TR 2002/9 - Income tax: withholding from payments where recipient does not quote ABN

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Taxation Ruling
Income tax: withholding from payments where recipient does not quote ABN

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Preamble

The number, subject heading, ***Class of person/Arrangement, Date of effect*** *and* ***Ruling*** *parts of this document are a 'public ruling' for the purposes of Part IVAAA of the* ***Taxation Administration Act 1953*** *to the extent to which they rule on the way in which a tax law applies. To that extent they are legally binding on the Commissioner. The remainder of the document is administratively binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]

What this Ruling is about

1. This Ruling provides guidance as to whether an entity making a payment in respect of a supply is required to withhold an amount under section 12-190 of Part 2-5 (the PAYG provisions) of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

2. That section imposes an obligation on the paying entity to withhold an amount from the relevant payment where the payment is for a supply made or proposed to be made in the course or furtherance of an enterprise carried on by the supplier in Australia and none of the exceptions listed in the section apply.

3. This ruling is only concerned with payments to which section 12-190 of Schedule 1 to the TAA 1953 applies. In this ruling a reference to section 12-190 is a reference to section 12-190 of Schedule 1 to the TAA 1953.

Background

Context of Reform - section 12-190 of Schedule 1 to the TAA 1953

4. This new withholding event provides that a payer must withhold from a payment made for a supply if the payer does not have

an invoice or some other document relating to the supply which quotes the supplier's ABN and none of the other exceptions to the requirement to withhold provided for in section 12-190 are satisfied.

5. The event is designed to act as a compliance measure to ensure that entities, especially those that are not required to be registered for the Goods and Services Tax (GST), do not avoid their taxation obligations by requesting cash payments.

6. Section 12-190 is not designed to be another general withholding collection mechanism - it should only operate where suppliers that are carrying on an enterprise fail to quote their ABN number to the payer.[1]

7. All suppliers that carry on an enterprise should obtain an ABN and quote it in relation to all supplies that they make to other enterprises to ensure the provision does not operate.

Ruling and Explanations

In what circumstances does a payer need to withhold

8. Subsection 12-190(1) of Schedule 1 to the TAA 1953 provides that:

An entity (the payer) must withhold an amount from a payment it makes to another entity if:

> *(a) the payment is for a *supply[2] that the other entity has made, or proposes to make, to the payer in the course or furtherance of an *enterprise *carried on in Australia by the other entity; and*
>
> *(b) none of the exceptions in this section applies.*

9. Subsections (2)-(6) set out exceptions to the requirement to withhold. The primary exception is that the supplier has quoted their ABN to the payer on an invoice or some other document relating to the supply at or before the time of payment. The provision is set out in full in Appendix A.

Application of the provision

10. Section 3(1A) of *A New Tax System (Pay As You Go) Act 1999* which inserted the PAYG provisions into Schedule 1 to the TAA 1953

[1] The withholding rate for failure to provide an ABN is specified in regulation 38(2) of the Taxation Administration Regulations 1976.
[2] In this Ruling, an asterisk identifies a term that is defined in the *Income Tax Assessment Act 1997* and has the same meaning as the term in that Act.

provides that section 12-190 applies to a payment made on or after 1 July 2000, but only if some or all of the supply is made on or after that day. When a supply has been made is determined under *A New Tax System* (*Goods and Services Tax Transition) Act 1999.*

11. The provision does not apply where a payment is made before 1 July 2000. If a payment is made on or after 1 July 2000, then whether or not the provision applies depends on when the supply is made.

12. If a supply is made wholly on or before 30 June 2000 and payment is made on or after 1 July 2000 the provision does not apply. If part of the supply is made before 1 July 2000 and part of the supply is made on or after 1 July 2000 and the payment is made on or after 1 July 2000 the provision applies.

Example

13. John and Nev enter into a contract for the supply of goods on 2 June 2000. Nev pays John on 28 June 2000 and the goods are supplied on 15 July 2000. In this example, if John does not supply his ABN to Nev, there is no requirement to withhold as the payment was made before 1 July 2000.

14. If Nev paid John on 25 July 2000, then Nev would be required to withhold if John did not quote his ABN to Nev before payment.

15. Subsection 12-190(1) contains a number of key terms and phrases that are fundamental in clarifying when the provision has potential operation. Paragraphs 17 to 50 of this Ruling clarify these terms and phrases and paragraphs 51 to 108 explain the key exceptions provided for in section 12-190 to the requirement to withhold.

16. The key terms and phrases contained in section 12-190 that require further explanation include:

(a) entity;

(b) supply;

(c) payment for supply; and

(d) in the course or furtherance of an enterprise carried on in Australia.

What is an entity?

17. Section 12-190 of Schedule 1 to the TAA 1953 provides that *an entity must withhold an amount from a payment it makes to another entity if the payment is for a supply that the other entity has made, or proposes to make, to the payer….*

18. The term entity takes its meaning from section 995-1 of the *Income Tax Assessment Act 1997* (ITAA 1997).[3] Under that provision, an entity is defined by section 960-100 of the ITAA 1997 to mean an individual, body corporate, body politic, partnership, any other unincorporated association or body of persons, a trust, or a superannuation fund.

19. The entity receiving the payment must be the entity that made the supply and the entity that makes the payment must be the entity that received the supply. In determining whether an entity has made a payment to the supplier, section 11-5 of Schedule 1 to the TAA 1953, which deals with constructive payments, is relevant. The concept of a constructive payment is further explained at paragraphs 33-35.

Is there a supply?

20. Section 12-190 of Schedule 1 to the TAA 1953 requires that there be a payment for a 'supply'.

21. The term supply takes its meaning from the Goods and Services Tax legislation. Section 9-10 of *A New Tax System (Goods and Services Tax Act) 1999* (GST Act 1999) states that a supply is any form of supply whatsoever and includes:

- a supply of goods;
- a supply of services;
- a provision of advice or information;
- a grant, assignment or surrender of *real property;
- a creation, grant, transfer, assignment or surrender of any right;
- a *financial supply;
- an entry into, or release from, an obligation:
  - to do anything;
  - to refrain from an act; or
  - to tolerate an act or situation;
- any combination of any 2 or more of the matters referred to above.

