

INTERNATIONAL PRODUCTION IN AUSTRALIA

GOODS & SERVICES TAX (GST) & CAST/CREW WITHHOLDING TAX GUIDE FOR FOREIGN PRODUCERS

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in conjunction with



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INTERNATIONAL PRODUCTION IN AUSTRALIA

GOODS & SERVICES TAX (GST) CONSIDERATIONS

Introduction

The GST is a 10% tax on most goods, services and rights connected with AUSTRALIA. Much like VAT in other jurisdictions around the world, it is designed as a tax on the private end user or consumer and not as a tax to be imposed on businesses.

Both AUSTRALIAN and non-resident entities and individuals (not employees) are entitled to register for GST to reclaim this tax paid on their business purchases, if they are conducting a business-like enterprise either in AUSTRALIA or abroad.

Considering that entities with an annual turnover exceeding A\$75,000 must register for GST and charge and collect this tax on the supplies they make, nearly all the costs incurred by a film production will have a GST component (wages and salaries of employees do not attract the GST).

Therefore it is recommended that a foreign producer planning to undertake production activity in AUSTRALIA, should ensure that the appropriate structure is in place to enable the recapture of this tax is factored into the final price of the production activities undertaken or agreed to. Monthly or Quarterly claims can be made to minimise the cash flow exposure within the production cycle to virtually nil. The AUSTRALIAN Tax Office undertakes to refund an entity's GST entitlements within 14 days of lodging each Business Activity Statement (BAS).

Generally if undertaking production in AUSTRALIA, either one of the following common scenarios will see that the GST rebate on the production expenses can be reclaimed:

- operate through an established AUSTRALIAN production services/facilitation company which will incur all the expenses of production and claim back the GST on those expenses OR
- foreign producer establishes their own subsidiary Australian company with an Australian Business Number (ABN) and registration for GST which all production expenses will be incurred to claim the refunds (although this is possible it does have some practical implications such as requiring at least one AUSTRALIAN resident director and AUSTRALIAN bank accounts etc)

Whichever option is chosen the funds received by the AUSTRALIAN company from the foreign producer to undertake the making of the project, will be considered payment for some combination of services and rights/final goods provided/delivered.

Broadly, these transactions between the AUSTRALIAN company and the foreign producer can be GST free as per either Section 38-185 or Section 38-190 of the "A New Tax System (Goods & Services Tax) Act 1999". *Extracts of this Sections are included below.*

While the foreign producer may be asked to cash flow the expected GST, if it is properly accounted for and contracted, it should not be a cost or additional production cost to the foreign producer in conducting its activities in AUSTRALIA.

Contracting Considerations with Australian Production Companies

Typically the relationship between the AUSTRALIAN company and the foreign producer is contracted in either of two (2) ways:

Costs + Services Margin

In this scenario, the AUSTRALIAN company and foreign producer agree an indicative budget for the production costs required to be incurred and an agreed Services Fee/Margin in addition. There is an agreement or understanding that these costs may vary with approval between the parties on such variances.

The production costs budget would be prepared EXCLUDING any GST that may be levied by local suppliers, because the AUSTRALIAN production company will be able to claim this GST back as part of its monthly or quarterly filings with the ATO. The AUSTRALIAN production company would generally provide an estimate or breakdown of the expected GST to be incurred and the timing of the refunds. The foreign producer would typically cash flow the required production costs and Service Fee/Margin as agreed to the AUSTRALIAN production company, taking into account the anticipated GST refund(s) timeline.

At the completion of the production activity the final costs and GST claims are accounted for and any over or under funded contributions from the foreign producer are dealt with accordingly.

The final production costs of the project (removing any GST charged along the process by local suppliers/contractors as the AUSTRALIAN production company has claimed this back) are usually contracted as the Rights or Goods delivered fee to the foreign producer, which can usually be GST Free as outlined above. The additional Services Fee/Margin can also be charged GST Free to the foreign producer.

