioner of Taxation* (1946) 71 CLR 623, at 629.
[41] *Waterloo Pastoral Company Limited v. The Federal Commissioner of Taxation* (1946) 72 CLR 262, at 266.

considered reasonable that Division 57 should not apply to require a resident agent to be responsible for the GST consequences of that partnership.

154. Accordingly, if the central management and control of a partnership is in Australia the partnership is, in our view, a resident of Australia (whether the central management and control of the partnership is also located elsewhere). Conversely, a partnership is a non-resident if its central management and control is not located in Australia.[42]

155. If the partnership is not carrying on business (that is, it is a partnership because the partners are in receipt of ordinary income or statutory income jointly), we consider that the test of central management and control may also be applied. Although stated in the context of a company that carried on business, Williams J in *Waterloo* stated that the important element in determining the location of central management and control is the place of personal control over, and not the physical operations of, the business. While a partnership that is a partnership for GST purposes only because it is in receipt of income jointly may not have physical operations in the sense of carrying on of a business, it will nonetheless have person(s) exercising control over the activities generating the income of the partnership. We therefore consider it appropriate to apply a central management and control test with reference to the activities of the partnership.

156. Item 2, therefore, applies to a supply that is made to a partnership that is a non-resident and not in Australia when the thing supplied is done.

157. Paragraph (b) of item 4 applies to a supply that is made in relation to rights if that supply is to a partnership that is a non-resident and outside Australia when the thing supplied is done.

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

158. We consider that a corporate limited partnership, as defined in section 94D of the ITAA 1936, is a resident of Australia for the purposes of the ITAA 1936 if it satisfies the requirements of section 94T of the ITAA 1936.[43]

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[42] This approach is also consistent with the decision in *Padmore v. Inland Revenue Commissioners* [1989] STC 493 in which the Court of Appeal held that the correct test for residence of a partnership is the location of its management and control, albeit noting that there was a negative test under the relevant provisions to the effect that residence is deemed to be outside the jurisdiction if the partnership is managed and controlled abroad.

[43] Refer to paragraph 164 where section 94T is reproduced.

159. The GST Act defines a 'non-resident' to mean an entity that is not an 'Australian resident'. It defines Australian resident to mean 'a person who is a resident of Australia for the purposes of the ITAA 1936'. Arguably the reference to 'person' could refer to a 'person' as defined for the purposes of the ITAA 1936 or, alternatively, as defined for the purposes of the GST Act.

160. In this Ruling we have taken the view that the reference to 'person' refers to 'person' as defined for the purposes of the ITAA 1936. A corporate limited partnership is included as a company (other than for the definitions of 'dividend', 'resident' or 'resident of Australia' in subsection 6(1)).[44] As a company is included as a person,[45] a corporate limited partnership is a person for the purposes of the ITAA 1936.

161. The alternative view that 'person' refers to 'person' as defined for the purposes of the GST Act would mean that the definition of Australian resident refers to a company or an individual. However, as 'company' is not defined to include a corporate limited partnership for the purposes of the GST Act, if this view were taken it would require the residency status of a corporate limited partnership to be determined on a different basis for GST than for the purposes of the ITAA 1936.

162. With respect to corporate limited partnerships, we consider therefore that the better view is that a corporate limited partnership is 'a person' within the meaning of the expression 'a person who is a resident of Australia for the purposes of the ITAA 1936'.

163. It follows that if a corporate limited partnership is a resident of Australia for income tax purposes, it is also an Australian resident under the GST Act, being 'a person who is a resident of Australia for the purposes of the ITAA 1936'.

164. For the purposes of the income tax law a corporate limited partnership is a resident of Australia if the requirements of section 94T of the ITAA 1936 are met. That section provides that a corporate limited partnership is:

(a) a resident; and

(b) a resident within the meaning of section 6; and

(c) a resident of Australia; and

(d) a resident of Australia within the meaning of section 6;

if and only if:

(e) the partnership was formed in Australia; or

(f) either:

(i) the partnership carries on business in Australia; or

[44] See section 94J of the ITAA 1936.
[45] See definition of 'person' in subsection 6(1) of the ITAA 1936.

(ii) the partnership's central management and control is in Australia.

165. This means that a supply that is made to a corporate limited partnership is a supply to a non-resident if the corporate limited partnership is not a resident of Australia as defined in section 94T of the ITAA 1936. A corporate limited partnership is a 'resident' of Australia if and only if:

- the partnership was formed in Australia; or
- the partnership carries on business in Australia; or
- the partnership's central management and control is in Australia.[46]

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

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

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

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

169. Determining whether a trust is a non-resident for GST purposes gives rise to similar issues to those discussed at paragraphs 129 to 143 with respect to partnerships.

170. As with partnerships, a trust is an entity for GST purposes but is not a 'person' for the purposes of either the GST Act or the ITAA 1936. A trust does not fall within the ordinary meaning of person and is not specifically included in the definition of person in either Act.

171. The GST Act determines who is an Australian resident by reference to a *person* who is a resident of Australia for the purposes of the ITAA 1936. The broad intention of the GST Act seems to have been to adopt income tax definitions for the purpose of determining when an entity is a resident. Subsection 95(2) of the ITAA 1936 provides a definition of 'resident trust estate'. Considering this, and that the concept of whether a trust is a resident is so closely analogous to the concept of a resident trust estate, we consider the

[46] Section 94T of the ITAA 1936.

most probable outcome if a court were confronted with the issue would be that it would be decided that Parliament intended that a trust should be regarded as a resident for GST purposes if it is a resident trust estate for income tax purposes.

172. Accordingly, in our view, a trust is a resident of Australia if at least one of its trustees is a resident of Australia or the trust's central management and control is located in Australia (whether the central management and control of the trust is also located elsewhere). Conversely, a trust is a non-resident if its central management and control is not located in Australia and none of its trustees are residents of Australia.

173. Item 2, therefore, applies to a supply that is made to a trust that is a non-resident and not in Australia when the thing supplied is done.

174. Paragraph (b) of item 4 applies to a supply that is made in relation to rights if that supply is to a trust that is a non-resident and outside Australia when the thing supplied is done.

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

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

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

(a) an *individual;

(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.

Note: a company as defined for GST purposes in section 195-1 means a body corporate or any other unincorporated association or body of persons but does not include a partnership or a non-entity joint venture.

177. The asterisked terms (*) are defined in section 195-1. With respect to a trust the GST Act recognises that it is the trustee of a trust, as the legal person, upon whom the rights and obligations are conferred or imposed.[47] The Act does not create two separate entities – the trust and trustee – but rather the relevant entity is the trust, with the trustee standing as that entity if legal personality is required for

[47] Subsection 184-1(2).

the purposes of conferring or imposing rights and obligations. Under subsection 184-1(2) the trustee of a trust comprises the person, or persons, acting in the capacity of trustee of the trust at any given time. In accordance with the GST Act we refer in this Ruling to the 'trust' other than where the legal status of the trustee is relevant.

178. Item 3 therefore applies to a supply that is made to any one of the following entities:

- an individual;
- a company (as that term is defined for GST purposes);
- a partnership (other than a corporate limited partnership);
- a corporate limited partnership; or
- a trust.

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 the residency status of the entity.

179. This means that even if the recipient of a supply is an Australian resident, the supply may be GST-free under item 3 if the resident entity is not in Australia when the thing supplied is done and the other requirements of item 3 are met.[48]

Part II – the meaning of 'not in Australia', 'outside Australia' and 'when the thing supplied is done'

180. In this Part, 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).

In particular we discuss…	at paragraphs
The meaning of 'not in Australia' and 'outside Australia'	181 to 185
Application of subsection 38-190(4) with respect to item 3	186 to 197
The meaning of 'when the thing supplied is done'	198 and 199

[48] Where a supply would not be GST-free under item 3 because paragraph (a) of item 3 is not satisfied, (that is, the recipient is in Australia in relation to the supply), subsection 38-190(4) may apply with the effect that the supply is taken for the purposes of item 3 to be a supply made to a recipient who is not in Australia. Refer to paragraphs 186 to 197 where subsection 38-190(4) is discussed in more detail.

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

181. The requirement that a supply is made to a non-resident (item 2), or recipient (item 3), who is 'not in Australia' '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.

182. A strict literal interpretation of the 'not in Australia' requirement merely requires a presence of that entity in Australia when the thing supplied is done for that requirement not to be satisfied. A literal approach would mean, for example, that a supply made to a non-resident individual who happens to be in Australia on holidays when the thing supplied is done fails the not in Australia requirement even though his or her presence in Australia is completely unrelated to the supply.

183. A literal approach would also mean, for example, that a supply provided to the offshore branch of an Australian resident company would not be GST-free under item 3 due to the presence of the Australian resident company in Australia. Subsection 38-190(4) could not apply to treat the supply as made to a recipient that is not in Australia as paragraph 38-190(4)(b) requires the supply to be provided to another entity, which a branch is not. A literal approach, therefore, does not give effect to the policy intent to only tax supplies consumed in Australia.

184. As the Australian location of the entity to which the supply is made at the relevant time is a proxy test for identifying when consumption occurs in Australia, we consider that the expression 'not in Australia' should be interpreted in the context of the supply in question. The expression 'not in Australia' requires, in our view, 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 if that entity is in Australia but not in relation to the supply. We examine this more fully when considering the application of items 2 and 3 and paragraph (b) of item 4 to specific entity types in Part III.

185. As noted at paragraph 105, 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.

Application of subsection 38-190(4) with respect to item 3

186. 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 if:

- 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

187. 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.