Goods and Services Tax Ruling GSTR 2000/11 provides guidance on the meaning of supply.

[3] Section 3AA(2) of the *Taxation Administration Act 1953* provides that an expression has the same meaning in Schedule 1 as in the *Income Tax Assessment Act 1997*.

22. Supply is defined as 'any form of supply whatsoever'. In other jurisdictions the term 'supply' has been held to take its ordinary and natural meaning, being 'to furnish or to serve'. Similarly, the definition of 'supply' in the Macquarie Dictionary is 'to furnish or provide (something wanting or requisite: to supply electricity to a community)'.

23. It should be noted that there is no requirement for the supply to be a taxable supply as defined in section 9-5 of the GST Act 1999.

Is the payment for a supply?

24. Division 12 of the PAYG provisions does not apply to a payment in so far as it consists of providing a non-cash benefit; Division 12 applies to cash payments. Where the payment is made by the provision of a non-cash benefit, a payment is required to be made to the Commissioner as set out in Division 14 of Schedule 1 to the TAA 1953.

25. For the purposes of section 12-190, the payment must be 'for' the supply which is made or proposed to be made.

26. This can be contrasted with the language used in the GST legislation that a payment will be 'consideration' for the purposes of the GST Act if the payment is 'in connection with', 'in response to' or 'for the inducement' of a supply (see section 195-1 and 9-15 of the GST Act 1999).

27. The preposition 'for' may have, among other meanings, the meanings 'in place of, instead of, in exchange for, as the price of, in the requital of' and, also, 'with the object or purpose of, in order to obtain' and, again, 'by reason of or on account of, of operative cause, the effect of' (see the Shorter Oxford Dictionary). The word 'for' may have a somewhat narrower meaning than 'in connection with' (see *Berry v. FC of T* (1953) 89 CLR 653[4]), but includes more than payments which are a price, in the strict sense, of supply; it includes payments made in requital of, or for the purpose of obtaining, or as an effect of having obtained supply. A payment made to induce supply may be said to be for supply. A payment may be for a supply even though there is no legal obligation to make it.

28. A payment made voluntarily may be payment for a supply. However, for a voluntary payment to fall within section 12-190, the voluntary payment would have to be made in return for, on account of, or by reason of, or in order to obtain the supply provided, which in turn will require a practical causal relationship between payment and

[4] Note however that the decision in *Berry* concerned the meaning of the expression 'consideration for', rather than 'payment for'; the technical contractual meaning of 'consideration for' is not identical with the meaning of 'payment for'.

supply. A voluntary payment that is a gift in the strictest sense of the term will generally lack such a relationship, for to be a gift in the strictest sense of the word, the donor must not obtain any advantage of a material character in return for providing the gift (see, for example, *FC of T v. McPhail* (1968) 117 CLR at 117). That is to say, there will not be a supply for the gift. A voluntary payment will also lack the appropriate relationship with a supply if it is made on account of, or in return for something other than a supply, albeit in connection with a supply, such as where the payment is made on account of personal friendship with the supplier.

29. The no ABN withholding event will not apply to gifts that have the above characteristics because there would not be the relevant nexus between the provision of the gift and the supply.

30. While the question of whether a payment is for the supply of goods and services is not strictly the same questions as whether it is income, similar considerations arise in answering either question. A payment that is for a supply that is made, or proposed to be made, by a supplier in the course or furtherance of an enterprise would generally be income and conversely an amount that is not income will generally not be for a supply made, or proposed to be made in the course or furtherance of an enterprise.

31. Income Tax Ruling IT 2674 is mainly concerned with whether gifts received by church workers are assessable income. However, the principles that apply in determining whether gifts received by church workers are assessable income are no different to those which apply in determining whether gifts received by taxpayers in the course or furtherance of an enterprise are assessable income.

32. Broadly, *Scott v FC of T* (1966) 117 CLR 514, provides[5] that a gift will form part of a taxpayer's assessable income if it is appropriate to:

(a) relate the receipt of the gift to any income producing activity; or

(b) or if there is any employment, personal exertion or other income earning activity of which the receipt of the gift is in a relevant sense a product or incident.

Constructive Payment

33. Section 11-5(1) of Schedule 1 to the TAA 1953 provides that in working out whether an entity (payer) has paid an amount to another entity, and when the payment is made, the amount is taken to have been paid to the other entity when the first entity (payer) applies

[5] See Income Tax Ruling IT 2674.

or deals with the amount in any way on the other's behalf or as the other directs.

34. This means that a payer will be considered to have made a payment to the supplier where, for example, the payer pays an amount into a bank account as requested by the supplier.

35. Payment can be made either before or after the supply has been made. Section 12-190 of Schedule 1 to the TAA 1953 provides that the payer must withhold from a payment for a supply that the supplier has made, or proposes to make, to the payer.

The payment and supply must be made in the course or furtherance of an enterprise carried on in Australia

36. Under section 12-190(1) of Schedule 1 to the TAA 1953, the supplier must make the supply in the course or furtherance of an enterprise carried on in Australia for the provision to apply. Similarly, under paragraph 12-190(4)(a) of the same Schedule, the payer must also make the payment in the course or furtherance of an enterprise carried on in Australia by the payer.

What is meant by 'in the course or furtherance'?

37. The payment and the supply must be made in the course or furtherance of the entity's enterprise. To be 'in the course of' means 'while doing'.[6] In this context, to be 'in the furtherance of' means 'to advance'.[7]

Example

38. Jack runs a Thai Restaurant that is recognised as one of the most popular small restaurants in town. It is a family business and he employs an additional 5 staff. Jack does not cater to functions. A longstanding customer is planning a staff function to show the company's appreciation for the extra hours the staff have worked in recent times and wants Jack to cater for the function. Jack needs to hire an additional 10 staff for the day.

39. The supply is made by Jack in the course or furtherance of his enterprise. The payment is also made in the course or furtherance of the customer's enterprise even though it was a one off event.

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[6] Macquarie Dictionary 2nd Edition 1991.
[7] Macquarie Dictionary 2nd Edition 1991.