Example

Expected costs of Production in Australia \$1,080,000 inc GST
(location fees, local crew, equipment, accommodation etc)

Agreed Service Fee/Margin from Australian Production company \$60,000 GST Free
(on top of the expected production costs above)

Production period in Australia – 3 months (1 July to 30 September)

Foreign producer agrees to cash flow the activities in 3 x monthly instalments in advance – these instalments would be treated as loans to the AUSTRALIAN production company:

Month 1 \$432,000 Month 2 \$324,000 Month 3 \$324,000 – production costs

Month 1 \$20,000 Month 2 \$20,000 Month 3 \$20,000 – service fee

The line items within the budget for the \$1,080,000 above may see in this example approximately 80% of the costs contain GST from the local suppliers, meaning that approx \$800,000 of the costs have the 10% GST added i.e. \$800,000 + \$80,000 = \$880,000 inc GST. This means that approx \$200,000 of the costs do not have any GST contained (e.g. casual employee local crew,). Therefore the expected costs of the production removing the GST are estimated to be \$1,000,000.

If we assume that the final production costs were a little more than budgeted and the overage was agreed and paid along the way by the foreign producer of say \$55,000 inc GST (\$50,000 with \$5,000 GST charged on top by local vendors), the invoicing and cash flow consequences would be as follows:

Final production costs/goods/rights delivered	\$1,050,000 GST Free
Service Fee/Margin	\$60,000 GST Free

GST refund of \$85,000 is received by the AUSTRALIAN production company at or near the completion of the production activity and physically returned to the foreign producer.

Therefore despite outlaying initially \$1,195,000 in cash for the production (\$1,080,000 + \$55,000 + \$60,000), after the GST refund is returned to the foreign producer via the AUSTRALIAN production company, the NET cost is \$1,110,000.

Fixed Fee for Production

In this scenario, the AUSTRALIAN production company and foreign producer agree a fixed price or fee for the final product to be delivered factoring in the anticipated production costs required to be incurred inclusive of any Services Fee/Margin. There is an agreement or understanding that if these production costs vary that is to be the responsibility of the AUSTRALIAN production company.

If this approach is to be taken the foreign producer should review the "bid" by the AUSTRALIAN production company on the basis that any GST charged by local suppliers/vendors will be reclaimed as part of its routine filings with the ATO. The foreign producer would typically cash flow the required funds as agreed to the AUSTRALIAN production company without any amount allowed for GST. However as per the example below they may agree to cash flow the additional GST outlay and receive it back during or on completion of the production.

The agreed cost of the project to the foreign producer is usually contracted as either a Services or Rights/Goods delivered fee, which can usually be charged GST Free as outlined above.

Example

Using the estimated budget figures and service fee/margin initially in the above example, the bid or quoted price to the foreign producer should be :

\$1,000,000 + \$60,000 = \$1,060,000 GST Free

Production period in Australia – 3 months (1 July to 30 September)

With regards to the approx \$80,000 GST contained within the estimated production costs, the AUSTRALIAN production company may seek to negotiate with the foreign producer to cash flow this. If so this GST should be reimbursed to the foreign producer when the GST refund is received from the ATO by the AUSTRALIAN production company.

Foreign producer agrees to cash flow the activities in 3 x monthly instalments in advance – these instalments would be treated as loans to the AUSTRALIAN production company:

Month 1	\$432,000	Month 2	\$324,000	Month 3	\$324,000 – production costs
Month 1	\$20,000	Month 2	\$20,000	Month 3	\$20,000 – service fee

As it's a fixed fee deal, the invoicing and cash flow consequences would be as follows:

Final production costs/goods/rights delivered	\$1,000,000 GST Free
Service Fee/Margin	\$60,000 GST Free

GST refund of \$80,000 is received by the AUSTRALIAN production company at or near the completion of the production activity and physically returned to the foreign producer (if they agreed to cash flow it upfront).

Therefore despite outlaying initially \$1,140,000 in cash for the production (\$1,080,000 + \$60,000), after the GST refund is returned to the foreign producer via the AUSTRALIAN production company, the NET cost is \$1,060,000.

What to do if the AUSTRALIAN production company believes it needs to charge GST to the foreign producer on the Production costs and/or Service fees?

Under either contracting scenario above, if this occurs, the foreign producer can claim back any GST it is charged by registering for GST in its own capacity. Please seek local tax advice if this is likely to occur but this process usually does not create any income tax obligations for the foreign producer in AUSTRALIA. A local accountant should undertake the registration of the foreign producer entity on its behalf. Registration can happen retrospectively i.e. after the production has completed but it is best to do so as soon as there is a known requirement.

Under this scenario, the foreign producer must receive a Tax Invoice from the AUSTRALIAN production company for the total value of the production costs/goods delivered + GST and the Service Fee/Margin + GST.

