Goods and Services Tax

In determining an entity's GST obligations, all provisions below refer to ***A New Tax System (Goods and Services Tax) Act 1999***, unless otherwise stated.

Taxable Supply

An entity makes a taxable supply under **s9-5** if:

1. It makes a **supply**
   - **S9-10** defines 'supply' as 'any form whatsoever', including **(a)** supply of goods; **(b)** supply of services.
   - Wide interpretation adopted according to ***Reliance Carpet*** and ***Qantas Airways***.
2. The supply is for **consideration**
   - **S9-15(1)** → any payment or act or forbearance in connection with the supply, i.e. anything of value
3. In the **course or furtherance of the entity's enterprise**
   - **S9-20(1)** defines 'enterprise' as including any activity **(a)** in the **form of a business** (***Stone***; ***Ferguson***; **TR97/11**; **TR2005/1**); (b) **isolated commercial activities** in the form of an adventure or concern in the nature of trade (***Whitfords Beach***; ***Westfield***; ***Myer***)
   - ***Reliance Carpet*** suggests that any supply that connects to or involves benefit to the entity's enterprise will be made **'in the course or furtherance'** of that enterprise. I.e. NON-PRIVATE transactions.
   - S9-20(2) excludes from the meaning of 'enterprise' (a) the provision of labour as an employee; (b) a private recreational pursuit or hobby
4. There is connection with the **indirect tax zone** (i.e. Australia per s195-1)
   - **S9-25** states that this is satisfied if
     - ✓ **(1)** goods are made available in Australia to the recipient;
     - ✓ (4) the supply of real property (s195-1) is of Australia land; or
5. The entity is (or required to be) **registered for GST**
   - Entities carrying on an enterprise must register for GST where their annual turnover during the relevant 12-month period exceeds the registration turnover threshold (**$75,000 for for-profit entities**): s23-5, s23-15, s188-10; s188-15; **GSTR2001/7**; r23.15 of the *GST Regulations 1999*
6. **Not input-taxed or GST-free**

GST-Free Supply – Div 38 and s9-30(1)

Under s38-1, GST does not have to be paid on GST-free supplies, which are excluded from the definition of 'taxable supply' in s9-5.

Supplier is still entitled to ITC if there is a 'creditable acquisition' in relation to the supply of GST-free items.

Food – Subdiv 38-A

- S38-2 stipulates that a supply of food is GST-free.
- S38-3(1) states that a supply is **NOT GST-free** under s38-2 if it is a supply of: (a) food for consumption on the premises (see s38-5) from which it is supplied, e.g. café/restaurant food; (b) hot food for consumption away from those premises; or (c) food specified in Sch 1 as not being GST-free.

Health – Subdiv 38-B

- S38-7 states that a supply of a medical service is GST-free.

Education – Subdiv 38-C

- Under s38-85, the supply of an education course or any administrative services directly related to the supply of such a course which are provided by the supplier of the course are GST-free supplies.
- Course materials (s38-95); and leases of curriculum-related goods (s38-97) are GST-free where they relate to an education course supplied by the entity and satisfy the conditions specified in those sections.
- Under s38-100, aside from course materials (s38-95), a supply of any other goods related to an education course (e.g. textbooks) is NOT GST-free.

Childcare– Subdiv 38-D

- Childcare is GST-free when provided by a registered carer or an approved childcare service: Subdiv 38-D.

Exports – Subdiv 38-E

- Under s38-185(1) item 1 and **GSTR2002/6**, A supply of goods will generally be GST-free if exported from Australia within 60 days after day the consideration is received or the day the supplier gives an invoice for the supply.

Input Taxed Supply – Div 40 and s9-30(2)

Under s40-1, GST does not have to be paid on the making of input-taxed supplies, which are excluded from the definition of 'taxable supply' in s9-5.

Financial Supplies – Subdiv 40-A and GSTR2002/2

- The broad categories of financial supplies include the provision, disposal or acquisition of an interest in or under a bank account; a loan arrangement; a superannuation fund; an insurance agreement; and shares or derivatives: s40-5 by reference to GST Regulations 40.5.09, and 40.5.11 by reference to Sch 7 of the GST Regulations.