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

189. In the context of subsection 38-190(4), we consider that entering into an agreement indirectly with an Australian resident occurs if an entity such as a nominee or agent 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.

Australian resident

190. '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.[49]

191. When explaining the application of item 3 and subsection 38-190(4) to specific entity types in Part III, we discuss supplies that are made under an agreement with an Australian resident.

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

192. That supply refers to the supply made to a recipient who is in Australia in relation to the supply.

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[49] In determining whether an entity that is an individual, company, partnership, corporate limited partnership or a trust is a non-resident we discuss when that entity is a resident of Australia. Refer to paragraphs 114 to 174.

193. Subsection 38-190(4), by means of the expression 'provided to another entity' seeks to identify the entity to which the item 3 supply actually flows.

194. If the supply is made under an agreement with an Australian resident recipient but the thing supplied is provided, or the agreement requires it to be provided, to another entity located outside Australia, subsection 38-190(4) applies and the not in Australia requirement in item 3 is satisfied.

195. An example illustrating the application of subsection 38-190(4) (and provided in the Explanatory Memorandum for subsection 38-190(4))[50] is a supply of training services made to an Australian employer but provided to employees attending a training course conducted outside Australia. The Australian employer is treated as a recipient who is not in Australia in relation to the supply because the supply is provided to another entity (an employee) outside Australia.

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

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

197. Subsection 38-190(4)recognises that a supply under an agreement with an Australia resident may be provided, or be required by an agreement to be provided, to another entity. If that other entity is located outside Australia, subsection 38-190(4) requires the location test in paragraph (a) of item 3 to take account of the location of that other entity.[51]

The meaning of 'when the thing supplied is done'

198. 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.[52]

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

[51] Subsection 38-190(3) applies in the reverse situation in relation to supplies covered by item 2 (that is, the non-resident recipient is not in Australia in relation to the supply but the supply is provided to another entity in Australia).

[52] See paragraphs 61 to 77 of GSTR 2000/31 Goods and services tax: supplies connected with Australia.

199. Consistent with the views expressed in GSTR 2000/31:[53]

- *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 – when particular entity types are in Australia in relation to the supply

200. In this Part, we explain, in terms of specific entity types namely, individuals, companies, partnerships, corporate limited partnerships and trusts, when an entity is 'not in Australia'. We do this by describing when an entity is in Australia in relation to the supply.

In particular we discuss…	**at paragraphs**
When an individual is in Australia in relation to the supply	201 to 228
When a company is in Australia in relation to the supply	229 to 379
When a partnership (other than a corporate limited partnership) is in Australia in relation to the supply	380 to 409
When a corporate limited partnership is in Australia in relation to the supply	410 to 419

[53] GSTR 2000/31 Goods and services tax: supplies connected with Australia.

In particular we discuss…	at paragraphs
When a trust is in Australia in relation to the supply	420 to 438

When an individual is in Australia in relation to the supply

201. We discuss:

- when a non-resident individual is in Australia for the purposes of item 2 and paragraph (b) of item 4 at paragraphs 202 to 213 and whether that presence is in relation to the supply at paragraphs 214 to 220; and
- when a recipient who is an individual is in Australia for the purposes of item 3 at paragraphs 221 to 224 and whether that presence is in relation to the supply at paragraphs 225 to 228.

How to determine if a non-resident individual is in Australia for the purposes of item 2 and paragraph (b) of item 4

202. 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.

203. If a supply is made to a non-resident individual who is physically 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. This is discussed at paragraphs 214 to 220.

Representative in Australia of a non-resident individual

204. 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 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.

205. 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.

206. 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 2 – representative in Australia acting on behalf of a non-resident individual

207. *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 3 – employee of a non-resident individual in Australia

208. *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 4 – presence in Australia of an agent of a non-resident individual

209. *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 5 – supply to a managing agent on behalf of a non-resident individual rental property owner

210. *A non-resident individual owns a commercial rental property in Fitzroy, Melbourne. 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 building to be painted. As the non-resident individual is not physically in Australia when the thing supplied is done, the individual is not in Australia for the purposes of item 2.*

211. *Even though the supply is directly connected with real property situated in Australia, the supply is GST-free if the non-resident individual is not registered or required to be registered.*[54]

[54] 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.

Alternative view

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

213. We consider that in the case of a non-resident individual, presence determined on the basis of actual physical presence is the better view for the reasons outlined at paragraph 204. This is to be contrasted with a non-resident company (refer to paragraphs 230 to 244) where the presence of its representatives is the only way that presence in Australia can be established.

How to determine if the physical presence in Australia of a non-resident individual is in relation to the supply for the purposes of item 2 and paragraph (b) of item 4

214. A non-resident individual may be physically in Australia when the thing supplied is done, but that presence in Australia may be unrelated to the supply. For example, the non-resident is in Australia on holidays only.

215. If that individual is in Australia only on matters unrelated to the supply, we consider that the individual recipient is in Australia but not 'in relation to the supply'. We recognise that the physical presence in Australia of the non-resident individual at the relevant time is merely coincidental.

216. Thus, if a non-resident individual is, for example, in Australia on holidays and has no contact with the supplier, we consider that the presence of the non-resident individual in Australia when the thing supplied is done is not in relation to the supply.

217. If a non-resident individual recipient of a supply is physically in Australia and in contact with the supplier (other than contact which is only of a minor nature), we consider that presence is in relation to the supply. The extent to which an individual's presence in Australia is in relation to the supply must be determined on a reasonable basis having regard to the period of the individual's involvement with the supply while in Australia. This is discussed further in 'Part IV – apportionment'.

218. Contact is minor if it is limited to contact of a simple administrative nature, such as checking on the progress of the supply or a courtesy call on the supplier. If this is the only contact between the non-resident individual and the supplier we consider that the individual is not in Australia in relation to the supply.

Example 6 – non-resident individual is in Australia but not in relation to the supply

219. *A supply of legal services is made by an Australian lawyer 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 lawyer while in Australia. The presence of the individual in Australia is not in relation to the supply of the legal services.*

Example 7 – non-resident individual is in Australia in relation to the supply

220. *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 meeting with the lawyer, is involved with the supply.*

How to determine if a recipient who is an individual is in Australia for the purposes of item 3

221. 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 202 to 213 in relation to item 2 and paragraph (b) of item 4, 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.

Resident individuals

222. Like non-resident individuals, an Australian resident individual is in Australia if the individual is physically located in Australia when the thing supplied is done.

Example 8 – resident individual who is not in Australia

223. *An Australian tourist is arrested in New Zealand for possession of an illegal substance. While in New Zealand 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. However, the supply is only GST-free if the other requirements of item 3 are satisfied.*

Non-resident individuals

224. If 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. If a supply is made to a non-resident individual who is physically 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. This is discussed at paragraph 228.

How to determine if the physical presence in Australia of an individual recipient is in relation to the supply for the purposes of item 3

Resident individuals

225. A resident individual who is physically in Australia when the thing supplied is done is in Australia in relation to the supply.

226. Therefore, a supply to a resident individual who is physically in Australia when the thing supplied is done only satisfies item 3 if subsection 38-190(4) applies and the other requirements of item 3 are satisfied.

Application of subsection 38-190(4) to supplies made to a resident individual

227. If an Australian resident individual is in Australia when the thing supplied is done, a supply made to that individual is taken to be a supply made to a recipient who is not in Australia for the purposes of item 3 if the supply is provided, or the agreement requires it to be provided, to another entity outside Australia. Refer to paragraphs 186 to 197, where this provision is explained in more detail.

Non-resident individuals

228. A non-resident individual who is physically in Australia when the thing supplied is done is not in Australia in relation to a supply if that individual is in Australia only on matters unrelated to the supply. Refer to paragraphs 214 to 220, where we discuss how to determine if the physical presence of a non-resident individual in Australia is in relation to the supply for the purposes of item 2 and paragraph (b) of item 4.

When a company is in Australia in relation to the supply

229. We discuss:

- when a non-resident company is in Australia, for the purposes of item 2 and paragraph (b) of item 4, at paragraphs 230 to 332;

- when a recipient that is a company is in Australia for the purposes of item 3 at paragraphs 333 to 346; and
- whether the presence of that company in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4 at paragraphs 347 to 379.

How to determine if a non-resident company is in Australia for the purposes of item 2 and paragraph (b) of item 4

230. 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 and its presence can only be established through the presence of its representatives.

231. 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, therefore, necessary to identify the type of presence by a representative of a non-resident company in Australia that makes a company in Australia.

232. The presence of a non-resident company in Australia is the means by which consumption of the supply in Australia is identified.

233. If a broad approach is taken to determining presence of a non-resident company in Australia a very minor presence would equate with consumption in Australia.

234. For example, consider the outcome if 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 broad approach, 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.

235. An alternative would be to take a narrower approach, limiting the meaning of 'in Australia' to, for example, cases where persons who are the directing or controlling mind of the company, such as a director or a senior manager, are in Australia. 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.[55]

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

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[55] 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.

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

238. Determining presence of a foreign company[56] in a jurisdiction is an issue that has been faced by the courts in determining whether jurisdiction exists over a foreign company.[57] 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 an originating process such as a writ or enforcing a judgment.

239. 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.[58] 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.