Using the example above these Tax invoices would be as follows and remembering that any initial GST cash flowed to the AUSTRALIAN production company should be already reimbursed to the foreign producer:

\$1,000,000 + 10% GST of \$100,000 = \$1,100,000 (production costs)
\$60,000 + 10% GST of \$6,000 = \$66,000 (service fee/margin)

(being the value of the production costs after the initial local vendors GST has been removed as this has been claimed back by the Australian production company and reimbursed to the foreign producer. This Tax Invoice is for a different supply between the Australian production company and the foreign producer and NOT the initial supply between the local vendors and the Australian production company. Therefore the foreign producer is not required to obtain copies of all the underlying local vendor invoices NOR have them re-issued in its name in order to claim back this GST charged on the production and services fees)

Therefore the foreign producer owes another \$106,000 for GST to the Australian production company. Remember it has already received back the GST it cash flowed initially to the AUSTRALIAN production company for the production costs. The foreign producer would submit these 2 x Tax Invoices as part of its GST filing with the ATO via the local accountant and would receive the \$100,000 and \$6,000 GST back as a refund from the ATO.

The net cost to the foreign producer after all these transactions is the same as above i.e. being \$1,000,000 + \$60,000 = \$1,060,000.

However as outlined above this is an unlikely scenario as usually the arrangements between the foreign producer and the AUSTRALIAN production company can avail themselves of the GST free status available under the GST Act.

TAXATION OBLIGATIONS FOR INTERNATIONAL CAST AND CREW WORKING IN AUSTRALIA

Introduction

The first requirement is to obtain the appropriate visa(s) for a production's foreign cast and crew. This is another compelling reason to establish an AUSTRALIAN subsidiary or to engage an AUSTRALIAN production company to act as sponsor.

AUSTRALIA has entered into international taxation agreements with a number of countries around the world that prescribe the taxable status applicable to foreign personnel working in AUSTRALIA on productions.

Cast

Income derived by entertainers (i.e. on screen performers) for services performed in AUSTRALIA as either an employee or contractor will be subject to income tax in AUSTRALIA, regardless of the contracting entity and the length of stay. The only exception to this requirement is if the entertainer is from the USA (i.e. a US tax resident) and their gross fee for the services provided in AUSTRALIA is less than US\$10,000. In this scenario an exemption may be granted as per the terms of the International Double Tax Agreement in place between the two countries and certain paperwork must still be lodged with the ATO to achieve this exemption.

Usual practice is for the sponsoring AUSTRALIAN entity (usually the contracting party) to withhold the tax required on the value of the AUSTRALIAN contract (from 1st dollar) at source from the payments made to the cast member. If the cast member is contracting as an individual, this will be at non-resident graduated rates (see table below). If the cast member is contracted through a personal "loan out" corporation this tax will be withheld at a flat 30%.

The sponsoring AUSTRALIAN entity could become liable for the income tax due from the non-resident performers if not withheld at source. If the payments are made from another non-resident entity i.e. direct from the foreign producer, the appropriate tax should be withheld and remitted to the AUSTRALIAN entity to avoid a tax liability.

It is also recommended that the actor be advised to engage a local tax accountant to lodge their AUSTRALIAN tax return so that any available personal deductions can be optimised. Any refund due to an actor after the tax return is lodged can then be returned to them.

Crew

In most of the international agreements, income derived in AUSTRALIA by foreign off-screen crew employed as independent professional contractors will face no income tax liabilities in AUSTRALIA provided they:

- do not have a fixed base or permanent establishment available to them in AUSTRALIA and
- do not spend more than 183 days in AUSTRALIA in the financial year

If these conditions are not satisfied, the contractor may be subject to income tax in AUSTRALIA and the production entity should withhold PAYG tax on payments made under the contract to avoid being liable itself for these taxes.

If the foreign crew member is not a contractor but an employee of the AUSTRALIAN production entity, tax will be required to be withheld from these payments at non resident rates (see table below) regardless of the length of stay in AUSTRALIA. The crew member will be required to lodge an AUSTRALIAN tax return and should obtain a Tax File Number (TFN) on arrival.

Visiting employees of foreign companies will not face income tax liabilities in AUSTRALIA provided they:

- do not spend more than 183 days in AUSTRALIA in the financial year AND
- are being paid by an employer or company not resident in AUSTRALIA and this remuneration is not deductible in determining the profits of a permanent establishment it has in AUSTRALIA

The executive should have a contract with the foreign entity/producer to evidence permanent residence in the other country. If these conditions are not satisfied, the employee may face a tax liability here and the sponsoring AUSTRALIAN entity should make arrangements with the foreign producer to facilitate these tax payments.

