



## THE TAX INSTITUTE

1 May 2018

Ms Louise Clarke  
A/g Deputy Chief Tax Counsel  
Public Advice and Guidance Area  
Australian Taxation Office  
PO Box 9977  
CIVIC SQUARE ACT 2608

By email: [louise.clarke@ato.gov.au](mailto:louise.clarke@ato.gov.au)

Dear Ms Clarke,

### **Supplies no longer treated as GST-free due to amendments with effect from 1 October 2016**

The Tax Institute wishes to seek clarification of the Commissioner's interpretation of subsection 38-190(3)(c)(iii) of the *A New Tax System (Goods and Services) Act 1999* (Cth) (**GST Act**). This subsection was inserted into the legislation by virtue of the *Tax and Superannuation Laws Amendment (2016 Measures No. 1) Act 2016* (Cth) (**TSLA**) with effect from 1 October 2016.

#### *Amendments made with effect from 1 October 2016*

The amendments made with effect from 1 October 2016 no longer exclude from GST-free treatment supplies made pursuant to section 38-190 where the final customer is one of the following:

- An Australian-based business;
- An employee or officer of that business; or
- An employee or officer of a business that **acquires the thing solely for a creditable purpose**. In other words, the business does not acquire the thing for a non-creditable purpose.

In our view, a non-resident business that is not registered for GST in Australia **does not acquire the thing for a non-creditable purpose**.

Thus, where:

- supplies of training services are made under a contract entered into with a non-resident business outside the indirect tax zone (**ITZ**);
- the training is provided to employees of that non-resident business; and
- the employees are doing that training in Australia;

these supplies would be GST-free as these services would not be excluded from Item 2 of subsection 38-190(1) of the GST Act.

This approach would appear to be consistent with the intention of the legislative changes as detailed at paragraph 2.166 of the Explanatory Memorandum to the TSLA which states:

2.166 The amendments preserve the GST-free treatment of supplies to non-resident recipients outside of the ITZ where:

- the non-resident recipient is not registered for GST;
- the providee is an employee or officer of the recipient; and
- the recipient's acquisition of the thing is both solely for a creditable purpose and is not a 'non-deductible expense'. [**Schedule 2, item 19, subparagraph 38-190(3)(c)(iii)**]

#### *ATO View*

However, if our interpretation is correct, the position now seems at odds with Example 35 in GSTR 2004/7<sup>1</sup> (at paras 491 to 493). We have extracted the example below:

#### **Example 35 - Employees of a non-resident company trained in Australia**

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.

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.

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.

GSTR 2004/7 was released a number of years ago and in our view, requires review in light of the amendments made by the TSLA.

We would be grateful if the Commissioner would confirm the appropriate interpretation of the amended provision and, if this interpretation is consistent with our interpretation, advise whether there is an intention to amend GSTR 2004/7 accordingly.

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<sup>1</sup> *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'?

If you would like to discuss any of the above, please contact either myself or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Tracey Rens', with a stylized, cursive script.

**Tracey Rens**  
President