What is an enterprise?

40. An enterprise is defined in section 9-20 of the GST Act 1999. It is a broad term and includes an activity or activities, done:

- in the form of a business;
- in the form of an adventure or concern in the nature of trade;
- on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property;
- by the trustee of a fund that is covered by, or by an authority or institution that is covered by, Subdivision 30-B of the *Income Tax Assessment Act 1997* and to which deductible gifts can be made;
- by a charitable institution or by a trustee of a charitable fund;
- by a religious institution;
- by the Commonwealth, a State or a Territory, or by a body corporate, or corporation sole, established for a public purpose by or under a law of the Commonwealth, a State or a Territory; or
- by a trustee of a fund covered by item 2 of the table in section 30-15 of the ITAA 1997 or of a fund that would be covered by that item if it had an ABN.

41. The Commissioner has released Miscellaneous Taxation Ruling MT 2006/1 The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number. That Ruling provides guidance, among other matters, as to the meaning of an enterprise. Goods and Services Tax Determination GSTD 2006/6 also states that the principles in MT 2006/1 apply equally to the terms 'entity' and 'enterprise' for GST purposes.

What is not an enterprise

42. Paragraph 9-20(2)(a) of the GST Act 1999 provides that an enterprise does not include activities done:

> *'by a person as an employee or in connection with earning withholding payments covered by subsection 9-20(4) (unless the activity or series is done in supplying services as the holder of an office that the person has accepted in the course of or in connection with an activity or series of activities of a kind mentioned in subsection (1)).'*

43. Subsection 9-20(4) provides that a withholding payment for the purposes of paragraph 9-20(2)(a) is a payment covered by any of the following provisions in Schedule 1 to the TAA 1953: section 12-35 (payment to employee); section 12-40 (payment to company director); section 12-45 (payment to office holder); section 12-60 (payment under labour hire arrangement, or specified by regulations).

44. An enterprise does not include an activity or series of activities done as:

- a private recreational pursuit or hobby;
- by an individual (other than a trustee of a charitable fund or fund covered by item 2 of the table in section 30-15 of the ITAA 1997 or a fund that would be covered by that item if it had an ABN), or a *partnership (all or most of the members of which are individuals), without a reasonable expectation of a profit or gain; or
- as a member of a local governing body established by or under a *State law or *Territory law (except a local governing body to which subsection 12-45(3) in Schedule 1 to the TAA 1953 applies).

See paragraphs 9-20(2)(b) to 9-20(2)(d).

When is an enterprise carried on in Australia?

45. For the no ABN withholding event to apply, the supply must be made in the course or furtherance of an enterprise carried on in Australia.

46. Prior to 1 July 2003, the term 'carried on in Australia' for the purposes of no ABN withholding was defined in section 995-1 of the ITAA 1997 as having the meaning given by subsection 9-25(6) of the GST Act. Under that definition the phrase was linked to the definition of 'permanent establishment', which is a place where a person carries on a business. Arguably, this meant that section 12-190 only applied to business-to-business transactions.

47. *Taxation Laws Amendment Act (No. 4) 2003* repealed the definition of 'carried on in Australia' from section 995-1 of the ITAA 1997 applicable to payments made after 30 June 2003. The expression 'carried on in Australia' for the purpose of section 12-190 now has its ordinary meaning and the operation of the no ABN withholding event is not limited to business-to-business transactions.

48. If the payer does not have adequate evidence to satisfy itself that the payee is a non-resident and is not carrying on an enterprise in Australia, it would be prudent for the payer to seek a written statement

from the payee. There is no requirement for this statement to be in any particular form; as noted at paragraphs 113 to 115 of this Ruling, the Commissioner has released a form that may be used in these circumstances. The payer could not rely on this statement where, for example, they paid money in relation to the supply to an Australian bank account and the payer was aware that the supplier had an office in Australia.

Meaning of Australia

49. Subsection 12-190(7) provides that in working out whether an enterprise is 'carried on in Australia' for the purpose of section 12-190, external Territories are ignored. However, in this definition Australia does include installations within the meaning of the *Customs Act 1901* that are deemed by section 5C of the *Customs Act 1901* to be part of Australia. An example of an installation of this nature would be a gas or oil rig.

50. [Omitted]

The exceptions - when is there no requirement to withhold?

51. For the no ABN withholding provision to apply, the operative requirements contained in paragraph 12-190(1)(a) of Schedule 1 to the TAA 1953 must be satisfied (e.g., there must be a supply, the supply must be made by an entity carrying on an enterprise in Australia etc). If these conditions are satisfied then the provision will require a withholding unless one of the exceptions listed in the provision is satisfied. These exceptions are contained in subsections 12-190(2) to (6) of Schedule 1 to the TAA 1953 and provide that there is no requirement to withhold:

(i) if a supplier quotes their ABN on

- an invoice or
- some other document relating to the supply (subsection 12-190(2));

(ii) if the other entity has made the supply, or proposes to make the supply, through an agent and, when the payment is made

(a) the agent has given the payer an invoice that relates to the supply and quotes the agent's ABN; or

(b) the payer has some other document relating to the supply on which the agent's ABN is quoted (subsection 12-190(2A));

(iii) if the payment is made otherwise than in the course or furtherance of an enterprise carried on in Australia by the payer (paragraph 12-190(4)(a));

(iv) if the payment does not exceed $75 (disregarding so much of it as relates to GST payable on the supply) or, if the payer has also made, or proposes to make, one or more other payments to the other entity for the supply, the total of all the payments (disregarding so much of them as relates to GST payable on the supply) does not exceed $75 (paragraph 12-190(4)(b));

(v) if the supply is made by a member of a local governing body (paragraph 12-190(4)(c));

(vi) if the supply is wholly input taxed (paragraph 12-190(4)(d));

(vii) if the payment is from an investment body paying an amount to which section 12-140 or section 12-145 applies (subsection 12-190(5)); or

(viii) where the income is exempt income in the hands of the supplier (section 12-1).