Residential Rent – Subdiv 40-B

- Under s40-35(1), a supply of premises by way of lease, hire or license (including renewals and extensions) is input-taxed where the premises are: **(a) residential premises** that are NOT **commercial residential premises**
    - S195-1 defines **'residential premises'** as land or building that is occupied or intended to be occupied or capable of being occupied as a residential accommodation: ***Vidler v FCT***; ***South Steyne Hotel***; **GSTR2012/5**. Residential premises are **INPUT TAXED SUPLLIES**.
    - S195-1 defines **'commercial residential premises'** as (a) a hotel, motel, inn, hostel, or boarding house; (b) premises used to provide accommodation in connection with a school. Commercial residential premises are **TAXABLE SUPPLIES**. The Commissioner's views are set out in **GSTR2012/6**.

Residential Premises – Subdiv 40-C

- The **sale** (s40-65(1)) or **long-term lease** (s40-70(1) and i.e. a lease, hire or license for at least 50 years under s195-1) of '**residential premises**' is input-taxed where it is to be used predominantly for residence/residential accommodation.
- However, the sale (s40-65(2)) or long-term lease (s40-70(2)) is NOT treated as input taxed if the premises are **'commercial residential premises**' (see above) or '**new residential premises**'.
    - S40-75 defines '**new residential premises**' as residential premises that (a) have not previously been sold as residential premises and have not previously been the subject of a long-term lease; (b) have been created through substantial renovations (s195-1 and **GSTR2003/3**) of a building; or (c) have been built, or contain a building that has been built, to replace demolished premises on the same land.

Creditable Acquisition

An entity makes a creditable acquisition under **s11-5** if:

1. It makes an **acquisition**
    - **S11-10** defines acquisition as 'any for whatsoever', including (a) goods; (b) services; (c) receipt of advice or information; (d) acceptance of grant, assignment or surrender of real property; (e) acceptance of grant, transfer, assignment or surrender of any right; (f) acquisition of a financial supply; (g) acquisition of a right to require another person to do something, to refrain from an act, or to tolerate an act.
2. The acquisition was **solely or partly** for a **creditable purpose**
    - **S11-15(1)** defines creditable purpose as where the acquisition relates to the carrying on of the entity's enterprise, i.e. made for a **business purpose**.

- However, under s11-15(2)(a) & (b), an acquisition is not for creditable purpose if it relates to **making input taxed supplies** or is applied to **private or domestic purpose**.
    - E.g. if acquire services for residential premises (input taxed supply), no creditable purpose exists under s11-15(2)(a) and ***Rio Tinto***.
- Acquisitions which relate to the **provision of fringe benefits** that are for an employee's private use are taken to be for a creditable purpose: **GSTR2001/3**.

3. The supply to the entity was a **taxable supply** under s9-5.
    - **Where the acquisition price includes GST**, this is clearly an acquisition of taxable supply by the entity under s9-5.
    - **Where the acquisition price does not include GST**, it is necessary to ascertain this element **from the supplier's perspective**: ss9-10, 9-15, 9-20, 9-25, 23-5, 23-15, r 23.15 *GST Regulations 1999*, Div 38 and Div 40.
4. The entity provided or was liable to provide **consideration** (s11-5(c) and see above).
5. The entity is/must be **registered for GST purposes** (s11-5(d) and refer above).
6. An acquisition will not be a creditable acquisition if it is a **non-deductible expense**: s69-5. For GST purposes, only the following non-deductible expenses are treated as NOT being creditable acquisitions under s69-5:
    - Relative's travel expenses: s26-30 ***ITAA97***
    - Recreational club expenses: s26-45 ***ITAA97***
    - Higher education contribution payments**:** s26-20 ***ITAA97***
    - Entertainment expenses: Div 32 ***ITAA97***
    - Where a **non-deductible expense is deductible for income tax purposes** because it relates to the **provision of a fringe benefit**, the restriction in s69-5 does not apply and the acquisition will be treated as a creditable acquisition provided all the elements of creditable acquisition are satisfied.