240. In *Fiduciary Ltd & Ors v. Morningstar Research Pty Ltd & Ors* [2004] NSWSC 381 the Court, in considering whether a corporation was in Australia for the purposes of item 2, held that the line of authority with respect to the jurisdiction of the courts should be applied. The Court went on to say, with reference to earlier drafts of this Ruling, that:

> …the Commissioner of Taxation has adopted the principles applicable to the presence of a corporation in Australia for jurisdictional purposes and has, correctly in my view, applied those principles to item 2 of the table…[59]
>
> By using the phrase 'in Australia', Parliament invited adoption of the body of law dealing with that which constituted a corporate presence in Australia.[60]

[56] The case law refers to 'foreign company' which is a company that is incorporated outside the relevant jurisdiction (that is for an Australian court, a company incorporated outside Australia is a foreign company).
[57] 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 Lloyd's Rep 330 and *Vogel v. R & A Kohnstamm Ltd* [1973] QB 133.
[58] See Halsbury's Laws of Australia , 'Conflict of Laws', Chapter 85, paragraph [85-1880].
[59] *Fiduciary Ltd & Ors v. Morningstar Research Pty Ltd & Ors* [2004] NSWSC 381, at paragraph 32.
[60] *Fiduciary Ltd & Ors v. Morningstar Research Pty Ltd & Ors* [2004] NSWSC 381, at paragraph 44.

241. We consider, therefore, that a non-resident company[61] is in Australia for the purposes of item 2 and paragraph (b) of item 4 if that company carries on business (or in the case of a company that does not carry on business, carries on its activities)[62] in Australia:

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

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

242. In addition to producing an outcome that is more aligned with the policy intent to tax supplies consumed only 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.

243. 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 have a presence in Australia as determined under the test in paragraph 241) 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 negates the GST-free status that would otherwise apply to an item 2 supply, if that supply is provided to another entity in Australia, such as an employee. Thus, although presence of the non-resident company in Australia is determined by whether the company is carrying on business in Australia, another provision takes into account the presence of representatives in Australia if the non-resident company does not carry on business in Australia.

244. 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 347 to 379.

Indicators of when a non-resident company is in Australia

245. While the test for determining whether a non-resident company is in Australia is outlined at paragraph 241, 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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[61] A non-resident company means a body corporate or any other unincorporated association or body of persons that is a non-resident but does not include a partnership or a non-entity joint venture as those terms are defined in section 195-1. We consider that the test for presence in Australia should be the same for both a body corporate and an unincorporated association or body of persons that is a non-resident under the ITAA 1936. An unincorporated 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]).

[62] See *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929, at 1009.

246. A company incorporated outside Australia is required to register as a foreign company with the Australian Securities and Investments Commission ('ASIC') if it wishes to carry on business in Australia.[63] A supplier can check whether a company is registered by conducting a search of the National Names Index on the ASIC website.[64]

247. 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.

248. 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 241) to its particular circumstances, the non-resident company is not in Australia.

249. 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 (at paragraph 241). 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 to its particular circumstances.

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 (item 2 and paragraph (b) of item 4)

250. We consider that if a non-resident company carries on business at or through 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.

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

252. A non-resident company is considered to be carrying on business in Australia even though the activities carried on in Australia are not a substantial part of, or are no more than incidental to, the main objects of the company.[65]

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[63] A company incorporated outside Australia that is registered with ASIC is given an Australian Registered Body Number ('ARBN').
[64] The ASIC website address is: http://www.asic.gov.au/.
[65] See *South India Shipping Corporation v. Bank of Korea* [1985] 1 WLR 585 and the discussion at paragraph 271.

Place of its own

253. 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 if it has a right to be there. 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.

254. If 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 are the asset on which the leasing activities are based, we do not consider it to be a place at or through which the activities are carried out for the purposes of determining whether the non-resident company is in Australia.

255. 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 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'.

256. 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 paragraphs 277 to 318 where this is discussed further.

Fixed and definite place

257. 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.

258. The jurisdiction case of *Littauer Glove Corporation v. F.W. 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.

259. 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.

260. 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.

261. 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.

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

263. 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, if the non-resident company has at its constant disposal premises or part of premises owned by another entity.

264. 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 are still a fixed and definite place.

Sufficiently substantial period of time

265. 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.

266. 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 to be in Australia.

267. 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.[66]

Example 9 – intention to continue business

268. *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

269. 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.

270. In *Anglo Australian Foods Ltd v. Credit Suisse* (1988) 1 ACSR 69 ('*Anglo*') a Swiss bank set up a representative office in Melbourne 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.

271. 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

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

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 no more than incidental to, the main objects of the Korean bank.

272. 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.

273. 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.

274. 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.[67]

275. 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.[68]

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[67] *Actiesselskabet Dampskib 'Hercules' v. Grand Trunk Pacific Railway Company* [1912] 1 KB 222, at 227 to 228.

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

276. 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 257 to 264) and sufficiently substantial period of time (see paragraphs 265 to 268).

A non-resident company carries on business in Australia through an agent at a fixed and definite place for a sufficiently substantial period of time (item 2 and paragraph (b) of item 4)

277. If 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.

278. 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.

279. 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 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.[69]

280. The question of whether 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.[70]

281. 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?

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[69] *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929, at 1009.
[70] *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929, at 1010.

- 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.[71]
- 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 the agent's 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 the agent's premises or on stationery and, if so, does it indicate that the agent is an agent of the non-resident company?
- What business, if any, does the agent transact as principal exclusively on the agent's 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?
- 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?[72]

The business of the non-resident company involves making contracts for sale, lease or similar

282. If 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.

283. 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

[71] See *Saccharin Corporation Ltd v. Chemische Fabrik von Heyden Aktiengesellschaft* [1911] 2 KB 516.
[72] 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.

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.

284. The following three jurisdiction cases illustrate this.

285. In *Thames and Mersey Marine Insurance Company v. Societa Di Navigazone A Vapore Del Lloyd Austriaco* [1914-15] All ER Rep 1104 ('*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 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.

286. 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.

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

288. 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.

289. 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.[73]

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

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

291. 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.

292. Fletcher Moulton LJ found on the evidence that '…every trade operation is done by [the agent] for the defendants at this fixed address.'[74] 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.'[75] It was held that the foreign company was in the UK through the agent who carried on the company's business in the UK.

293. The above three jurisdiction cases illustrate that regard must be had to other factors even if 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 at paragraph 281 must also be considered to determine whether the agent's fixed place of business is the non-resident's place of business.

294. 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*

[74] *Saccharin Corporation Ltd. v. Chemishe Fabrick Von Heyden Aktiengesellschaft* [1911] 2 KB 516, at 525.
[75] *Saccharin Corporation Ltd. v. Chemishe Fabrick Von Heyden Aktiengesellschaft* [1911] 2 KB 516, at 524.

Clementine [1897] P 18, *The Lalandia* [1933] P 56, [1932] All ER Rep 391 and *The Holstein* [1936] 2 All ER 1660.[76]

295. While it is also relevant to consider other factors, if an agent does not have the power to bind the non-resident company without seeking the company's approval before binding the company, there does not, apart from one case (discussed at paragraphs 302 to 310), 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 the agent.

296. 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 more likely that the agent is carrying on the agent's own business, unless the circumstances are similar to those discussed at paragraphs 302 to 310. If the agent is carrying on the agent's own business and not the non-resident company's business in Australia, the non-resident company is not in Australia.

297. In the following three jurisdiction cases the agent did not have the power to bind the foreign corporation without its prior approval and the foreign corporation was found not to be in the jurisdiction.

298. *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.

299. 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.)

300. In *Vogel v. R & A Kohnstamm Ltd* [1973] 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.

[76] *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929, at 1013.

301. 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.

302. *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.

303. 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.

304. 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.

305. Subject to that limitation the shipping brokers were given full power to act, exclusive of operations in 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.

306. 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].[77]

307. 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.

308. 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].[78]

309. 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, …'.[79] 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.[80]

310. 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 commercial 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.[81] 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.[82]

The business of the non-resident company does not involve making contracts for sale, lease or similar

311. If 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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[77] *The World Harmony* [1965] 2 All ER 139, at 146.
[78] *The World Harmony* [1965] 2 All ER 139, at 149.
[79] *The World Harmony* [1965] 2 All ER 139, at 149.
[80] *The World Harmony* [1965] 2 All ER 139, at 149.
[81] This can be contrasted with the situation described in paragraphs 254 and 255, where a non-resident owner has no agent in Australia.
[82] As Slade J commented in *Adams and others v. Cape Industries plc and another* [1991] 1 All ER 929, 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.'

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

313. 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 forms a part and a material part of the defendant's business as a trustee.[83]

314. 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.[84]

315. 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.

316. 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.[85]

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

318. 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 a non-resident company (item 2 and paragraph (b) of item 4)

319. If 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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[83] *BHP Petroleum Pty Ltd v. Oil Basins Ltd* [1985] VR 725, at 733.
[84] *BHP Petroleum Pty Ltd v. Oil Basins Ltd* [1985] VR 725, at 733.
[85] *BHP Petroleum Pty Ltd v. Oil Basins Ltd* [1985] VR 725, at 733 to 734.

320. 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'.

321. 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.

322. The tasks required of the subsidiary company pursuant to its agency agreement with the foreign company included: providing assistance to the foreign company in supervising and controlling tours; making available qualified sales and operational personnel; consulting the parent company regarding the employment of management staff; obtaining the approval of the parent company before concluding any major contracts and for the appointment of advertising and public relations agents. The subsidiary company was also required to promote its commercial image in accordance with the parent company's strategies and within the financial constraints specified by it and to deal with passenger's complaints. It was subject to other obligations in accordance with the foreign company's policy including refraining from taking any legal proceedings without the parent company's prior approval and not working for other passenger transport companies without the parent company's prior consent. Further, in matters of pricing the discretion of the subsidiary company was extremely limited. In return the subsidiary company was paid a gross commission on all fares sold.

