Australian Government
Australian Taxation Office

Australian Taxation Office Legislative Instrument
Instrument ID: 2015/ITX/0038

Goods and Services Tax: Telecommunication Supplies Determination (No. 38) 2015

Explanatory Statement

General Outline of Instrument

1. This determination is made under subsection 85-5(2) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).
2. This determination replaces the *A New Tax System (Goods and Services Tax) Act 1999 Telecommunication Supplies Determination (No. 1) 2000* (the previous instrument).
3. The instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Date of effect

4. The instrument commences on the day after registration.
5. The instrument does not apply retrospectively.

What is this instrument about

6. Under Division 85 of the GST Act, a telecommunication supply is connected with the indirect tax zone if the recipient of the supply will effectively use or enjoy the supply in the indirect tax zone. That is, the telecommunication supply will be connected with the indirect tax zone even though the supply is not done in the indirect tax zone or made through an enterprise that the supplier carries on in the indirect tax zone.
7. In some circumstances a telecommunication supply may be connected with the indirect tax zone as a result of the application of Division 85, but for administrative reasons it is not feasible for the Commissioner to collect the GST. Subsection 85-5(2) allows the Commissioner to determine that in these circumstances the telecommunication supply (or a class of supplies) will not be connected with the indirect tax zone.
8. This determination is made to address a number of shortcomings identified with Division 85. In brief these are that:
   (a) its interaction with Division 84 produces unintended consequences;

(b) input tax credits may be claimed even when no GST is collected;

(c) it may be in conflict with Australia's undertakings as signatory to the International Telecommunication Regulations. In particular 42K under Article 6 provides:

42K 6.3 *Where, in accordance with the national law of a country, a fiscal tax is levied on collection charges for international telecommunication services, this tax shall normally be collected only in respect of international services billed to customers in that country, unless other arrangements are made to meet special circumstances.*

The first two pose significant revenue risks.

9. Division 84 requires resident recipients to reverse charge in circumstances where full input tax credits would not be available. For example, a bank buying computer programming services from an offshore programmer would be required to reverse charge under Division 84. Division 84 applies only to supplies that are not connected with the indirect tax zone. Division 84 and Division 85 are mutually exclusive. The result is that if a bank acquired telecommunication services from offshore, it would not be required to reverse charge. Rather the GST would be payable by the offshore supplier in accordance with Division 85. There is high risk that the GST would not be paid. Collection of the tax from an offshore entity will be problematic.

10. The outcome discussed above gives entities making input taxed supplies an incentive to source telecommunication services from offshore, as they would avoid the reverse charge. The offshore supplier would have a GST liability, but may have failed to register due to ignorance of Australia's laws, or as a result of an informed decision to not comply.

11. As the Commissioner is not currently able to enforce the GST law internationally, suppliers with no presence in the indirect tax zone who might prefer to avoid Australian domestic taxes are seen as a significant revenue threat. To address this threat, the Commissioner has determined that collecting GST on telecommunication supplies made through an enterprise that is not carried on in the indirect tax zone and is not registered for GST is not administratively feasible.

12. Another revenue risk was identified where the recipient acquires the offshore telecommunication supply for a wholly creditable purpose so that Division 84 is not a consideration. Division 85 provided the potential for registered recipients to claim input tax credits (on wholly creditable acquisitions) in circumstances where the offshore supplier is not registered or not remitting the tax. This is because part of the creditable test for a creditable acquisition is that the supply to a recipient is a taxable supply. It does not require the tax to be paid.

13. Lastly, in order to comply with the International Telecommunication Regulations (of which Australia is a signatory), the Determination excludes supplies where the recipient is a telecommunications provider.

What is the effect of this instrument

14. The effect of this instrument is that even though a recipient effectively uses or enjoys the telecommunication supply in the indirect tax zone, the supply is not connected with the indirect tax zone if the supplier that makes the supply through an enterprise that is not carried on in the indirect tax zone, is not registered for GST. The recipient might have a potential Division 84 reverse charge liability

15. The telecommunication supply that the supplier makes through an enterprise that is not carried on in the indirect tax zone to a telecommunication provider is not connected with the indirect tax zone.
16. Compliance cost impact: minor- there will be no or minimal impacts for both implementation and ongoing compliance costs. The legislative instrument is minor or machinery in nature.

Background

17. This instrument replaces the *A New Tax System (Goods and Services Tax) Act 1999 Telecommunication Supplies Determination (No. 1) 2000.*

Consultation

18. Section 18 of the *Legislative Instruments Act 2003* specifically provides for circumstances where consultation may not be necessary or appropriate. One of those circumstances is where the instrument is considered minor or machinery in nature, and does not substantially change the law.
19. Because there is no substantive change from the previous instrument, the instrument is considered minor or machinery in nature.
20. As such, no further consultation has been undertaken in the development of this instrument.

James O'Halloran
Deputy Commissioner of Taxation
15 September 2015

Statement of compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of *the Human Rights (Parliamentary Scrutiny) Act 2011.*

Overview of the Bill/Legislative Instrument

Even though a recipient effectively uses or enjoys the telecommunication supply in the indirect tax zone, the supply is not connected with the indirect tax zone provided the supplier that makes the supply through an enterprise that is not carried on in the indirect tax zone is not registered for GST. The telecommunication supply that the supplier makes through an enterprise that is not carried on in the indirect tax zone to a telecommunication provider is not connected with the indirect tax zone.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Legislative references:

A New Tax System (Goods and Services Tax) Act 1999

Human Rights (Parliamentary Scrutiny) Act 2011.