# Barristers' work as a GST-free export

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*This article considers GST classification of barristers' services when conventionally retained by Australian solicitors to act for a non-resident client that is not "in Australia". It argues that the barrister's supply is made and provided to the client rather than the solicitor, whether or not the solicitor is personally liable for counsel's fees, and can qualify as a GST-free export on the same basis as a supply by a solicitor. This is contrary to Levy v Bergseng (2008) 72 NSWLR 178, but consistent with the approach taken by the Commissioner.*

## INTRODUCTION

Where a barrister is retained by Australian solicitors to act for a non-resident client who is not in Australia, is the barrister's supply of professional services capable of qualifying as a GST-free export? This depends on whether one follows the views of the Commissioner in GSTR 2004/7 or a recently reported decision in the Supreme Court of New South Wales, *Levy v Bergseng* (2008) 72 NSWLR 178. The point is one of practical importance for legal practitioners. This article argues that, contrary to *Levy v Bergseng*, the barrister's supply can generally attract GST-free treatment on the same footing as a solicitor's supply because it is properly viewed as being made and provided to the client, not the solicitors.

Section 38-190 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act) recognises a class of GST-free supplies which may broadly be conceived as representing the export of services. Item 2 in the table in subs (1) has particular relevance to barristers and solicitors. It applies where the supply is "made to a non-resident who is not in Australia when the thing supplied is done". To qualify as GST-free under that item, the supply must lack certain prescribed connections with goods or real property in Australia and, if the recipient is registered or required to be registered, the supply must not be acquired in carrying on its enterprise.[1] A negative condition is added by s 38-190(3), which excludes a supply made under agreement with the non-resident if "the supply is provided, or the agreement requires it to be provided, to another entity in Australia".

Where an Australian solicitor acts in Australian proceedings for a non-registered, non-resident client, services supplied by the solicitor during the client's absence from Australia are, in most cases, uncontroversially GST-free under item 2. The question is, whether the same is true of an Australian barrister retained by the solicitor for the client. If the barrister's supply is "made" to the client and is not "provided" to the solicitors in Australia, it has the same GST character as a solicitor's supply in the same situation.

The discussion below begins by briefly addressing what it means to be "in Australia". This sets the scene for consideration of the identity issue – to whom the barrister's supply is made or provided – which provides the main focus of attention. Satisfaction of the other statutory criteria applicable to item 2 will be assumed.

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[1] The table is headed "Supplies of things, other than goods or real property, for consumption outside Australia". The words "for consumption outside Australia", which echo the heading of Subdiv 38-E, do not appear to impose a separate substantive requirement. GSTR 2004/7 [181] says: "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." A supply of work physically performed on goods then in Australia is excluded from item 2, as is a supply "directly connected with real property situated in Australia". GSTR 2003/7 deals with the concept of direct connection; some of its examples concern legal services which are, or are not, considered to be "directly connected" with particular real property. Section 38-190(2) excludes rights and options to acquire something, the supply of which would be connected with Australia and not GST-free. Section 38-190(2A) separately excludes supplies related to making input taxed supplies under Subdiv 40-B or 40-C (residential rent or residential premises).

The identity issue is approached in stages. An initial outline is given of the significance of GST classification, then the competing views are set out. Next, a distinction is drawn between aspects of the identity issue arising under item 2 and s 38-190(3). This is followed by substantive analysis and resolution of the issue itself.

## BEING "IN AUSTRALIA"

The concept of being "in Australia" has been considered by the Commissioner in GSTR 2004/7 and, in relation to corporations, by Gzell J in *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 60 NSWLR 425.

A convenient starting point is the simple proposition that an individual who is not physically in Australia is not "in Australia" for purposes of s 38-190; the presence of an agent such as the solicitor conducting litigation is not presence of the client.[2] To this may be added the Commissioner's concession that incidental physical presence of the client which is not "in relation to the supply of the legal services" does not qualify as presence for the purposes of the section.[3]

The presence of a company, partnership or trust is necessarily a more complex question.[4] For present purposes, it will be sufficient to confine attention to companies. In broad terms, corporate presence is determined by reference to a test similar to the tax treaty concept of "permanent establishment", which turns on whether the entity carries on its business in Australia at and through a fixed place of business or through a dependent agent; mere presence of representatives for the purposes of instructing solicitors or giving evidence in litigation is insufficient.[5]

The result is that a good deal of Australian litigation for non-resident clients can take place when the client is "not in Australia".