52. Paragraphs 53 to 108 provide clarification for each of these exceptions.

(i) quoting an ABN on an invoice or some other document relating to the supply when the payment is made – subsection 12-190(2)

53. To avoid having an amount withheld, the supplier's ABN must be quoted to the payer before or at the time the payment is made. The essential criterion is the payer has the ABN 'relating to' the supply when the payment is made.

54. 'Relates to' is equivalent to the term 'in relation to'. A series of cases have found that the words 'in relation to' are of the widest import but must be read in the context in which the words are used in the particular Act. These cases are also relevant to interpreting 'relates to': *O'Grady v. The Northern Queensland Company Limited* (1989-1990) 169 CLR 356; *Burswood Management Ltd v. A-G* (Cth) (1990) 94 ALR 220; *Berry v. FC of T* (1953) 89 CLR 653; *Re Ross-Jones Marinovich; ex parte Green* (1984) 56 ALR 609.

55. The receipt of an invoice that relates to the supply before the actual payment is made which quotes the supplier's ABN would meet the requirements of section 12-190.

56. The term to 'quote' is defined under subsection 995-1(1) of the ITAA 1997. That provision provides that to quote an entity's ABN

means to quote in a form and manner approved by the Commissioner. The ABN may be quoted in the following manner:

- in writing;
- in an electronic document;
- orally or over the telephone; or
- on an internet site.

An oral quotation would need to be recorded on a document (paper or electronic) held by the payer to satisfy the requirement to hold an ABN on 'some other document relating to the supply'.

57. If the supplier quotes their ABN on an invoice or some other document relating to the supply, there will be no requirement for the payer to withhold. However, the invoice or some other document must be obtained before or at the time payment is made.

58. It should also be noted that a tax invoice may be obtained up to 28 days after the supply has been made (subsection 29-70(2) GST Act 1999), whereas an ABN must be quoted at or before the time of payment if the no ABN withholding event applies.

What is an invoice that relates to the supply?

59. Under subsection 995-1(1) of the ITAA 1997, an invoice is defined as a document notifying an obligation to make a payment. An invoice for the goods or services provided by a supplier at or before the time of payment that contains the supplier's ABN would satisfy this provision.

60. Businesses that are in the GST system will require a tax invoice to enable them to be able to claim an input tax credit. One of the features of a tax invoice is that it contains the ABN of the supplier (except if it is an invoice created by an agent).[8] Where the tax invoice is not supplied before payment, the payer may be able to rely on some other document notifying an obligation to make a payment relating to the supply that is obtained before or at the time payment is made.

61. Where a payer does not hold a tax invoice at the time of payment, but subsequently acquires the tax invoice after payment they would only be required to keep the tax invoice in their records. Until such time as they receive the tax invoice, they would need to hold 'some other document' that contained the supplier's ABN.

[8] See Goods and Services Tax Ruling GSTR 2000/17.

What is 'some other document'?

62. A document may be in paper or electronic form and will satisfy the requirements where it notifies an obligation to make a payment that relates to the supply. In the context of this provision the quotation will relate to the supply if there is sufficient connection to the supply in question. The Commissioner considers that the following examples would satisfy the requirement to quote an ABN on some other document.

Periodic quoting of ABN

63. A very narrow reading of subsection 12-190(2) of Schedule 1 to the TAA 1953 could require a payee to quote their ABN every time a supply is made to ensure that the payer is not required to withhold. Many payers will hold lists of approved suppliers that they purchase goods or services from on a regular basis. The Commissioner considers that where a payer holds a list of approved suppliers and that list contains the ABN of the supplier, there is sufficient connection with the supply to meet the quotation requirements in subsection 12-190(2) where the list is reasonably intended to cover future supplies of that nature.

64. It is reasonable to rely on an earlier quotation (subsection 12-190(3)) contained on the list where it relates to periodic supplies. To reasonably rely on this list, it would be prudent for the payer to ensure that the list is checked at least once a year with vendors to ensure currency of the list and that the nature of the supplies to which it will apply is correct.

Offer documents

65. In some situations, a supplier may issue a document before it is certain that they will make a supply because the document is merely an offer. Examples are insurance renewal notices, motor vehicle registration and subscription notices. Supplies made by subscription include subscriptions to trade magazines, online legal research and subscriptions to professional associations. In these situations, there is no supply until the recipient accepts the offer. In many cases, the recipient accepts the offer by making a payment. If these types of documents contain an ABN, they will satisfy the requirement to quote the ABN on some other document relating to the supply.

Quotation notice/Price List

66. If a supplier gives a quote which forms the basis of an offer that was accepted, the quotation document would satisfy the

requirement to quote an ABN on 'some other document' if it contained the supplier's ABN.

Catalogues and other promotional documents for example., auction catalogue, price lists etc

67. Similarly to above, if an ABN is quoted in these documents and an order is made from the catalogue etc this satisfies the requirement to quote an ABN on some other document relating to the supply.

Lease agreements, insurance policies, contracts, terms and conditions etc

68. Where an entity makes periodical supplies such as leases, quoting the ABN on the lease document constitutes quoting the ABN on some other document. There is no need for the lessor to quote their ABN to the lessee each time rent is paid under the lease. Insurance policies and other general contractual documents would also be considered to fall within the some other document exception. A document setting out the terms and conditions of a relationship would also be sufficient provided that it quotes the ABN.

Recipient created tax invoices

69. A recipient created tax invoice provided for under the GST legislation would satisfy the requirement to quote an ABN on some other document.[9]

Purchases by a credit card holder

70. If a purchaser chooses to pay by credit card, they should ensure that they obtain the ABN at or before the time payment is made by ensuring that the ABN is printed on the docket.

71. The ABN may be obtained over the phone if the payer records it in writing.

72. Where the supplier does not provide their ABN or a statement that they are not carrying on an enterprise, the payer should withhold 46.5% of the payment unless one of the exceptions in subsections 12-190(4) to (6) of Schedule 1 to the TAA 1953 applies. The amount authorised to be debited to the credit card should only be 53.5% of the total price. It is not the responsibility of the credit card

[9] See Goods and Services Tax Ruling GSTR 2000/10.

issuer to obtain an ABN from the supplier before transmitting the funds.[10]

Transactions between credit card company and the merchant

73. In relation to credit card transactions, there is a supply made by the credit card company to the merchant. The credit card company charges a fee and generally would withhold this fee from the amount that it forwards to the merchant in relation to transactions that were paid for by credit card.