323. It was found that the foreign parent company had established its business in the UK by virtue of its agency arrangement with the subsidiary. The court stated that the fact that the premises of the subsidiary company, which had its own legal personality, belonged to it and not to the foreign company was not sufficient in itself to establish that the subsidiary company was independent from the foreign company. The court found that the 100% ownership of the subsidiary company by the foreign company, along with the contractual obligations imposed on it by the foreign company, showed that the subsidiary company established in the UK merely acted as an auxiliary organ of its parent. The court also found that the subsidiary company displayed the features of a fixed establishment having regard to the number of employees (about 100) and the actual terms under which it provided services to customers.

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

325. 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.

326. 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 representative, 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.[86]

Division 57 agent (item 2 and paragraph (b) of item 4)

327. If 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.

328. The mere existence of a Division 57 agent does not necessarily mean that the non-resident for which the agent acts is in Australia. However, if the agent is carrying on the business of a non-resident entity other than an individual, 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).[87]

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[86] *Commonwealth Bank v. White; ex parte Lloyd's* [1999] VSC 262, at 32 to 36.
[87] The fact that an agent carries on the business of an individual in Australia does not make that individual in Australia. Refer to paragraphs 202 to 213.

Example 10 – Division 57 resident agent not carrying on business of the non-resident company

329. *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.*

330. *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.*

331. *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 non-resident 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.*

332. *Provided the other requirements of item 2 are met the supply of the stevedoring services and the supply of the agency services (see paragraphs 374 to 379) by the Division 57 agent are GST-free.*

How to determine if a recipient that is a company is in Australia for the purposes of item 3

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

334. 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.

Company incorporated in Australia

335. By definition,[88] 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.

[88] Definition of 'a resident of Australia' in subsection 6(1) of the ITAA 1936.

336. 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.

337. In Australia, the *Corporations Act 2001* 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 2001.*[89]

338. Bodies corporate can be incorporated under legislation other than the *Corporations Act 2001.* For example, the *Associations Incorporation Act 1981* (Qld) 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 ASIC unless they wish to establish an office or carry on business in another state or territory.

339. We consider that a company that is incorporated in Australia is in Australia by virtue of its incorporation in Australia.

Company incorporated outside Australia

340. Item 3 may apply if 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.[90]

341. 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.

342. Therefore, a company (that is incorporated outside Australia) is in Australia for the purposes of item 3 if that company carries on business (or in the case of a company that does not carry on business, carries on its activities) in Australia:

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

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[89] Section 119 of the *Corporations Act 2001*.

[90] A company that is incorporated outside Australia is a resident if 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. In determining whether a company is a non-resident we discuss when a company is a resident of Australia. Refer to paragraphs 121 to 126.

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

Indicators of when a company incorporated outside Australia is in Australia

343. 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 245 to 249, are equally applicable as indicators, for the purposes of item 3, of when a company that is incorporated outside Australia is in Australia.

Unincorporated association or body of persons

344. Item 3 may apply if an unincorporated association or body of persons is the recipient of the supply irrespective of whether the unincorporated association or body of persons is a resident of Australia or a non-resident.

345. We consider that it is likely that the test that would be held to apply for determining whether an unincorporated association or body of persons is in Australia for the purposes of item 3 would be 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.

346. Therefore, an unincorporated association or body of persons is, in our view, in Australia for the purposes of item 3 if that unincorporated association or body of persons carries on business (or in the case of an unincorporated association or body persons that does not carry on business, carries on the association's or body's activities) in Australia:

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

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

How to determine if the presence of a company in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4

347. 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 or item 3 or 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. Companies, unlike individuals, may have a presence in more than one location. A resident company that has a presence in Australia as well as offshore, may be regarded

as not in Australia in relation to a particular supply that is provided to its offshore presence.

348. 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.

349. Clearly if the supply to a company is solely or partly 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.

350. If 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', unless the only involvement is minor.

351. 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 the 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.

352. Tasks of a simple administrative nature include:

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

353. 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 and 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. However, for the reasons explained at paragraphs 182 to 184 it is, in our view, reasonable to infer that the location of an entity in Australia is only relevant if that entity is in Australia in relation to the supply.

Example 11 – branch in Australia but not in Australia in relation to the supply

354. *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.*

355. *The non-resident company carries on business in Australia through a number of branches. The supply of freight services is not for the purposes of any of these Australian branches, and there is no involvement of any branch in that supply. The presence of Europe Airways in Australia is not in relation to the supply of freight services made by Aussie Line and therefore, Europe Airways is not in Australia for the purposes of item 2 or item 3. The supply is GST-free if the other requirements of the item are met.*

Example 12 – branch in Australia but not in Australia in relation to the supply

356. *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's head office engages an Australian legal firm, Aus Legal, to provide written legal advice.*

357. *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.*

358. *The fact that the advice is received and on-forwarded by the Australian branch to Sing Co does not make Sing Co in Australia in relation to the supply. 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. If the Australian branch translates the advice into Malay before on-forwarding it to Sing Co, that does not alter this outcome. Therefore, Sing Co is not in Australia for the purposes of item 2 or item 3. The supply is GST-free if the other requirements of the item are met.*

Example 13 - branch in Australia in relation to the supply

359. *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.*

360. *The involvement of the branch in Australia in relation to the supply is not limited to administrative tasks of a minor nature. US Co is in Australia in relation to the supply. Therefore, the supply is not GST-free under item 2 or item 3.*

Example 14 – supply for the purposes of an offshore branch of an Australian company - in Australia but not in Australia in relation to the supply

361. *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. The supply is GST-free if the other requirements of item 3 are satisfied.*

Example 15 – representative office in Australia in relation to the supply

362. *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.*

363. *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. Therefore, the supply is not GST-free under item 2 or item 3.*

Example 16 – supply for the purposes of the branch in Australia

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

365. *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. Therefore, as Asia Co is in Australia in relation to the supply the supply is not GST-free under item 2 or item 3.

Example 17 – branch in Australia in relation to the supply of rights

366. *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.*[91]

Example 18 – supply to off-shore branch of an Australian company - in Australia but not in relation to the supply

367. *ABC Pty Ltd is incorporated in Australia and its 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 other directors, including the managing director, reside in South Africa.*

368. *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.*

369. *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. Therefore, paragraph (a) of item 3 is satisfied. The supply is GST-free if the other requirements of item 3 are satisfied.*

Example 19 – supply to off-shore branch of Australian company – in Australia but not in relation to the supply

370. *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. Therefore, paragraph (a) of item 3 is satisfied. The supply is GST-free if the other requirements of item 3 are satisfied.*

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[91] 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 2003/8 Goods and services tax: supply of rights for use outside Australia – subsection 38-190(1), item 4, paragraph (a) and subsection 38-190(2).

Example 20 – supply to off-shore branch – head office engaging the supplier does not make the company in Australia in relation to the supply

371. *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. Therefore, paragraph (a) of item 3 is satisfied. The supply is GST-free if the other requirements of item 3 are satisfied.*

372. *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, for example, detailed briefings on the operations in Vanuatu, Aus Co is in Australia in relation to the supply. Therefore, paragraph (a) of item 3 is not satisfied and the supply is not GST-free under item 3.*

Application of subsection 38-190(4) to supplies made to a resident company

373. If a resident company is in Australia in relation to the supply when the thing supplied is done, a supply to that company is taken to be a supply made to a recipient that is not in Australia for the purposes of item 3 if the supply is provided, or the agreement requires it to be 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 186 to 197 where this provision is explained in more detail.

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

374. If 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 of services by the agent to the non-resident company in the course of its own business (‘agency services’) may still be GST-free.

375. For supplies of agency services made by the agent to the non-resident company, the company is not in Australia in relation to the supply of those agency services. This is because the agent does not make the company in Australia in relation to supplies that it makes itself to the company. 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 the non-resident company is a GST-free supply.

376. For example, a non-resident company that is in Australia because the real estate agent attends to the day to day management and operation of a commercial rental property in Australia on behalf of the company is not in Australia in relation to a supply of services that the real estate agent itself makes to that company. The company is not in Australia in relation to the supply unless those services are for the purposes of some other presence of the company in Australia, such as a branch, or there is some other connection (that is not minor in nature) between the agency services and that other Australian presence of the company. If this is the case, the company is in Australia in relation to the supply of the agency services through its other presence in Australia and the supply of the agency services is not GST-free.

377. This treatment of agency services also applies if the entity receiving the services is an entity other than a company, for example a partnership.

Example 21 – supply of agency services

378. *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.*

379. *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.*

When a partnership (other than a corporate limited partnership) is in Australia in relation to the supply

380. We discuss:

- when a non-resident partnership is in Australia, for the purposes of item 2 and paragraph (b) of item 4, at paragraphs 381 to 395;
- when a recipient that is a partnership is in Australia for the purposes of item 3 at paragraphs 396 and 397; and
- whether the presence of that partnership in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4 at paragraphs 398 to 409.

How to determine if a non-resident partnership is in Australia for the purposes of item 2 and paragraph (b) of item 4

381. A supply to a partnership is GST-free under item 2 or paragraph (b) of item 4 if the partnership is a non-resident partnership, is not in Australia in relation to the supply when the thing supplied is done and the other requirements of the item are met. Paragraphs 127 to 157 explain when a partnership is a non-resident for the purposes of the application of item 2 and paragraph (b) of item 4 to supplies to partnerships.