## SIGNIFICANCE OF GST CLASSIFICATION

What, then, is really at stake in the GST classification of the barrister's supply?

GST-free treatment under s 38-190(1) item 2 depends on the characteristics of the person to whom the supply is made. Where an Australian barrister is retained by Australian solicitors to represent or advise a non-resident offshore client, the question is whether the barrister makes a supply of professional services to the solicitors (as *Levy v Bergseng* decides) or to the client. If the former, the solicitors may be expected to have an input tax credit and make a notional re-supply of the barrister's services to the client. The notional re-supply will be GST-free,[6] and the client will end up paying for the barrister's services as a GST-free item. This implies that solicitors should regularly include barrister's fees in their own GST accounting as an input and a re-supply to the client, regardless whether the client is local or offshore; a proposition which would surprise most solicitors. If the latter characterisation applies, however, the barrister's supply is made to the client and is GST-free in the first place; no GST accounting is required of the solicitor for the barrister's fees.

If the barrister charges on a basis expressed as a net rate plus GST, if any, the difference between these two outcomes is primarily a matter of bookkeeping and compliance. This is not to say that such procedural matters cannot have financial consequences. An error of classification, once discovered, may require a corrective payment between the parties concerned, which may be problematic if a paying party turns out to be insolvent or uncooperative. On the other hand, if the barrister charges without reference to the incidence of GST, there is a substantive after-tax difference: if the initial

[2] GSTR 2004/7 [202], [204].

[3] GSTR 2004/7 [203], [214]-[220]. The example is given at [219] of an individual sole trader client who happens to be in Australia on holiday when legal services are performed, no contact being made between client and lawyer during the holiday. According to the ruling, the client is not relevantly "in Australia".

[4] See GSTR 2004/7 [229]-[438].

[5] *Fiduciary Ltd v Morningstar Research Pty Ltd* (2004) 60 NSWLR 425 at 431-4; GSTR 2004/7 [229]ff.

[6] Assuming there is no timing anomaly, such as if the solicitor's notional re-supply is taken to occur after the barrister's original supply and at a time when the client is "in Australia".

barrister's supply is made to the solicitor and taxable, the barrister is liable for GST, the solicitor has an input tax credit and the client ends up paying net of GST; if the initial barrister's supply is to the client and GST-free, the solicitor has no input tax credit or GST liability, and the client pays the full face value of the barrister's fees.

## COMPETING VIEWS

*Levy v Bergseng* took the view that a barrister conventionally retained by Australian solicitors to represent a non-resident client in local personal injury proceedings supplied his professional services to the solicitors on the basis that the solicitors, in personally contracting to pay the barrister's fees, did not act as agent for the client, and that the barrister's advices, preparation for trial and appearances in court were "supplied" to the solicitors, albeit for the benefit of the client.[7] The retainer and costs agreement in the case were conventional, as was the barrister's work in advising, getting up the case, and appearing in court. The case arose as an appeal from a costs assessment between barrister and solicitors; the Commissioner was therefore not a party.[8]

The Commissioner approaches the matter differently. GSTR 2004/7 includes the example of "Jan", a non-resident individual who "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".[9] The Commissioner appears content to treat this statement as applying to a conventional retainer of a barrister by a solicitor for a client.[10] If Jan remains outside Australia, the barrister's fees are GST-free. Alternatively, if Jan has to come to Australia for the trial, the barrister's fees are taxable to the extent that they correspond with the time when she was relevantly in Australia. A footnote states: "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."[11]

A later ruling, GSTR 2005/6, addresses the negative condition in s 38-190(3).[12] The example is given of an Australian solicitor obtaining immigration advice from an Australian barrister for a non-resident client offshore; the Commissioner accepts that the barrister's supply is provided to the client through the solicitor, not to the solicitor.[13] The example proceeds on stated assumptions that the solicitor "acting as agent" for the client engages the barrister "to supply legal services to" the client. One might say that the assumptions dictate the outcome. On the other hand, to retain counsel is usually within the scope of a solicitor's authority and function as agent for a client, and it seems clear that the example reflects the Commissioner's understanding of a typical barrister's retainer.[14]

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[7] *Levy v Bergseng* (2008) 72 NSWLR 178 at 204, 206-207.

[8] Not infrequently, GST issues fall first to be decided in non-tax litigation between private parties. This can create difficulties for the Commissioner and other taxpayers, particularly if the case as argued by the parties does not fully expose the issues as the Commissioner or taxpayers perceive them. The defendant's GST submissions in *Levy v Bergseng* (2008) 72 NSWLR 178 are recorded very briefly (at 204); cf text accompanying n 19. No reference is made in the judgment to GSTR 2004/7 or GSTR 2005/6 (see below), and it is not clear whether arguments as developed in this article were put to the court.