Non-resident Individual Tax Rates (AUD) as at 30 June 2011

Taxable Income	Gross Tax Payable
0-\$37,000	29%
\$37,001-\$80,000	\$10,730 + 30% of excess over \$37,000
\$80,001-\$180,000	\$23,630 + 37% of excess over \$180,000
\$180,001 and over	\$60,630 + 45% of excess over \$180,000

The above tax thresholds and rates are subject to change from year to year, so please visit www.ato.gov.au

GST Requirements for Cast & Crew

Cast & Crew performing services in AUSTRALIA as an independent professional contractor or via their personal loan-out corporation, will be required to register for GST purposes if the value of these services performed in AUSTRALIA is A\$75,000 or more. The registered contractor will then be required to charge the production company GST on top of the value of the services and remit this GST to the tax office.

This requirement may be avoided contractually so that the AUSTRALIAN production company will account for the GST obligations on the supply of services from the contractor within its BAS, via the Reverse Charge mechanism. This method is quite often utilized due to its administrative concessions. Further details on this process can be provided by a local AUSTRALIAN accountant/advisor.

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 - SECT 38.190

Supplies of things, other than goods or real property, for consumption outside Australia

(1) The third column of this table sets out supplies that are *GST-free* (except to the extent that they are supplies of [goods](#) or [real property](#)):

Supplies of things , other than goods or real property , for consumption outside Australia		
Item	Topic	These supplies are GST-free (except to the extent that they are supplies of goods or real property)...
1	Supply connected with property outside Australia	a supply that is directly connected with goods or real property situated outside Australia .
2	Supply to * non-resident outside Australia .	<p>a supply that is made to a * non-resident who is not in Australia when the thing supplied is done, and:</p> <p>(a) the supply is neither a supply of work physically performed on goods situated in Australia when the work is done nor a supply directly connected with *real property situated in Australia; or</p> <p>(b) the * non-resident acquires the thing in * carrying on the non-resident's * enterprise, but is not * registered or * required to be registered.</p>
3	Supplies used or enjoyed outside Australia	<p>a supply:</p> <p>(a) that is made to a * recipient who is not in Australia when the thing supplied is done; and</p> <p>(b) the effective use or enjoyment of which takes place outside Australia;</p> <p>other than a supply of work physically performed on goods situated in Australia when the thing supplied is done, or a supply directly connected with * real property situated in Australia.</p>

Supplies of things, other than goods or real property, for consumption outside Australia

Item	Topic	These supplies are GST-free (except to the extent that they are supplies of <u>goods</u> or * <u>real property</u>)..
4	Rights	a <u>supply</u> that is made in relation to rights if: (a) the rights are for use outside <u>Australia</u> ; or (b) the <u>supply</u> is to an <u>entity</u> that is not an * <u>Australian resident</u> and is outside <u>Australia</u> when the <u>thing</u> supplied is done.
5	Export of services used to repair etc. <u>imported goods</u>	a <u>supply</u> that is constituted by the repair, renovation, modification or treatment of <u>goods</u> from outside <u>Australia</u> whose destination is outside <u>Australia</u> .

A NEW TAX SYSTEM (GOODS AND SERVICES TAX) ACT 1999 - SECT 38.185

Exports of goods

(1) The third column of this table sets out supplies that are *GST-free* :

GST-free exports of goods

Item	Topic	These supplies are GST-free ...
1	Export of <u>goods</u> -- general	a <u>supply</u> of <u>goods</u> , but only if the supplier exports them from <u>Australia</u> before, or within 60 days (or such further period as the <u>Commissioner</u> allows) after: (a) the day on which the supplier receives any of the *consideration for the <u>supply</u> ; or (b) if, on an earlier day, the supplier gives an *invoice for the <u>supply</u> --the day on which the supplier gives the <u>invoice</u> .

GST-free exports of [goods](#)

Item	Topic	These supplies are GST-free ...
2	Export of goods -- supplies paid for by instalments	a supply of goods for which the * consideration is provided in instalments under a contract that requires the goods to be exported, but only if the supplier exports them from Australia before, or within 60 days (or such further period as the Commissioner allows) after: (a) the day on which the supplier receives any of the final instalment of the consideration for the supply ; or (b) if, on an earlier day, the supplier gives an *invoice for that final instalment--the day on which the supplier gives the invoice .