382. To establish an appropriate way of testing for presence of a non-resident 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.[92]

383. 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.[93]

384. 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.

385. As a partnership is a separate entity for GST purposes, we consider that a test that mirrors the test for determining whether a non-resident company is in Australia is an appropriate basis on which to assess whether a non-resident partnership is in Australia.

386. As explained at paragraphs 230 to 244, the test for determining presence of a non-resident company 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.

Non-resident partnership that carries on business

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

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

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

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[92] Section 184-1.
[93] Section 184-5.

388. As this is the same test that is used to determine whether a non-resident company is in Australia, the explanation of the various elements of the test for a non-resident company is equally relevant. The paragraphs discussing the various elements are as follows:

- paragraphs 250 to 276 – carries on business at or through its own fixed and definite place for a sufficiently substantial period of time:
  - paragraphs 253 to 256 – place of its own;
  - paragraphs 257 to 264 – fixed and definite place;
  - paragraphs 265 to 268 –sufficiently substantial period of time; and
- paragraphs 277 to 332 – carries on business through an agent.

Example 22 – non-resident partnership not in Australia

389. *CR Enterprises, a partnership, the central management and control of which is in the United Kingdom, engages an Australian agent to call for expressions of interest for the supply of top quality Australian wines. The Australian agent does not have any further involvement with the supplies. Lawrence, a partner in the partnership, visits Australia to negotiate the purchases with the suppliers. The presence of Lawrence 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.*

390. *Neither does the nature or 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 for the purposes of either item 2 or item 3 and the supply is GST-free under either item 2 or item 3 if the other requirements of the item are met.*

Example 23 – non-resident partnership not carrying on business at a fixed and definite place

391. *A Hong Kong woollen garment manufacturing partnership, the central management and control of which is also in Hong Kong, 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. The partnership is not in Australia for the purposes of either item 2 or item 3 and the supply is GST-free under either item 2 or item 3 if the other requirements of the item are met.*

Non-resident partnership that carries out activities that do not amount to carrying on business

392. The definition of partnership in section 195-1 refers to the definition of a partnership in section 995-1 of the ITAA 1997. According to the definition in the ITAA 1997 a partnership includes an association of persons in receipt of ordinary income or statutory income jointly.

393. 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.

394. It is, therefore, necessary to determine when a non-resident partnership that exists under the extended definition is in Australia. We consider that a partnership of this kind is in Australia if the partnership carries on the activities, which generate the partnership's ordinary or statutory income, in Australia:

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

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

395. An example is owning and renting out a commercial property in Australia if 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 commercial property in Australia on behalf of the partnership, the partnership is in Australia.

How to determine if a recipient that is a partnership is in Australia for the purposes of item 3

396. A supply may be GST-free under item 3 if the supply is made to a partnership that is not in Australia when the thing supplied is done, regardless of whether that partnership is a resident or a non-resident (as determined in accordance with this Ruling).

397. The test that applies for determining whether a 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 an explanation of the test, refer to paragraphs 387 and 388 where there is an association of persons carrying on business as partners and paragraphs 394 and 395 where there is an association of persons in receipt of ordinary income or statutory income jointly. References to 'non-resident partnership' should be read as references to 'partnership', and references to 'item 2 and paragraph (b) of item 4', should be read as a reference to 'item 3'.

How to determine if the presence of a partnership in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4

398. Even if a partnership 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 or item 3 or paragraph (b) of item 4. 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.

399. At paragraphs 347 to 379, 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 24 – non-resident partnership in Australia but not in relation to the supply

400. *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 central management and control of the partnership is based. It has a branch in Australia that offers software development services in Australia, staffed by personnel from the US and Australia.*

401. *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.*

402. *The non-resident 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 or item 3. The supply is GST-free under item 2 or item 3 if the other requirements of the item are satisfied.*

Example 25 – resident partnership in Australia but not in relation to the supply

403. *Assume the same facts as in Example 24 except that Cyberian Systems has three partners one of whom is an Australian resident individual and the central management and control of the partnership is in Australia. As the central management and control of the partnership is located in Australia the partnership is a resident of Australia.*

404. *The resident 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 the partnership is a resident.*

405. *However, the partnership is not in Australia in relation to the supply of services by the computer engineer. The Australian branch of the partnership is not involved with the supply of the services to the US branch of the partnership and the services are not supplied for the purposes of the partnership business being conducted in Australia. Therefore, paragraph (a) of item 3 is satisfied. 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 a resident partnership

406. If a resident partnership is in Australia in relation to the supply when the thing supplied is done, a supply to that partnership is taken to be a supply made to a recipient that is not in Australia for the purposes of item 3 if the supply is provided, or the agreement requires it to be 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.

407. 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 if the recipient of the supply is a partnership which has its central management and control located in Australia.

408. A supply made under an agreement with either a partner acting in the capacity of partner of the partnership or a partnership in the name of the partnership firm is an agreement entered into directly or indirectly with an Australia resident if the central management and control of the partnership is in Australia.

409. Refer to paragraphs 186 to 197, where this provision is explained in more detail.

When a corporate limited partnership is in Australia in relation to the supply

410. We discuss:

- when a non-resident corporate limited partnership is in Australia, for the purposes of item 2 and paragraph (b) of item 4, at paragraphs 412 and 413;
- when a recipient that is a corporate limited partnership is in Australia for the purposes of item 3 at paragraphs 414 to 416; and
- whether the presence of that corporate limited partnership in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4 at paragraphs 417 to 419.

411. We consider 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.

How to determine if a non-resident corporate limited partnership is in Australia for the purposes of item 2 and paragraph (b) of item 4

412. 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 (or in the case of a corporate limited partnership that does not carry on business, carries on its activities) in Australia:

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

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

413. This is the same test that is used to determine whether a non-resident company is in Australia. The explanation of the various elements of the test for a non-resident company is also relevant for applying the test to a corporate limited partnership. The paragraphs discussing the various elements are as follows:

- paragraphs 250 to 276 – carries on business at or through its own fixed and definite place for a sufficiently substantial period of time:
  - paragraphs 253 to 256 – place of its own;
  - paragraphs 257 to 264 – fixed and definite place;
  - paragraphs 265 to 268 – sufficiently substantial period of time; and
- paragraphs 277 to 332 – carries on business through an agent.

How to determine if a recipient that is a corporate limited partnership is in Australia for the purposes of item 3

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

415. 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. [94]

416. If 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 an explanation of the test, refer to paragraphs 412 and 413. References to 'non-resident corporate limited partnership' should be read as references to a 'corporate limited partnership', and references to 'item 2 and paragraph (b) of item 4', should be read as a reference to 'item 3'.

How to determine if the presence of a corporate limited partnership in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4

417. Even if a corporate limited partnership 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 or item 3 or paragraph (b) of item 4. 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.

418. At paragraphs 347 to 379, 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 made to a resident corporate limited partnership

419. If a resident corporate limited partnership is in Australia in relation to the supply when the thing supplied is done, a supply to that partnership is taken to be a supply made to a recipient that is not in Australia for the purposes of item 3 if the supply is provided, or the agreement requires it to be 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 186 to 197, where this is provision is explained in more detail.

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[94] Limited partnerships are formed upon registration under State statutes (*Limited Partnerships Act 1908* (WA), section 5; *Partnership Act 1891* (SA), section 51; *Partnership Act 1892* (NSW), section 50A; *Partnership (Limited Liability) Act 1988* (QLD), section 7; *Partnership Act 1958* (Vic), section 52; *Limited Partnerships Act 1908* (Tas), section 5) and thus, like companies, are situated in the State in which they were registered and from whose sovereign power they derive their origin.

When a trust is in Australia in relation to the supply

420. We discuss:

- when a non-resident trust is in Australia, for the purposes of item 2 and paragraph (b) of item 4, at paragraphs 422 to 427;
- when a recipient that is a trust is in Australia for the purposes of item 3 at paragraphs 428 and 429; and
- whether the presence of that trust in Australia is in relation to the supply, for the purposes of items 2 and 3 and paragraph (b) of item 4, at paragraphs 430 to 436.

421. At paragraph 177, we discuss the use of the terms 'trust' and 'trustee' in the GST Act. In accordance with the GST Act we refer, in the discussion below, to the trust other than where the legal status of the trustee is relevant.

How to determine if a non-resident trust is in Australia for the purposes of item 2 and paragraph (b) of item 4

422. A supply to a trust is GST-free under item 2 or paragraph (b) of item 4 if the trust is a non-resident, is not in Australia in relation to the supply when the thing supplied is done, and the other requirements of the item are met. Paragraphs 169 to 174 explain when a trust is a non-resident for the purposes of the application of item 2 and paragraph (b) of item 4 to supplies to trusts.

423. We consider that a non-resident trust is in Australia for the purposes of item 2 or paragraph (b) of item 4 if the trustee(s) of the trust carries on business (or in the case of a trustee that does not carry on business, carries on the trust's activities) in Australia in its capacity as trustee of that trust:

- at or through a fixed and definite place of its own for a sufficiently substantial period of time; or
- through an agent at a fixed and definite place for a sufficiently substantial period of time.

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

- paragraphs 250 to 276 – carries on business at or through its own fixed and definite place for a sufficiently substantial period of time:
  - paragraphs 253 to 256 – place of its own;
  - paragraphs 257 to 264 – fixed and definite place;

- paragraphs 265 to 268 – sufficiently substantial period of time; and

- paragraphs 277 to 332 – carries on business through an agent.