If creditable acquisition exists, the entity can claim ITCs in relation to the acquisition under s11-20.

Jurisdiction to Tax – Residence and Source

- S3-5 *ITAA97* provides that income tax is payable for each year by each individual and company.
- The **income tax financial year** is 1 July to 30 June: ss4-10(1) and 995-1 *ITAA97*.

Residence of Australia - Individuals

- If an individual satisfies any one of the four residency tests in s6(1) *Income Tax Assessment Act 1936* (*ITAA36*), s/he will be an Australian resident for tax purposes for the **year ended 30 June 2018 (FY2018)**. Otherwise, s/he will be a foreign resident for tax purposes: s995-1 *ITAA97*.
- Residency is assessed on a year-by-year basis and a **person can be a resident for only part of the year**.
    - Therefore, if facts indicate clear residency for part of year, apply **ordinary residency test** or **domicile tests** to the **separate time periods** noting that the taxpayer would be a resident from date to date and issue is whether s/he would be resident from date once s/he moves overseas.
- ***Applegate*** confirms that it is **possible to consider events after year-end to decide a taxpayer's residency status**!!!!!

Ordinary Residency Test (ORT)

Under this **primary common law test of residency**, the tp will be a resident if they 'reside' in Australia: s6(1)(a), i.e. 'dwelled permanently or for a considerable period in a particular place': ***Levene***; ***Miller***.

This is a question of fact/degree based on the taxpayer's individual circumstances: ***Lysaght***; ***Joachim***; ***Harding***.

Though a rigid checklist in law to be applied in determining residency according to ***Harding***, the ATO's guidance/factors in **TR98/17** can facilitate analysis:

- ✓ **Physical presence in Australia**
    - ***Levene*** suggests that a taxpayer 'resided' in the UK although he was only there for 4 to 5 months each year. Similarly, in ***Lysaght*** the court found that a taxpayer who was in the UK for 1 week every month 'resided' there. However, these cases involve no set end to the taxpayers' arrangements → need to see if the taxpayer's stay in Australia is for a set period.

- As seen in ***Joachim***, the lack of physical presence in Australia is not in itself determinative and other factors need to be considered.
- **TR98/17** suggest considerable time is ≥ 6 months.

✓ **Frequency, regularity and duration of visits to Australia**
- ***Lysaght***: if the visit is not casual and uncertain but in the ordinary course of life → suggest reside
- ***Levene***: 4-5 months considered considerable time for visiting

✓ The **purpose/intention of visits** to Australian and abroad
- Intention to treat Australia as home: ***Joachim*** → suggests reside
- If expected to return to Australia in the future → suggests reside.
- If move overseas merely for work-related purpose → suggest reside: ***Joachim***.

✓ The **maintenance of a place of abode in Australia** for the taxpayer's use
- Lease or apartment retained or given up?

✓ **Business or employment ties**
- If based in Australia → suggests resides → ***Lysaght***

✓ **Family ties → *Joachim*; *Levene***

✓ **Social ties and living arrangements**
- Friends and/or social activities such as attending religious ceremonies → suggest resides: ***Levene***.
- The fact of staying at hostels or employer-provided accommodations overseas → suggest continuing association with Australia and that absence in that Australia is temporary: ***Levene***; ***Harding***.
- Establishing/purchasing abodes overseas → suggest NOT reside.

✓ **Economic ties**
- Bank account, share portfolio, superannuation savings in Aus → reside.

✓ **Nationality**
- Citizenship suggests reside but this is normally not decisive.

Conclusion

Evaluating all factors and the taxpayer's circumstances, on balance, it would appear that the taxpayer DOES or DOES NOT reside in Australia under the ORT.

If DOES reside, then the taxpayer is an *Australian* resident for the period date to date during FY2018 → i.e. from the period that the taxpayer starts residing here by e.g. obtaining a lease/established an abode in Australia…

OR

If DOES NOT reside, then the taxpayer is a *foreign* resident for the period date to date during FY2018 → i.e. from the period that the taxpayer ceases residing here

TR98/17 confirms that other statutory tests need not be considered where a taxpayer 'resides' in Australia. However, given ORT's ambiguous nature, other statutory tests are applied for completeness.