74. The merchant would be required to withhold if it did not obtain the credit card company's ABN. The credit card company can provide its ABN on an invoice or some other document relating to the supply.

75. For example, if a credit card company supplied its merchants with a document setting out the terms and conditions of its relationship and that document contained the credit card provider's ABN, it would satisfy the requirement to quote an ABN on 'some other document' relating to the supply.

Other

76. Other documents that will satisfy the provision if they quote the ABN related to the relevant supply and are provided before or at the time of payment include:

- letterhead (it may be a letter by way of introduction in relation to a product that is subsequently purchased);
- order form;
- business card provided in relation to a supply if obtained at or before payment and kept in the records in relation the supply;
- record of over the phone quotation of the ABN; or
- e-mail or internet record (web page).

[10] Refer to footnote at paragraph 6 of this Ruling for more information in regard to the withholding rate.

(ii) the other entity has made the supply, or proposes to make the supply, through an agent and, when the payment is made:

(a) the agent has given the payer an invoice that relates to the supply and quotes the agent's ABN; or

(b) the payer has some other document relating to the supply on which the agent's ABN is quoted - subsection 12-190(2A)

77. This subsection was inserted into section 12-190 of Schedule 1 to the TAA 1953 by the *A New Tax System (Tax Administration) Act (No2) 2000* on 30 June 2000.

78. This provision provides that where the supplier makes the supply through an agent, the agent's ABN may be quoted to the payer in relation to the supply. The form and manner of the quotation is the same as if the supplier had quoted their ABN.

79. The Commissioner's position on when a relevant transaction under Divisions 57 and 153 (that is, taxable supply, taxable importation, creditable acquisition or creditable importation) is made through an agent is set out in GSTR 2000/37, paragraphs 45-47. The discussion in that ruling considering when a supply is made through an agent is relevant in this context.

Example

80. A singer's agent may contract on his or her behalf for them to perform at a venue. While the agent does not make the supply of actually singing, the supply is made through the agent if the agent contracted on behalf of the supplier. If the agent quotes their own ABN on the invoice or some other document relating to the supply, there is no requirement for the payer to withhold.

81. Where the agent does not have the authority to, and does not actually contract on behalf of the principal, but merely brings the two contracting parties together, the supply is not made through the agent and the agent cannot quote their ABN in satisfaction of the quotation requirements. The ABN of the principal would need to be quoted.

(iii) the payment is made otherwise than in the course or furtherance of an enterprise carried on in Australia by the payer paragraph 12-190(4)(a)

82. If the payment is not made in the course or furtherance of an enterprise carried on in Australia by the payer, there is no requirement to withhold.

83. This subsection was inserted into section 12-190 by the *A New Tax System (Tax Administration) Act (No2) 2000* on 30 June 2000. Previously the provision had provided that there was no requirement

to withhold if the payment was made by an individual and the payment was for the payer wholly of a private or domestic nature.

84. It was considered that this exclusion was too narrow. The new exception is wider in that it also applies to payers that are not individuals. Also, the provision now clearly excludes payments made to an employee or a labour hire worker relating to their work in that capacity.

Example

85. Naree has just purchased a home in a residential suburb to be used for her private residential accommodation. Naree has her own consulting business and has an ABN as she is carrying on an enterprise in relation to her consulting work. Naree works from her business premises in the city.

86. The home needs painting so Naree engages a painter to paint the exterior and interior of the house. The painter does not provide Naree with his ABN at or before the time of payment. Naree is not required to withhold as the payment is not made in the course or furtherance of an enterprise carried on by Naree. Naree has hired the painter in her personal capacity in relation to a private and domestic matter - not as part of her business or enterprise activities.

(iv) the payment (disregarding so much of it as relates to GST payable on the supply) or, if the payer has also made, or proposes to make, one or more other payments to the other entity for the supply, the total of all the payments (disregarding so much of them as relates to GST payable on the supply) does not exceed $50 or some higher amount as is specified in regulations in force for the purposes of subsection 29-80(1) of the GST Act – paragraph 12-190(4)(b) of Schedule 1 of the TAA 1953

87. This paragraph was amended by *A New Tax System (Tax Administration) Act (No2) 2000* to provide that there is no requirement to withhold if the payment for the supply does not exceed $50 or if GST is payable in relation to the supply, the payment does not exceed $55 (inclusive of the GST).

88. The underlying policy intention of section 12-190 was that it would align with the GST requirements as to amounts where a tax invoice would be required. The amended provision ensures this alignment by providing that the threshold amount for the operation of the provision excludes any GST component.

89. The amendments also make it clear that the payment cannot be broken down into amounts of $50 or less, excluding GST, to avoid the application of the provision.

89A. Regulation 29-80.01 of the A New Tax System (Goods and Services Tax) Regulations 1999 commenced on 1 July 2007. This regulation increased the threshold amount to $75 for the purposes of subsection 29-80 of the GST Act, and consequently for paragraph 12-190(4)(b) of Schedule 1 to the TAA 1953. Accordingly from 1 July 2007 a payer does not have to withhold an amount, under section 12-190 of Schedule 1 to the TAA 1953, from a payment for a supply where the payment, or the total of all the payments, does not exceed $75 (exclusive of GST).

90. It is the total contract price for the supply that must be considered in determining whether the threshold is met. This means the total payment for the supply, not merely the amount invoiced on an occasion. If the contract price for the supply is $120 and the supplier invoices for the supply over three months with amounts of $40 on each invoice, the payer would still need to obtain the ABN of the supplier in relation to supplies made under the contract or withheld.

91. A payer and payee may enter into a contract that involves one supply, although delivery and payment of the supply may take place over a period of time. For example, a contract to supply particular goods every three months for twelve months. In this case, the total contract price is relevant for determining whether the no ABN withholding event applies. If the contract price is more than the threshold amount, the provision applies.