[9] GSTR 2004/7, Examples 31, 32 at [483], [484].

[10] See ATO Register of Private Binding Rulings, Authorisation No 93299, the facts of which appear materially indistinguishable from the situation in *Levy v Bergseng*.

[11] GSTR 2004/7 [484] (fn 102).

[12] The Commissioner's view is that one must consider all the circumstances and determine the true recipient with reference to the exact nature of the supply: GSTR 2005/6 [67], [69]. The idea seems to be one of functional characterisation: does the supply predominantly serve the practical, business or personal needs of the offshore non-resident or of the local entity? In relation to legal services, it is said that "the question of whether the supply is provided to another entity depends on the facts and circumstances in any given case": GSTR 2005/6 [76].

[13] GSTR 2005/6, Example 19, [472]-[476].

[14] See n 10.

## ASPECTS OF THE IDENTITY ISSUE

Before resolving the conflict between these positions, we should consider whether the identity of recipient issue properly arises under s 38-190(1) item 2 or under s 38-190(3). Although nothing much may ultimately turn on the distinction, we should be clear about it if we can.

Identity of the recipient of a supply is an element of the positive criteria in item 2 and the negative condition in s 38-190(3), but the language of the two provisions differs: item 2 speaks of a supply "made" to a non-resident not in Australia where s 38-190(3) speaks of a supply "provided" to an entity in Australia. The difference is deliberate. GST-free treatment is denied where the supply is initially made to the entity offshore, but is passed on to another entity onshore. This is an anti-avoidance or prophylactic measure: if the supply were made to the onshore entity in the first place, item 2 would not apply.[15] If services were successfully exported only to be re-imported, GST would be avoided because import GST only applies to goods.[16] The point for present purposes is that s 38-190(3) contemplates a situation where the subject supply, though initially "made" to one entity which is non-resident and offshore, is nevertheless identifiably passed on to another entity that is onshore.

The Act assumes that there is a single recipient for any supply, or a group of recipients among whom a supply can be fully apportioned;[17] where a supply is procured by A for the benefit of B, it is made either to A or to B, not to both, and it is necessary to identify A or B as the true recipient. If the true recipient of a barrister's supply is the client, it cannot in any ordinary circumstances be said that the client "provides" or passes that supply on to its solicitor. It follows that the critical issue for present purposes is the true recipient of the barrister's supply in terms of item 2. If the supply is "made" to the client, it will not ordinarily be "provided" to the solicitor.

This leads us back to the fundamental question: what determines whether the barrister's supply is made to the client or to the solicitor?

## RESOLUTION OF THE ISSUE

The costs assessor and review panel whose decision was under challenge in *Levy v Bergseng* had decided that the barrister's supplies were made to the solicitors because costs agreements with respect to his fees were made with the solicitors. The solicitors advanced two arguments in the Supreme Court. Primarily, they argued that they had contracted as agents for a disclosed principal. The court rejected that argument, and rightly so.[18] In the alternative, the solicitors argued that the barrister's supply of legal services was made to the client in any event.

The court gave three reasons for rejecting the solicitors' alternate argument: first, that the costs agreements were made between the barrister and the solicitors; secondly, that the barrister's advices were "supplied to" the solicitors; and thirdly, that the barrister's preparation work was for the provision either of the advices or of work in court, which was also "supplied to" the solicitors for the benefit of their client.[19] It is respectfully submitted that this reasoning was incorrect. The first point is true, but immaterial: the substance of the costs agreements was a promise to pay, not the supply of the

[15] A mirror-image provision in s 38-190(4) averts unintended taxation by treating certain supplies made to an entity in Australia but provided to another entity offshore as if they had been made to a recipient offshore for the purposes of s 38-190(1) item 3. Item 3 provides GST-free treatment to certain supplies "the effective use or enjoyment of which takes place outside Australia". That description may apply to some legal services provided by barristers without leaving their Australian chambers, but item 3 is less extensive in scope than item 2 and it is not the focus of this article.

[16] GST Act, Div 13.

[17] Section 195-1 of the GST Act defines "recipient" in relation to a supply as "the entity to which the supply is made". Special provision is made in Div 153 for supplies and acquisitions made through an agent. In absence of a special agreement or determination, these are attributed to the principal in accordance with the general law and not to the agent. Division 57 deals separately with resident agents acting for non-residents. The supplies and acquisitions of the principal are not imputed to the agent, but the agent bears certain derivative reporting and payment obligations.