425. In determining whether a trust is in Australia, the test referred to in paragraph 423 must be applied by reference to the business or activities conducted by the person(s) acting as trustee(s) of the trust, in the capacity as trustee(s) of the trust, and not by reference to any other business or activities the person(s) may conduct in their own capacity or as trustee of another trust.

426. For example, a non-resident company is the sole trustee of a trust. The non-resident company, when acting in its own capacity, carries on business in Australia through a branch. However, in its capacity as trustee of the trust it does not carry on any business or activities of the trust in Australia and it does not have an agency relationship with any entity in Australia, to carry on the business or activities of the trust in Australia. The non-resident company is in Australia when acting in its own capacity but the trust is not in Australia.

427. 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. Therefore, the test to determine whether a trust is in Australia must be applied with reference to the activities of the legal person when acting in the capacity as trustee of that particular trust and not when it is acting in any other capacity.

How to determine if a recipient that is a trust is in Australia for the purposes of item 3

428. A supply may be GST-free under item 3 if the supply is made to a trust that is not in Australia when the thing supplied is done, regardless of whether the trust is a resident or a non-resident (as determined in accordance with this Ruling).

429. The test that applies for determining whether a trust is in Australia for the purposes of item 3 is the same test that applies for determining whether a non-resident trust is in Australia. For an explanation of the test, refer to paragraphs 423 to 425. References to ‘non-resident trust’ should be read as references to ‘trust’, and references to ‘item 2 and paragraph (b) of item 4’, should be read as a reference to ‘item 3’.

How to determine if the presence of a trust in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4

430. Even if a trust is in Australia for the purposes of item 2 or item 3 or paragraph (b) of item 4 when the thing supplied is done, it may not be in Australia in relation to the supply and so can still satisfy the 'not in Australia' requirement. If the presence of the trust in Australia is unrelated to the supply being made, the trust is not in Australia in relation to the supply.

431. To work out whether a trust is in Australia in relation to the supply, it is necessary to examine the role the presence of the trust in Australia plays in relation to the supply. At paragraphs 347 to 379, 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 trust is in Australia in relation to the supply.

432. For example, a trust through its trustee(s) may carry on business in Australia as well as in another country such as the United Kingdom. If a supply is made for the purposes of the business carried on by the trustee of the trust in Australia the trust is in Australia in relation to the supply. There is a connection between the supply and the presence of the trust in Australia that is not a minor connection.

433. If a supply is not solely or partly for the purposes of the Australian presence of the trust (for example it is solely for the purposes of the presence of the trust in the United Kingdom), but that Australian presence is involved in the supply, the trust is in Australia in relation to the supply, except where the only involvement is minor. Involvement that is considered minor is explained, with reference to companies, at paragraphs 351 and 352 and is equally applicable to trusts.

Application of subsection 38-190(4) to supplies made to a resident trust

434. If a resident trust is in Australia in relation to the supply when the thing supplied is done, a supply to that trust is taken to be a supply made to a recipient that is not in Australia for the purposes of item 3 if the supply is provided, or the agreement requires it to be 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.

435. A supply made under an agreement entered into with the trustee of a resident trust, whether expressed as being made to the trust or the trustee of that trust, is a supply under an agreement entered into directly or indirectly with a resident trust.

436. Refer to paragraphs 186 to 197, where this provision is explained in more detail.

Supply of trustee services to a non-resident trust

437. If a trustee carries on the business of a non-resident trust in Australia at a fixed and definite place for a sufficiently substantial period of time, that trust is in Australia. However the supply of trustee services by the trustee to the non-resident trust in the course of its own business ('trustee services'), may be GST-free.

438. Similar to the supply of agency services by an agent to a non-resident company discussed at paragraphs 374 to 379, the trustee does not make the trust in Australia in relation to supplies that it makes itself to the trust (that is, the trustee services) If the other requirements of item 2 are met, the supply of trustee services made by the trustee to the non-resident trust in the course of its own business is a GST-free supply.

Part IV – apportionment

439. In this Part we 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.

When apportionment is necessary

440. 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.[95] A supply may be partly GST-free under item 2 or item 3 (or paragraph (b) of item 4 as a result of the application of subsection 38-190(2)) 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.

441. If 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 445 to 481.

442. The need to apportion in the context of items 2 and 3 arises if the thing supplied is done over a period of time. For example, apportionment is necessary if 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

[95] 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.

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.

443. If the thing supplied is done at a particular point in time (for example an instantaneous supply of advice),[96] apportionment is not necessary.

444. If there is a supply that is made in relation to rights to which paragraph (b) of item 4 applies, apportionment is only necessary if there is an application of subsection 38-190(2) to negate, in part, the GST-free status of the supply under paragraph (b) of item 4. This is because the supply occurs when the right is created, granted, assigned, transferred or surrendered.[97] 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, that is 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

445. If a supply is partly GST-free and partly taxable under item 2 or item 3[98] 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.

446. 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.[99]

447. If the recipient of the supply is an individual who is in Australia and in contact (other than contact which is only of a minor nature) with the supplier for part of the time the individual is here, the supplier must determine the period of the individual's involvement with the supply while in Australia on a reasonable basis having regard to the particular circumstances.

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[96] Refer to paragraph 199.
[97] Refer to paragraph 199.
[98] Or where a supply is partly GST-free under paragraph (b) of item 4 because of the operation of subsection 38-190(2).
[99] 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 paragraph 70(1)(d) of the *Taxation Administration Act 1953*.

Example 26 – non-resident individual is in Australia in relation to the supply for part of the time when the thing supplied is done

448. *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 four weeks during the 12 week period over which the services are performed. Of the four weeks, one week is spent either in discussions with legal counsel or available for discussion. The remaining three weeks are spent holidaying in Australia.*

449. *The supply is GST-free to the extent that the non-resident individual is not in Australia in relation to the supply, that is, 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, that is, for the one week out of the twelve weeks the non-resident individual is involved with the supply while in Australia. Note that although the non-resident individual was in Australia for four weeks, he was in Australia in relation to the supply for only one week. The supplier of the legal services is required to apportion the consideration for the supply between the GST-free and taxable parts of the supply.*

Example 27 – non-resident company in Australia in relation to the supply for part of the time when the thing supplied is done

450. *A supply of a service is made to a non-resident company by an Australian resident company. The supply is performed over a period of 12 months and is for the purposes of the non-resident company. 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.*

451. *The non-resident company also has a branch in Australia and two months into the supply the non-resident company requires its branch to become involved with the supply and that involvement is not minor. The branch is required to be involved with the supply for a period of three months upon the expiration of which its involvement with the supply ceases.*

452. *The non-resident company is in Australia in relation to the supply for the three month period during which its branch is involved with the supply. This part of the supply is taxable. For the first two months of the supply, prior to the branch's involvement, and the remaining seven months of the supply, following cessation of the branch's involvement, the non-resident company is not in Australia in relation to the supply and these parts of the supply are GST-free under item 2.*

453. *The Australian supplier is required to apportion the consideration for the supply between the taxable and GST-free parts of the supply.*

Periodic or progressive supplies

454. 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 progressive or periodic component of the supply were a separate supply.[100]

455. If 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 accept 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.

Example 28 – non-resident individual is in Australia in relation to the supply for part of the time when the service is performed

456. *Sylvia is a New Zealand resident who carries on business in New Zealand as a sole trader. She has a one year contract with an Australian company, Aus Computers, under which the company is to provide services including:*

- *building and maintaining customised 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.

457. *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. Sylvia is in Australia for two weeks in March for the purposes of the training and to discuss the system. Sylvia also takes in the sights of Sydney during the time.*

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

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

Invoice date	*Amount*	*Hours billed*
4 March 2003 (for services performed in February)	*$3,000 (no GST payable)*	*30*
6 April 2003 (for services performed in March)	*$10,600 (including $600 GST)*	*100* *(60 hours attributable to period when Sylvia was in Australia)*
5 May 2003 (for services performed in April)	*$2,000 (no GST payable)*	*20*

Explanation

459. *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.*

460. *There is no GST payable for the tax period ending 31 March 2003 (refer to invoice of 4 March 2003) because the supply is GST-free to the extent that Sylvia was not in Australia, that is, for the whole of the time when the services are performed. Similarly, there is no GST payable for the tax period ending 31 May 2003 (refer to invoice of 5 May 2003).*

461. *To work out the GST payable that is attributable to the tax period ending 30 April 2003 (refer to invoice of 6 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.*

462. *As Sylvia was involved with the supply – that is receiving training and discussing the system – for the two weeks that she was in Australia it is considered that Sylvia is in Australia in relation to the supply for two weeks. The supply is taxable to the extent that the consideration relates to the part of the supply performed during this time. The circumstances surrounding this supply are such that a time basis would be a reasonable basis on which to apportion the consideration, that is, using the hours billed while Sylvia was in Australia in relation to the supply (60 hours) as a proportion of the total hours billed (100 hours) to work out the value of the taxable part of the supply.*

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

Value of the taxable part: (60 ÷ 100**) × $10,000*** = $6,000*

GST payable: $6,000 × 10% = $600

Consideration payable: $10,000 + $600 = $10,600

** Number of hours billed during the period Sylvia was in Australia in relation to the supply*

*** Total number of hours billed in the relevant tax period to which the amount invoiced relates*

**** Total amount invoiced (excluding GST) in the relevant tax period*

Supplier accounts on a cash basis

464. If 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 455. The following example illustrates how to attribute GST payable in that case.