92. Alternatively, a payer and payee may establish an agreed set of terms and conditions in relation to the supply of particular goods for a certain period - a contract is only formed each time a request is made and accepted. Each individual request by a payer for the supplier to do a job involves an offer and acceptance and a separate supply. Where payment for that supply is more than the threshold amount, an ABN will be required to be quoted (unless one of the other exceptions applies).

(v) the supply is made by a member of a local governing body – paragraph 12-190(4)(c)

93. Where the supply is made by a member of a local governing body, in the course or furtherance of an activity, or series of activities, done as a member, there is no requirement to withhold if the member does not quote an ABN (see paragraph 12-190(4)(c)).

(vi) the supply is wholly input taxed – paragraph 12-190(4)(d)

94. Paragraph 12-190(4)(d) was inserted by *A New Tax System (Tax Administration) Bill (No2) 2000* on 30 June 2000 to exclude wholly input taxed supplies from the operation of the provision.

95. Section 995-1(1) of the ITAA 1997 defines input taxed by reference to section 195-1 of the GST Act. The GST Act 1999 provides that input taxed has the meaning given by subsection 9-30(2) and Division 40.

96. Subsection 9-30(2) of the GST Act 1999 provides that a supply is input taxed if:

(a) it is input taxed under Division 40 or under a provision of another Act; or

(b) it is a supply of a right to receive a supply that would be input taxed under paragraph (a).

97. Division 40 of the GST Act 1999 lists six categories of supplies that are input taxed. These categories cover:

(a) Financial supplies (Subdivision 40-A of the GST Act 1999);

(b) Residential rent (Subdivision 40-B of the GST Act 1999);

(c) Residential premises (Subdivision 40-C of the GST Act 1999);

(d) Precious metals (Subdivision 40-D of the GST Act 1999);

(e) School tuckshops and canteens (Subdivision 40-D of the GST Act 1999); and

(f) Fund-raising events conducted by charitable institutions etc (Subdivision 40-F of the GST Act 1999).

It is not the purpose of this Ruling to explain these provisions.

Example

98. A standard residential rental agreement involves a supply of residential premises by a landlord to a tenant. A landlord of residential premises is carrying on an enterprise (section 38(1)(c) of the *A New Tax System (Australian Business Number) Act 1999*). The supply of residential premises is a supply in the course or furtherance of the enterprise.

99. Where the tenant uses the premises solely for residential use there would be no need for the tenant to obtain the ABN of the

landlord. The no ABN withholding event does not apply for two reasons:

(i) the payment made by the tenant would not be in the course or furtherance of an enterprise carried on by the tenant/payer (paragraph 12-190(4)(a) of Schedule 1 of the TAA 1953);

(ii) the supply is wholly input taxed (paragraph 12-190(4)(d) of Schedule 1 of the TAA 1953).[11]

(vii) the payment is from an investment body paying an amount to which section 12-140 or section 12-145 applies – subsection 12-190(5)

100. These provisions (section 12-140 and 12-145) contain certain exceptions to the requirement to withhold. The provisions deal with the requirement to quote a Tax File Number (TFN) in relation to certain investments as described in Part VA of the ITAA 1936 (such as interest bearing accounts or deposits with financial institutions).

101. There is no requirement to withhold if the investor has quoted their ABN to the payer as an alternative to quoting their TFN where the investment is made in the course or furtherance of an enterprise - section 12-155. Further, there is no requirement to withhold where the amount of the payment is in relation to a fully franked dividend or is below the thresholds set by the regulations (sections 12-165 and 12-170).

(viii) exempt income

102. In addition to the exceptions contained in the provision itself, section 12-1 of Schedule 1 to the TAA 1953 provides that there will be no withholding requirement where the whole of the payment is *exempt income of the recipient.

103. The term exempt income is explained in section 6-20 of the ITAA 1997.

104. The total income of certain entities may be exempt from income tax (section 11-5 of the ITAA 1997).

105. In other cases income may be exempt no matter whose it is (section 11-10 of the ITAA 1997) and in other cases income may be exempt only if it is derived by certain entities (section 11-15 of the ITAA 1997).

106. Income will also be exempt where it is not taxable by virtue of the provision of one of the International Treaties. Subsection 6-20 (2)

[11] Refer to Goods and Services Taxation Determination GSTD 2000/9.

provides that ordinary income is exempt to the extent that this Act excludes it from being assessable income. 'This Act' is defined to include the *Income Tax Assessment Act 1936*. Subsection 4(1) of the *International Tax Agreement Act 1953* (ITA Act 1953) provides that 'the Assessment Act is to be incorporated and shall be read as one with this Act'. This means that the provisions of the two Acts are to be considered as if they are all in the one Act.[12]

107. The 'Assessment Act' is defined to mean the ITAA 1936 or the ITAA 1997. This means that where the ITAA 1936 or the ITAA 1997 provides that income is not taxable in Australia, it will satisfy the definition of exempt income and section 12-190 will not require a withholding.

Informing the payer that the withholding event does not apply

108. Where the supplier is not carrying on an enterprise in Australia or one of the other exclusions to the provision apply, how does the supplier inform the payer that there is no requirement to withhold?

109. If the payer is aware that an exception applies so that there is no requirement to withhold, then they are not required to withhold even where a supplier has not quoted an ABN. For example, there is no requirement to withhold where the payment for the supply does not exceed the threshold amount or the payer is aware that the supplier is a tax exempt entity such as a public hospital. It may be evident that the supplier is not carrying on an enterprise - for example, where goods are purchased from a garage sale. In these instances, it would be prudent for the payer to ensure that their records are sufficient for them to be able to identify the reason for not withholding where an ABN was not supplied.

110. However, it is recognised that the payer may not be aware that the requirement to withhold does not apply unless the supplier informs them of this. For example, where the supplier is not carrying on an enterprise in Australia, this may or may not be apparent to the payer.

111. Subsection 12-190(6) of Schedule 1 to the TAA 1953 provides that where the payer holds a written statement from the supplier who is an individual that they are not carrying on an enterprise or that the transaction is, for example, a hobby or a private recreational pursuit, and the payer has no reasonable grounds to believe that the statement is incorrect, the payer will not be required to withhold.