Domicile Test

If NOT applicable:

On the facts, it appears that the taxpayer's **domicile is not Australia** as they are not an Australian citizen or a permanent resident. As such, they are not an Australian resident for tax purposes under this test: s6(1)(a)(i).

If APLLICABLE:

Under s6(1)(a)(i), a taxpayer is automatically an Australian resident under this first statutory residency test if their domicile is in Australia, unless the Commissioner is satisfied that they have a '**permanent place of abode overseas**' (PPoAO).

- A person acquires a **domicile of origin** at birth (usually the place of the father's permanent home).
- A person acquires a **domicile of choice** in a particular country if they have the intention to make their home indefinitely in that country, for example, obtaining Australian permanent residency: s10 of the *Domicile Act 1982*. However, a fixed period student visa or working visa would NOT satisfy the test for domicile of choice.

- ❖ The fact that the taxpayer holds **dual citizenship** does not necessarily change the fact that their domicile is in Australia, e.g. acquiring domicile in another country purely because father's citizen status cannot be described as a domicile of choice.

From date to date of FY2018, the taxpayer has a place of abode overseas. Since domicile in Australia is established, the issue is whether the place of abode overseas is a PPoAO.

- ***Applegate*** and ***Jenkins*** confirm that 'permanent' does not have to be 'forever' or 'everlasting' but takes its meaning from its context, and should be contrasted with 'temporary' or 'transitory'. It is a question of fact/degree based on the taxpayer's individual's circumstances.
- ***Applegate*** confirms that it is **possible to consider events after year-end**.
    - Therefore, need to consider how long the taxpayer is expected to remain in a place until they move to next destination so as to see if abode can be **potentially permanent**.

The Commissioner's guidance/factors in **IT2650** can facilitate the analysis:

- ✓ The **intended/actual length and continuity of the taxpayer's stay** in the overseas country
    - Anything ≥ 2 years in one place according to ***Jenkins*** and **IT2650** would be considered permanent. However, this cannot be automatically be relied upon without considering the other factors.
- ✓ Whether the taxpayer **intended to stay in the overseas country only temporarily and then move on to another country**
- ✓ Whether the taxpayer intends to **return to Australia at some definite point in time**
    - ***Jenkins***: taxpayer was transferred overseas for a fixed three-year period.
    - ***Applegate***
- ✓ Whether the taxpayer has **established a home outside Australia**, e.g. family, household, dwelling place, house or shelter that is fixed residence
    - ***Harding***: taxpayer did not have PPoAO because constantly changed abodes even if in the same city, and did not establish any sense of permanence with the abodes, e.g. furnishing them.
    - If just stays or expected to stay in temporary accommodation provided by employer or merely at hostels then the overseas abode would not appear permanent.
- ✓ Whether any **abode exists in Australia or has been abandoned** because of overseas absence → ***Applegate***; ***Jenkins***
- ✓ The **durability of association with Australia**
    - ***Jenkins*** → **Sufficient economic ties?**
    - ***Applegate*** → **Economic and family ties**
    - **Living arrangements in the overseas country** such as economic ties and social ties may be suggestive that the place of abode abroad is **becoming permanent**, despite economic, social and family ties in Australia.
    - Still treats Australia 'home'?
    - Has the taxpayer informed government departments that they are leaving permanently and that family allowance payments should be stopped?
    - Place of education of the taxpayer's children

Conclusion

Evaluating all of the factors and the taxpayer's circumstances, it would appear that the taxpayer's place of abode overseas **IS** or **IS NOT** permanent.

If **NO PPoAO**, then the taxpayer WOULD BE an ***Australian*** **resident** under the domicile test for the **entire** FY2018.

OR

If **HAVE PPoAO**, then the taxpayer would be a ***foreign*** **resident** under the domicile test for the period date to date (the period that PPoAO is obtained) during FY2018.

183-day Test

If NOT applicable:

As the taxpayer was in Australia for less than 183 days during FY2018, they are not an Australian resident for tax purposes under this test: s6(1)(a)(1)(ii) .