Example 29 – non-resident individual is in Australia in relation to the supply for part of the time when legal services are supplied

465. *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.*

466. *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. The meetings and the conference took place over a period of five days. The matter was settled as a result of the conference.*

467. *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.*

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

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

Explanation

469. *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.*

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

471. *There is no GST payable on the supply for the quarterly tax period ending 30 June 2003. The consideration received in that tax period (that is $800 and $600) is for services that were performed when William was not in Australia in relation to the supply.*

472. *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.*

473. *As William was in Australia and involved with the supply for a period of five days it is considered that William is in Australia in relation to the supply for five days. The part of the supply performed during this time is therefore the taxable part of the supply. The circumstances surrounding this supply are such that a time basis would be a reasonable basis on which to apportion the consideration, that is, using the hours billed while 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.*

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

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

GST payable: $1,000 × 10% = $100

Consideration payable: $2,000 + $100 = $2,100

** Number of hours billed during the period William was in Australia in relation to the supply and to which the consideration received relates*

*** Total number of hours billed in the period to which the consideration relates*

**** Consideration (excluding GST) received in the tax period*

Example 30 – supply of property management services by a real estate agent to a non-resident individual

475. *Jane is a non-resident individual who owns a commercial rental property in Australia. Alex is a real estate agent and manages Jane's rental property for her. Jane travels to Australia for four weeks in June. One week is spent in Brisbane for the purposes of discussing*

with Alex various matters concerning the rental property. Jane spends the remaining three weeks holidaying in Australia during which time she is not available to deal with Alex.

476. *On these facts, it is fair and reasonable for Alex to determine that Jane is in Australia in relation to the supply of the property management service for one week during the relevant tax period(s). That part of the supply performed during this period is therefore taxable.*

477. *Alex does not account for GST on a cash basis and has one month tax periods. Alex's commission for June is $100. The contract allows Alex to deduct his commission (plus GST if any) on the last day of the month prior to remitting the balance of the rental from the property into Jane's account.*

478. *It would be reasonable for Alex to apportion the consideration for the supply according to the period of time Jane was in Australia in relation to the supply (in the relevant tax period) as a proportion of the total period of time to which the consideration relates.*

479. *On this basis the GST attributable to the tax period ended 30 June is calculated as follows:*

Value of the taxable part: (1 wk ÷ 4 wks**) × $100*** = $25*

GST payable: $25 × 10% = $2.50

Total amount deducted prior to remitting rental to Jane:

$25 + $2.50 = $27.50

** Period of time Jane was in Australia in relation to the supply in the tax period*

*** Total period of time in the tax period over which the supply was performed*

**** Consideration received in the tax period*

Supply is performed over more than one tax period but consideration paid in earlier tax period

480. If a supply is performed over more than one tax period and the GST (if any) on the supply is attributable to a tax period prior to the completion of the supply (for example, consideration is fully paid in one tax period but the supply is spread across two or more later tax periods), the supplier must use a reasonable basis for determining the extent to which the supply is taxable. That is, the supplier must use a reasonable basis to determine the extent to which the recipient of the supply is in Australia in relation to the supply during the period of time over which the supply is done.

481. If there is a change in circumstance such that the supply is taxable to a greater or lesser extent than determined in an earlier tax period (for example, the recipient of the supply is in Australia in relation to the supply to a greater or lesser extent), the supplier has

an adjustment event. The adjustment may be either an increasing or a decreasing adjustment depending upon whether the corrected GST amount is greater than, or less than, the previously attributed GST amount.[101]

Part V – further examples

482. This Part contains further examples to illustrate the concepts discussed in the Ruling.

We provide the following examples:	**at paragraph(s)**
Non-resident individual not in Australia	
Example 31	483
Non-resident individual in Australia for part of the time	
Example 32	484
Non-resident company not in Australia	
Example 33	485 to 487
Example 34	488 to 490
Example 35	491 to 493
Example 36	494 and 495
Example 37	496 and 497
Non-resident company in Australia in relation to the supply	
Example 38	498 to 500
Example 39	501 to 504
Non-resident company in Australia but not in relation to the supply	
Example 40	505 and 506
Supply provided to another entity outside Australia	
Example 41	507 and 508

[101] Refer to paragraphs 12 to 15 and 72 to 87 in GSTR 2000/19 Goods and services tax: making adjustments under Division 19 for adjustment events.

Non-resident individual not in Australia

Example 31 – Australian barrister supplies legal services to a non-resident individual

483. *Jan, a non-resident individual engages an Australian solicitor to represent her in legal proceedings in Australia. The solicitor, as agent for Jan, engages the services of an Australian barrister for a period of one month. 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 32 – Australian barrister supplies legal services to a non-resident individual

484. *If, in the alternative to Example 31, Jan is required to give evidence at the trial in Australia and arrives in Australia one day, consults with her barrister the next, gives evidence in court on the third day and leaves Australia that night, Jan is in Australia in relation to the supply of barrister's services for the three days that she is here. The consideration for the supply of the barrister's services is to be apportioned on a reasonable basis (for example the hours charged by the barrister during those three days) to work out the value of the taxable part of the barrister's supply.*[102]

Non-resident company not in Australia

Example 33 – non-resident company with an Australian subsidiary

485. *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.*

486. *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*.

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[102] Whether a solicitor retains a barrister as principal or as agent of a client depends on the particular circumstances. That the solicitor is responsible, by custom or under the terms of a costs agreement, for payment of the barrister's fee is not conclusive.

487. *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 281 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 34 – non-resident company with an Australian agent

488. *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.*

489. *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.*

490. *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 35 – employees of a non-resident company trained in Australia

491. *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.*

492. *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.*

493. *However, 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. The supply of computer training is therefore not GST-free under item 2.*

Example 36 – executive of a non-resident company visiting Australia

494. *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.*

495. *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 37 – subsidiary established in Australia after advice is obtained on formation in Australia

496. *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.*

497. *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 319 to 326).*

Non-resident company in Australia in relation to the supply

Example 38 – supply to non-resident company with an Australian branch office

498. *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 two years with an option for a further two years. It is considered that the leased premises will serve the business needs for at least four years. The Melbourne office promotes and sells a wide range of photographic products. The business has been running smoothly for three months.*

499. *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.*

500. *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 of freight services by Aus Transport is not GST-free under item 2.

Example 39 – non-resident company with an Australian subsidiary

501. *Aus Co is an Australian company in which a non-resident company, Hong Kong Co ('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.*

502. *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 Co. Aus Co signs the contracts as agent for HK Co, and is able to negotiate the price charged for the goods.*

503. *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.*

504. *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 40 – supply to a non-resident company with an Australian branch

505. *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.*

506. *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.

Supply provided to another entity outside Australia

Example 41 – supply to Australian company and provided to employees of off-shore branch

507. *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.*

508. *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. The supply is GST-free under item 3 provided the other requirements of that item are met.*

Detailed contents list

509. Below is a detailed contents list for this Goods and Services Tax Ruling:

	Paragraph
What this Ruling is about	**1**
Date of effect	**7**
Withdrawal and replacement of paragraph 68 of GSTR 2000/31	9
Legislative context	**10**
Ruling	**19**
Items 2 and 3 and paragraph (b) of item 4	20
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?	21
When is a supply made to a 'recipient' for the purposes of item 3?	26
The meaning of 'not in Australia' and 'outside Australia' for the purposes of items 2 and 3 and paragraph (b) of item 4	31
When is a non-resident not in Australia when the thing supplied is done for the purposes of item 2 and paragraph (b) of item 4?	34
Non-resident individual in Australia in relation to the supply (item 2 and paragraph (b) of item 4)	35
Non-resident company in Australia in relation to the supply (item 2 and paragraph (b) of item 4)	37

Non-resident partnership (other than a corporate limited partnership) in Australia in relation to the supply (item 2 and paragraph (b) of item 4) 43

Non-resident corporate limited partnership in Australia in relation to the supply (item 2 and paragraph (b) of item 4) 46

Non-resident trust in Australia in relation to the supply (item 2 and paragraph (b) of item 4) 49

When is a recipient not in Australia when the thing supplied is done for the purposes of item 3? 52

Application of subsection 38-190(4) with respect to item 3 54

Individual in Australia in relation to the supply (item 3) 60

Subsection 38-190(4) 63

Company in Australia in relation to the supply (item 3) 64

Subsection 38-190(4) 67

Partnership (other than a corporate limited partnership) in Australia in relation to the supply (item 3) 68

Subsection 38-190(4) 71

Corporate limited partnership in Australia in relation to the supply (item 3) 72

Subsection 38-190(4) 76

Trust in Australia in relation to the supply (item 3) 77

Subsection 38-190(4) 80

The meaning of 'the thing supplied is done' 81

Apportionment 83

Application of items 2 and 3 and paragraph (b) of item 4 88

Flowchart 1 – Supply made to a non-resident individual 89

Item 2 and paragraph (b) of item 4 89

Flowchart 2 – Supply made to an individual including a non-resident individual 89

Item 3 89

Flowchart 3 – Supply made to a non-resident company 89

Item 2 and paragraph (b) of item 4 89

Flowchart 4 – Supply made to a company including a non-resident company 89

Item 3 89

Flowchart 5 – Supply made to a non-resident partnership (other than a non-resident corporate limited partnership) 89