[18] *Levy v Bergseng* 72 NSWLR 178 at 193, 205; *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492 at 505; *Dimos v Hanos* [2001] VSC 173.

[19] *Levy v Bergseng* 72 NSWLR 178 at 206.

barrister's services. The second and third points are unsound because they misconstrue the nature and incidents of a typical barrister's retainer and the professional relationship between barrister and client.

It is submitted that the correct resolution of the question, to whom a conventionally briefed barrister supplies professional services, does not depend on whether the solicitor enters into a costs agreement as agent for the client, or whether there is a costs agreement at all. The costs agreement is not a retainer; it is just an agreement about the payment of legal costs.[20] The concepts of retainer and costs agreement are quite different things.[21] Retainer is a relationship of professional engagement and authority; a costs agreement is a contract entailing payment obligations for services rendered under the retainer. The GST statutory question is not, who has contracted to pay, nor whether the payment obligation is undertaken as principal or agent, but to whom the barrister's services are supplied. That invites attention to the relationship between the barrister and the client as well as between the barrister and the solicitor.

The barrister is typically retained by the solicitor to act for the client, not for the solicitor.[22] In court, the barrister conducts the client's case, not the solicitor's case. The barrister's retainer creates a relationship between the client and the barrister, and the client is bound by counsel's conduct of the case, even to the point of settlement.[23] The solicitor creates the relationship between barrister and client by delivering a brief which the barrister accepts; in so doing, the solicitor exercises express or implied authority from the client. The barrister/client relationship may not be a contract between barrister and client or (for that matter) between barrister and solicitor, but it is created through the agency of the solicitor for the client. Barristers' advices are conventionally delivered (in a physical sense) to instructing solicitors, but they address the client as the querist or the person being advised. Barristers rightly recognise the client for whom they are instructed as their own clients, and owe professional duties to them as such clients, whether in court or in chambers.

Historically, the barrister could not sue anyone – neither client nor solicitor – for professional fees,[24] but the solicitor incurred a payment obligation as a professional engagement binding in honour. Under modern legislation, barristers can sue for their fees; solicitor's obligations are usually contractual under costs agreements[25] or arise by statutory recognition of the professional obligation.[26] It therefore does not follow that the solicitor is the person who receives the barrister's services just because the solicitor may incur a personal obligation to pay the barrister's fees, even if it may be characterised as an obligation "as principal", or because the client may incur no such personal obligation to the barrister.

[20] *Legal Profession Act 2004* (NSW) s 302; *Legal Profession Act 2004* (Vic) s 3.4.2; *Legal Profession Act 2007* (Qld) s 300; *Legal Profession Act 2008* (WA) s 252; *Legal Profession Act 2007* (Tas) s 283; *Legal Profession Act 2006* (ACT) s 261; *Legal Profession Act* (NT) s 295. The legislative structure in SA differs from that in other States, but appears to support a similar conclusion: see *Legal Practitioners Act 1981* (SA) s 42(6). The previous NSW definition in the *Legal Profession Act 1987* (NSW) s 173 was differently worded but to similar effect: an agreement "as to costs for the provision of legal services" as further referred to in s 184. The costs agreement considered in *Levy v Bergseng* was made under the 1987 Act.

[21] See *Legal Profession Act 2004* (NSW), ss 310, 322, Pt 3.2; *Legal Profession Act 2004* (Vic), ss 3.4.10, 3.4.26, Pt 3.4; *Legal Profession Act 2007* (Qld), ss 309, 322, Pt 3.4; *Legal Profession Act 2008* (WA), ss 261, 282, Pt 10; *Legal Profession Act 2007* (Tas), ss 293, 306, Pt 3.3; *Legal Profession Act 2006* (ACT), ss 270, 282, Pt 3.2; *Legal Profession Act* (NT), ss 304, 317, Pt 3.3. Similar distinction was inherent in *Legal Profession Act 1987* (NSW), Pt 11 esp ss 175, 176, 177, 184. The SA statute appears to support a similar conclusion: *Legal Practitioners Act 1981* (SA) s 42(6); that statute expresses more vigorous devotion to fusion of the legal profession than its counterparts elsewhere: s 6. There is no requirement for a costs agreement in any Australian jurisdiction. What the legislation typically requires is disclosure (eg *Legal Profession Act 2004* (NSW), ss 309, 310).