112. This subsection outlines a clear mechanism for the supplier to inform the payer that there should be no withholding in a particular case.

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[12] Pearce and Geddes Statutory Interpretation 3rd Ed 7.25.

113. In any case where the supplier believes that the payer should not withhold, they should provide the payer with a written statement to that effect. In many cases, it would be in the payer's interest to request that the supplier inform them before payment if there is any reason why they should not withhold if the supplier has not supplied an ABN. This could be done, for example, on an order form etc.

114. The Commissioner has issued a standard form that may be used by a supplier to advise the payer of an appropriate reason for not withholding for failure to quote an ABN. This form is called 'Statement by a supplier - Reasons for not quoting an Australian Business Number (ABN) to an enterprise'.

115. The form may be provided in relation to any particular supplies. Where the statement made in the form applies to a particular class of supplies, it would be prudent for the payer to request that the supplier renews or confirms their statement after a period of one year.

116. The statement does not provide a blanket protection for the payer. It must be reasonable for the payer to rely upon the statement made on the form[13]. For example if the payer is regularly paying a person to perform services for them, they might need to question the validity of a statement provided to them that the activity was merely a hobby.

Variation to the rate of withholding

117. Section 15-15 of Schedule 1 to the TAA 1953 provides that the Commissioner may, for the purposes of meeting the special circumstances of a particular case or class of cases, vary the amount required to be withheld by an entity from a withholding payment. The Commissioner's power to vary the amount includes the power to vary the amount to nil.

118. Where the variation applies to a particular entity, the Commissioner is required to give written notice to that entity. Where the variation applies to a class of entities, the Commissioner is required to give written notice to each of the entities or to publish a copy of the notice in the Gazette.

119. The Commissioner has exercised this power in a number of cases or class of cases including payments made to individuals under the age of 18 years where the payment does not exceed $120,[14] payments to indigenous artists for artistic works where the indigenous artist has income from art activities of less than $10 000 and the artist qualifies for a Special Zone A rebate;[15] payments made

[13] Paragraph 12-190(6)(b).
[14] Special Gazette No S 343, 29 June 2000.
[15] Special Gazette No S 343, 29 June 2000.

by a member of a body corporate for body corporate levies and like payments;[16] and payments of certain allowances to employees or labour hire workers.[17]

What about false or incorrect ABNs?

120. A payer is not required to check the validity of the ABN on the ABN register.[18] However, if the payer has reasonable grounds to believe that the supplier does not have an ABN or the ABN quoted is not that of the supplier they must withhold.

What is reasonable?

121. If an ABN has been quoted to the payer, the payer is not required to withhold unless they have reasonable grounds to believe that the ABN has been incorrectly quoted (subsection 12-190(3); 12-190(3A) of Schedule 1 to the TAA 1953).

122. For example, if a supplier called himself Jack Brown one day and Tom Smith on another occasion, the payer would be on notice and should make further enquires as to the identity of the supplier or possible agent involved. If the payer's suspicions are aroused they can check the ABN quoted on the ABN register to confirm the registered entity to which the ABN belongs. They can then check with the supplier if there is any discrepancy. Where the supplier provides an unsatisfactory explanation then it would be prudent to withhold.

123. Similarly if the same individual has quoted two different ABNs on separate occasions, it would be prudent for the payer to make further enquiries to see if the person is acting as an agent or has more than one enterprise.

124. Where the ABN number quoted is suspicious, for example, 11 111 111 111 or 12 345 678 910 then the payer should check the Australian Business Register (ABR) to ensure the ABN is a valid number. An ABN is an 11 digit number - where more or less than 11 numbers are quoted it would be prudent to make further enquires. It should be noted that where an entity has branches, for the purposes of PAYG they may have a payer number that is 14 digits long, the first 11 being their ABN. The supplier may accidentally quote their 14 digit payer number. In these cases, checking with the supplier would seem an appropriate first response when given a 14 digit number.

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[16] Special Gazette No S 343, 29 June 2000.
[17] Special Gazette No S343, 29 June 2000; Special Gazette No S676 28 December 2000.
[18] Unless the supply is subject to the ABN verification system contained in Part 5-30 of Schedule 1 to the TAA *1953*.

125. In certain cases the payer may have been told by the Australian Taxation Office that the ABN is incorrect. This may arise under the reporting and verification provisions contained in Part 5-30 of Schedule 1 to the TAA 1953. In this case, the payer must withhold.

Payer's obligations

126. Where a supplier who is required to quote their ABN does not do so, the payer will be required to withhold an amount from the payment. If a payer is not already registered as a withholder, they will need to register with the Australian Taxation Office (ATO) as a withholder (section 16-140 of Schedule 1 to the TAA 1953).[19]

127. A payer that withholds an amount under this provision will send this amount into the ATO together with any other amounts that they have been required to withhold, for example from payments of salary or wages to their employees. Payers will send in the amounts withheld under this event at the same time that they are required to send in their other withholding amounts. The amounts will be lodged and paid with the Activity Statement.[20]

128. The payer will be required to provide the supplier with a payment summary that sets out the amount of tax that the payer has withheld from the supplier. The payment summary must cover that payment only and should be provided at the time of payment or as soon as practicable thereafter (section 16-167 of Schedule 1 to the TAA 1953). There is no requirement to provide a payment summary if the amount withheld from the payment is nil (subsection 16-167(1)). The payer retains a copy of the payment summary in their records and uses the payment summary in preparation of their annual report.

Supplier's obligations

129. The supplier then lodges the payment summary with their income tax return and will be entitled to a credit for the amount of tax withheld. This credit will be applied against any taxation debt of the supplier - where there is no tax owing, the supplier would receive a refund of the amount withheld.

130. Where the supplier pays instalments under the PAYG instalment system, they would be required to include in their

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[19] Refer to footnote at paragraph 6 of this Ruling for more information in regard to the withholding rate.

[20] Except where the entity is classified as a large withholder under section 16-95; 16-125. Large withholders are required to pay electronically. For more information refer to the PAYG Withholding Guide to paying and reporting for large withholders.

instalment income the total amount receivable in respect of the supply (that is, the amount payable before the payer withheld).