Item 2 and paragraph (b) of item 4 89

Flowchart 6 – Supply made to a partnership (other than a corporate limited partnership) including a non-resident partnership 89
Item 3 89
Flowchart 7 – Supply made to a non-resident trust 89
Item 2 and paragraph (b) of item 4 89
Flowchart 8 – Supply made to a trust including a non-resident trust 89
Item 3 89
Explanation (this forms part of the Ruling) 90
Overview of items 2 and 3 and paragraph (b) of item 4 90
Item 2 92
Subsections 38-190(2) and (3) 96
Item 3 97
Subsection 38-190(4) 101
Subsection 38-190(2) 102
Paragraph (b) of item 4 103
Subsection 38-190(2) 106
How the various requirements of items 2 and 3 and paragraph (b) of item 4 are discussed in this Ruling 107
Items 2 and 3, and paragraph (b) of item 4 108
Part I – when a supply is made to a non-resident or other recipient 109
When is a supply made to a *non-resident* for the purposes of item 2 and paragraph (b) of item 4? 111
A supply is made to an individual who is a non-resident 114
A supply is made to a company that is a non-resident 119
The meaning of company 119
A company that is a non-resident 121
A supply is made to a partnership (other than a corporate limited partnership) that is a non-resident 127
The meaning of partnership 127
A partnership (other than a corporate limited partnership) that is a non-resident 129
Division 57 137
Division 83 141
Should the residence of a partnership be determined by the residence of the partners? 144

Our approach – for determining the residence of a partnership 146

A supply is made to a corporate limited partnership that is a non-resident 158

A supply is made to a trust that is a non-resident 169

When is a supply made to a recipient for the purposes of item 3? 175

Part II – the meaning of 'not in Australia', 'outside Australia' and 'when the thing supplied is done' 180

The meaning of 'not in Australia' and 'outside Australia' 181

Application of subsection 38-190(4) with respect to item 3 186

The supply is made under an agreement entered into, whether directly or indirectly, with an Australian resident 187

Australian resident 190

That supply is provided, or the agreement requires it to be provided, to another entity outside Australia 192

Example 1 – supply made to an Australian company and provided to employees outside Australia 196

The meaning of 'when the thing supplied is done' 198

Part III – when particular entity types are in Australia in relation to the supply 200

When an individual is in Australia in relation to the supply 201

How to determine if a non-resident individual is in Australia for the purposes of item 2 and paragraph (b) of item 4 202

Representative in Australia of a non-resident individual 204

Example 2 – representative in Australia acting on behalf of a non-resident individual 207

Example 3 – employee of a non-resident individual in Australia 208

Example 4 – presence in Australia of an agent of a non-resident individual 209

Example 5 – supply to a managing agent on behalf of a non-resident individual property owner 210

Alternative view 212

How to determine if the physical presence in Australia of a non-resident individual is in relation to the supply for the purposes of item 2 and paragraph (b) of item 4 214

Example 6 – non-resident individual is in Australia but not in relation to the supply 219

Example 7 – non-resident individual is in Australia in relation to the supply 220

How to determine if a recipient who is an individual is in Australia for the purposes of item 3 221
Resident individuals 222
Example 8 –resident individual who is not in Australia 223
Non-resident individuals 224
How to determine if the physical presence in Australia of an individual recipient is in relation to the supply for the purposes of item 3 225
Resident individuals 225
Application of subsection 38-190(4) to supplies made to a resident individual 227
Non-resident individuals 228
When a company is in Australia in relation to the supply 229
How to determine if a non-resident company is in Australia for the purposes of item 2 and paragraph (b) of item 4 230
Indicators of when a non-resident company is in Australia 245
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 (item 2 and paragraph (b) of item 4) 250
Place of its own 253
Fixed and definite place 257
Sufficiently substantial period of time 265
Example 9 - intention to continue business 268
Application of the criteria for determining if a non-resident company is in Australia 269
A non-resident company carries on business in Australia through an agent at a fixed and definite place for a sufficiently substantial period of time (item 2 and paragraph (b) of item 4) 277
The business of the non-resident company involves making contracts for sale, lease or similar 282
The business of the non-resident company does not involve making contracts for sale, lease or similar 311
Australian subsidiary of a non-resident company (item 2 and paragraph (b) of item 4) 319
Division 57 agent (item 2 and paragraph (b) of item 4) 327
Example 10 – Division 57 resident agent not carrying on business of the non-resident company 329

How to determine if a recipient that is a company is in Australia for the purposes of item 3 333

Company incorporated in Australia 335

Company incorporated outside Australia 340

Indicators of when a company incorporated outside Australia is in Australia 343

Unincorporated association or body of persons 344

How to determine if the presence of a company in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4 347

Example 11 – branch in Australia but not in Australia in relation to the supply 354

Example 12 - branch in Australia but not in Australia in relation to the supply 356

Example 13 - branch in Australia in relation to the supply 359

Example 14 – supply for the purposes of an offshore branch of an Australian company - in Australia but not in Australia in relation to the supply 361

Example 15 – representative office in Australia in relation to the supply 362

Example 16 – supply for the purposes of the branch in Australia 364

Example 17 – branch in Australia in relation to the supply of rights 366

Example 18 – supply to off-shore branch of an Australian company - in Australia but not in relation to the supply 367

Example 19 – supply to off-shore branch of Australian company - in Australia but not in relation to the supply 370

Example 20 –supply to off-shore branch – head office engaging the supplier does not make the company in Australia in relation to the supply 371

Application of subsection 38-190(4) to supplies made to a resident company 373

Supply of agency services by an agent to a non-resident 374

Example 21 – supply of agency services 378

When a partnership (other than a corporate limited partnership) is in Australia in relation to the supply 380

How to determine if a non-resident partnership is in Australia for the purposes of item 2 and paragraph (b) of item 4 381

Non-resident partnership that carries on business 387

Example 22 – non-resident partnership not in Australia 389

Example 23 – non-resident partnership not carrying on business at a fixed and definite place 391

Non-resident partnership that carries out activities that do not amount to carrying on business 392

How to determine if a recipient that is a partnership is in Australia for the purposes of item 3 396

How to determine if the presence of a partnership in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4 398

Example 24 – non-resident partnership in Australia but not in relation to the supply 400

Example 25 – resident partnership in Australia but not in relation to the supply 403

Application of subsection 38-190(4) to supplies to a resident partnership 406

When a corporate limited partnership is in Australia in relation to the supply 410

How to determine if a non-resident corporate limited partnership is in Australia for the purposes of item 2 and paragraph (b) of item 4 412

How to determine if a recipient that is a corporate limited partnership is in Australia for the purposes of item 3 414

How to determine if the presence of a corporate limited partnership in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4 417

Application of subsection 38-190(4) to supplies made to a resident corporate limited partnership 419

When a trust is in Australia in relation to the supply 420

How to determine if a non-resident trust is in Australia for the purposes of item 2 and paragraph (b) of item 4 422

How to determine if a recipient that is a trust is in Australia for the purposes of item 3 428

How to determine if the presence of a trust in Australia is in relation to the supply for the purposes of items 2 and 3 and paragraph (b) of item 4 430

Application of subsection 38-190(4) to supplies made to a resident trust 434

Supply of trustee services to a non-resident trust 437

Part IV – apportionment **439**

When apportionment is necessary 440

Apportionment method 445

Example 26 – non-resident individual is in Australia in relation to the supply for part of the time when the thing supplied is done 448

Example 27 – non-resident company in Australia in relation to the supply for part of the time when the thing supplied is done 450

Periodic or progressive supplies 454

Example 28 – non-resident individual is in Australia in relation to the supply for part of the time when the service is performed 456

Explanation 459

Supplier accounts on a cash basis 464

Example 29 – non-resident individual is in Australia in relation to the supply for part of the time when legal services are supplied 465

Explanation 469

Example 30 – supply of property management services by a real estate agent to a non-resident individual 475

Supply is performed over more than one tax period but consideration paid in earlier tax period 480

Part V – further examples **482**

Non-resident individual not in Australia 483

Example 31 – Australian barrister supplies legal services to a non-resident individual 483

Non-resident individual in Australia for part of the time 484

Example 32 – Australian barrister supplies legal services to a non-resident individual 484

Non-resident company not in Australia 485

Example 33 – non-resident company with an Australian subsidiary 485

Example 34 – non-resident company with an Australian agent 488

Example 35 – employees of a non-resident company trained in Australia 491

Example 36 – executive of a non-resident company visiting Australia 494

Example 37 – subsidiary established in Australia after advice is obtained on formation in Australia 496

Non-resident company in Australia in relation to the supply 498

Example 38 – supply to non-resident company with an Australian branch office 498

Example 39 – non-resident company with an Australian subsidiary 501

Non-resident company in Australia but not in relation to the supply 505

Example 40 – supply to a non-resident company with an Australian branch 505

Supply provided to another entity outside Australia 507

Example 41 – supply to Australian company and provided to employees of off-shore branch 507

Detailed contents list **509**

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Previous drafts:

GSTR 2002/D8; GSTR 2003/D9

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- Australian resident
- Australian Securities and Investments Corporation
- carrying on a business
- common law
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- connected with Australia
- consumption outside Australia
- corporations law
- exports
- fixed and definite place
- GST-free
- GST international services
- GST mixed use
- GST offshore supplies
- GST registration
- GST resident agents
- GST supply
- in relation to the supply
- international
- jurisdiction
- non-resident
- non-resident company
- non-resident individual
- not in Australia
- permanent establishment
- permanent establishment for GST purposes
- physically present
- place of business
- recipient
- registered
- representative of the non-resident
- representative office
- required to be registered
- sufficiently substantial period of time
- supplier
- supplies used or enjoyed outside Australia
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