[22] No doubt it is open to solicitors to retain a barrister to provide them with advice with a view to enabling the solicitors to provide their services to others and perhaps even to repeat the barrister's advice to a client without the solicitors' client ever becoming a client of the barrister. In such a situation, the barrister would supply services to the solicitors, not the client, but that would be an unusual case.

[23] *Strauss v Francis* (1866) LR 1 QB 379 at 381; *Waugh v H B Clifford & Sons* [1982] 1 Ch 374 at 387.

[24] Many of the old cases are discussed in *Rondel v Worsley* [1969] 1 AC 191; *Giannarelli v Wraith* (1988) 165 CLR 543. One of the earliest is *Thornhill v Evans* (1742) 2 Atk 330 at 332; 26 ER 601.

[25] See, eg *Legal Profession Act 2004* (NSW) s 326.

[26] See, eg *Legal Profession Act 2004* (NSW) ss 319, 352, 368.

Both historically and in its present manifestation, the solicitor's payment obligation exists to facilitate the supply of professional services to the client. From an economic viewpoint, the solicitor's personal obligation enables barristers to take a brief without examining the creditworthiness of the client or requiring security for their fees or payment in advance.[27] This has the effect of reducing the overall cost of legal services because barristers need not duplicate the more extensive office and accounting facilities typically required by a solicitor's practice. It does not imply that the solicitor is the real recipient of the barrister's services. The client is the only recipient of the barrister's services.

It may be that the solicitor supplies a service to the client of arranging and facilitating the barrister's services; it may even be that the barrister makes a separate supply to the solicitor by agreeing to provide legal services to the solicitor's client on the solicitor's pledge of personal credit; but none of that means that the supply of the barrister's legal services is made to anyone but the client for the purposes of s 38-190.[28]

Once we have determined that the barrister's supply is made to the non-resident client, à fortiori it can hardly be said that the supply is passed on or "provided" by the client to the solicitor in terms of s 38-190(3). The client is the person to whom the barrister's supply is both made and provided.

## CONCLUSION

The better view is therefore that a barrister, conventionally retained by a solicitor to represent or advise a client, makes a supply of professional services to the client and that the supply is not "provided" to the solicitor, regardless whether the solicitor has contracted to pay the barrister's fees and regardless whether the barrister can sue the client personally for those fees. It is respectfully submitted that the Commissioner's position is to be preferred over the approach taken in *Levy v Bergseng*. The barrister's supply is GST-free if the other criteria applicable to s 38-190(1) item 2 are satisfied.

Until this difference of opinion is authoritatively resolved, however, barristers and solicitors acting for non-resident offshore clients face troublesome choices, some but not all of which can be solved by seeking a private ruling from the Commissioner.

## Postscript

On 11 May 2010, the Assistant Treasurer released the report of the Board of Taxation on its review of the application of GST to crosss-border transactions and announced that the government would implement the Board's recommendations.[29] Recommendation 5 was that the GST law should be amended so that a supply of services or intangibles to a non-resident is GST-free, even if the supply is also "provided" to a registered business in Australia, an employee or office holder of a registered business in Australia (or of an unregistered non-resident business, if its acquisition is for a fully creditable purpose) who is acting in that capacity. This will reduce the scope of the s 38-190(3) exclusion from GST-free treatment.

The proposed amendment will not alter the conclusions in this article. Assuming registration of the Australian solicitor, it will provide an independent ground for concluding that s 38-190(3) does not apply.

[27] In New South Wales, barristers are now generally prohibited from receiving fees in advance: *Legal Profession Act 2004* (NSW), ss 243 "trust money", 252; cf the limited exception under the *Legal Profession Regulation 2005* (NSW), reg 106A.

[28] Multiple and different supplies can arise from the same or related conduct, and require careful analysis. See *Secretary to the Department of Transport (Vic) v Commissioner of Taxation* (2009) 73 ATR 690; 261 ALR 39 (appeal pending); *Customs & Excise Commissioners v Redrow Group plc* [1999] 1 WLR 408; *Customs & Excise Commissioners v Plantiflor Ltd* [2002] 1 WLR 2287, esp 2299-2300 (Lord Millett). The fact that A pays or contributes to the cost of a supply of particular services by B to C does not mean that those services were supplied to A.

[29] Board of Taxation, *Review of the application of GST to cross -border transactions: A report to the Assistant Treasurer* (February 2010); Assistant Treasurer, *Further Reductions in GST Compliance Costs for Business* (Media Release 95 of 2010, 10 May 2010).