131. Any amount withheld under this provision can only be claimed on lodgement of an income tax return - it cannot be claimed as a credit on an activity statement.

Example

132. If the supplier was registered or required to be registered for GST, they would also need to account for the GST on the total price. For example, where a supply was made on 1 April 2007 for $110 inclusive of GST, and the supplier had failed to quote their ABN to the payer before payment, the payer would withhold $51 and provide the supplier with a payment summary that showed they had withheld this amount.

133. The payer may request that the supplier provides a tax invoice and the supplier must provide the invoice within 28 days after the request[21] - this may occur after payment has been made. A tax invoice would contain the supplier's ABN. However to ensure there is no withholding, the supplier must quote their ABN to the payer when the payment is made - a tax invoice provided after payment does not alleviate the requirement to withhold where the ABN has not been quoted at the time of payment.

134. Where the supplier was required to pay PAYG instalments, the supplier would need to include in their instalment income as shown in their Activity Statement the total amount (exclusive of the GST component ie $110 - $10) of $100 and remit $10 in respect of the GST. The credit for the amount withheld cannot be claimed on the activity statement. It can only be claimed on lodgement of an annual income tax return.

135. [Omitted]

136. [Omitted]

Date of effect

137. This Ruling applies to years of income commencing both before and after its date of issue. This Ruling does not apply to taxpayers, to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

[21] Subsection 29-70(2) GST Act 1999.

Note: The Addendum to this Ruling that issued on 1 August 2007 explains our view of the law as it applied as follows:

- paragraphs 5 to 8 and 21(a) of the Addendum apply on and from 1 July 2003;
- paragraphs 2, 4 and 21(b) of the Addendum apply on and from 1 July 2005;
- paragraphs 17 to 19, 20(a), 20(b) and 21(c) of the Addendum apply on and from 1 January 2006;
- paragraphs 1, 10, 15, 16 and 21(d) of the Addendum apply on and from 1 July 2006;
- paragraphs 3, 20(c) and 20(d) of the Addendum apply from 13 December 2006; and
- paragraphs 9, 11 to 14 and 21(e) of the Addendum apply on and from 1 July 2007.

Detailed contents list

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Subject references:
- PAYG
- Withholding
- No ABN withholding

Legislative references:

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- International Tax Agreement Act 1953 4(1)
- ITAA 1936 6(1)
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Appendix A

Section 12-190 of Schedule 1 to the *Taxation Administration Act 1953*

12-190 Recipient does not quote ABN

(1) An entity (the **"payer"**) must withhold an amount from a payment it makes to another entity if:

(a) the payment is for a *supply that the other entity has made, or proposes to make, to the payer in the course or furtherance of an *enterprise *carried on in Australia by the other entity; and

(b) none of the exceptions in this section applies.

ABN correctly quoted

(2) The payer need not withhold an amount under this section if, when the payment is made:

(a) (a) the other entity has given the payer an *invoice that relates to the *supply and *quotes the other entity's *ABN; or

(b) the payer has some other document relating to the supply on which the other entity's ABN is *quoted.

(2A) The payer need not withhold an amount under this section if the other entity has made the *supply, or proposes to make the supply, through an agent and, when the payment is made:

(a) the agent has given the payer an *invoice that relates to the supply and *quotes the agent's *ABN; or

(b) the payer has some other document relating to the supply on which the agent's ABN is *quoted.

Payer has no reason to believe that ABN has been incorrectly quoted

(3) The payer need not withhold an amount under this section if, when the payment is made:

(a) the other entity has given the payer an *invoice that relates to the *supply and purports to *quote the other entity's *ABN, or the payer has some other document that relates to the supply and purports to *quote the other entity's ABN; and

(b) the other entity does not have an ABN, or the invoice or other document does not in fact quote the other entity's ABN; and

(c) the payer has no reasonable grounds to believe that the other entity does not have an ABN, or that the invoice or other document does not quote the other entity's ABN.

(3A) The payer need not withhold an amount under this section if the other entity has made the *supply, or proposes to make the supply, through an agent and, when the payment is made:

(a) the agent has given the payer an *invoice that relates to the supply and purports to *quote the agent's *ABN, or the payer has some other document that relates to the supply and purports to *quote the agent's ABN;

(b) the agent does not have an ABN, or the invoice or other document does not in fact quote the agents ABN; and

(c) the payer has no reasonable grounds to believe that the agent does no have an ABN, or that the invoice or other document does not quote the agents ABN.

No need to quote ABN

(4) The payer need not withhold an amount under this section if:

(a) the payment is made otherwise than in the course or furtherance of an *enterprise *carried on in Australia by the payer;

(b) the payment (disregarding so much of it as relates to *GST payable on the *supply), or, if the payer has also made, or proposes to make, one or more other payments to the other entity for the supply, the total of all the payments (disregarding so much of them as relates to *GST payable on the supply) does not exceed $50 or such higher amount as is specified in regulations in force for the purposes of subsection 29-80(1) of the *GST Act;

(c) the supply is made in the course or furtherance of an activity, or series of activities, done as a member of a local governing body established by or under a *State law or *Territory law; or

(d) the supply is wholly *input taxed.

(5) The payer need not withhold an amount under this section if the payment:

(a) is covered by section 12-140 or 12-145 (about not quoting *tax file number in respect of an investment in respect of which the payment is made); or

(b) would be covered by section 12-140 or 12-145 if the other entity had not quoted as mentioned in subsection 12-140(1) or section 12-155;

(c) would be covered by section 12-140 or 12-145 apart from section 12-160, 12-165 or 12-170 (which are exceptions to sections 12-140 and 12-145).

(6) The payer need not withhold an amount under this section if, when the payment is made:

(a) the other entity is an individual and has given the payer a written statement to the effect that:

(i) the *supply is made in the course or furtherance of an activity, or series of activities, done as a private recreational pursuit or hobby; or

(ii) the supply is, for the other entity, wholly of a private or domestic nature; and

(b) the payer has no reasonable grounds to believe that the statement is false or misleading in a material particular.