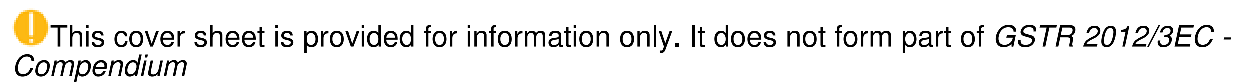
GSTR 2012/3EC - Compendium


This cover sheet is provided for information only. It does not form part of *GSTR 2012/3EC - Compendium*

This edited version of the Compendium of Comments is not intended to be relied upon. It provides no protection from primary tax, penalties, interest or sanctions for non-compliance with the law.

Ruling Compendium – GSTR 2012/3

This is a compendium of responses to the issues raised by external parties to draft Goods and Services Tax Ruling GSTR 2011/D5 *Goods and services tax: GST treatment of care services and accommodation in retirement villages and privately funded nursing homes and hostels*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft Ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1.	A major concern with the draft Ruling lies with the analysis of when services are provided in a 'residential setting' for the purposes of subsection 38-25(3). No authority is given for the restriction of the meaning of 'residential setting' to exclude a person's private home, apart from a contextual discussion in paragraphs 110 to 118 of the draft Ruling relating to an Act purportedly *in pari materia* (that is, dealing with the same subject matter), the *Aged Care Act 1997*, including exclusions from the definition of 'residential care' in section 41-3 of *the Aged Care Act* for care provided in a person's private home or in a hospital or psychiatric facility. Paragraph 115 of the draft Ruling concludes that section 38-25 is only concerned with residential care services within the meaning of the Aged Care Act. We do not consider that the GST Act and the Aged Care Act are necessarily *in pari materia*, or that the Commissioner's analysis properly applies that statutory interpretation principle. Footnote 22 in the draft Ruling refers to 'Statutory Interpretation in Australia' by Pearce and Geddes. Paragraph 3.8 of the 7th Edition refers to a more recent decision of the Full Federal Court, *H v. Minister for Immigration and Citizenship* (2010) 188 FCR 393. In this case (at 403) the Court confirmed that where an Act expressly refers to provisions in another Act it does not diminish the difference	Having reviewed the relevant authorities, we agree that there is some doubt as to whether the GST Act is *in pari materia* with the *Aged Care Act 1997,* in the context of the provisions addressing residential care. References to the GST Act being in *pari materia* with the Aged Care Act have been removed from the Ruling. It is agreed that because the term 'residential setting' is not defined in the GST Act, its ordinary meaning is relevant. However, established principles of statutory interpretation require words of statute to be read in their context. Having regard to the contextual considerations discussed in paragraphs 115 to 121 of the Ruling, we consider that the term 'residential setting' in paragraph 38-25(3) does not take its ordinary meaning to include a person's private home. The alternative view that the term 'residential setting' in paragraph 38-25(3) should be interpreted to include a person's private home is acknowledged at paragraphs 191 to 194 of the Ruling. We consider that the suggestion that, in the absence of subsection 38-25(3A), all accommodation in a retirement village would be considered to be a residential setting is inconsistent with the stated intent of the amendments that incorporated subsection 38-25(3A) into the GST Act in 2004. In particular, as set out at paragraph 193 of the Ruling, paragraph 1.14 of the Explanatory Memorandum to the Tax Laws Amendment (Retirement Villages) Bill 2004 states:

Issue No.	Issue raised	ATO Response/Action taken
	between the two subject matters, and that it is only where provisions are picked up expressly that they can inform the interpretation of the first Act. In the absence of a clear alternative legal meaning of 'residential setting' or 'setting', we have difficulty in accepting an interpretation that ignores or overrides the analysis of 'residential' in the *Marana Holdings case*. The ordinary meaning would include serviced apartments and ILUs in retirement villages, as well as private homes. In our view a better interpretation of the current legislation is that subsection 38-25(3) can apply to services provided in any residential environment, including retirement villages and private homes. Subsection 38-25(3A) however ensures that, in retirement villags where all accommodation may be provided in a residential setting, services are only provided to residents of serviced apartments as defined. This gives effect to the purpose behind the introduction of subsection 38-25(3A) , and is consistent with the Aged Care Act.	1.14 This bill does not seek to reduce the existing scope of operation of the term 'residential setting' as it appears in existing paragraph 38-25(3)(a).

Issue No.	Issue raised	ATO Response/Action taken
2.	**Independent living units and the meaning of 'residential setting'** In addition to the issues raised in another submission, it is submitted that the Commissioner is incorrect to assert (in paragraph 121 of the draft Ruling) that an independent living unit in a retirement village cannot constitute a 'residential setting' for the purposes of subsection 38-25(3) of … the GST Act … on the basis that the premises are '*marketed and held out to the public as a type of residential lifestyle rather than as a facility that provides residential care*'. In this respect, it is a taxpayer's view that the promotion of a resort lifestyle is not inconsistent with the provision of residential care. Rather, the availability of access to residential care services is a key component of the lifestyle that is offered to residents of a village. It is also submitted that, from a commercial perspective, it is unrealistic to expect operators of retirement villages, who also offer privately funded residential care, to focus their marketing materials primarily on the residential care services. Once a resident is satisfied that the residential care services that they require can be accessed within a particular village, their decision to move into that village is likely to be based on their perception of the lifestyle that they will enjoy within the village. The marketing materials for most villages focus on the lifestyle aspects of the village accordingly. The taxpayer is also of the view that the privately fund(ed) residential care sector will continue to grow. The taxpayer itself has responded to this trend by making such services available to residents of their resort.	The reference to an independent living unit in a retirement village not constituting a 'residential setting' because they are marketed and held out to the public as a type of residential lifestyle rather than as a facility that provides residential care has been removed from paragraph 126 of the Ruling (previously paragraph 121 of GSTR 2011/D5). However, we maintain the view that, for the purposes of subsection 38-25(3), an independent living unit does not constitute a 'residential setting' because it is a resident's private home. Under the current GST legislation the only instances in which care services supplied to a resident of a retirement village may be considered to be supplied in a 'residential setting' is when the resident resides in a 'serviced apartment' in the retirement village and all of the requirements of subsection 38-25(3A) are satisfied.

Issue No.	Issue raised	ATO Response/Action taken
3	**The concept of a 'self care' unit** Paragraph 34 of the draft Ruling introduces the concept of 'self care' units, which are not mentioned in the GST Act or the Explanatory Memorandum to the original GST Bill or any amendment Bills. Introducing such a concept is unhelpful as the concept appears to fall between the more recognised concepts of ILUs and serviced apartments, which are for example the only two categories referred to in the Explanatory Memorandum to the Tax Laws Amendment (Retirement Villages) Bill 2004. Accommodation with the physical characteristics of a serviced apartment may have a combination of residents who self care or require nursing services / daily living assistance. Apartments are also commonly designed such that a person can commence residence caring for themselves, with the availability of assisting living assistance in subsequent years (without the need to move to a new facility). Such an apartment may be described as 'self care' but would, in terms of physical characteristics, be similar to a serviced apartment. There is no need to introduce a third accommodation concept for GST purposes, as in a retirement village only supplies to residents in serviced apartments receiving the requisite care services can be GST-free under subsections 38-25(3) and (4).	All references to 'self care' units have been removed from the Ruling.

Issue No.	Issue raised	ATO Response/Action taken
4	**Provision of meals** Pursuant to paragraph 38-25(3A)(b) of the GST Act, for services provided to a resident of a retirement village to be provided in a residential setting there must be in force a written agreement under which the operator of the retirement village provides daily meals and heavy laundry services to all of the residents of the apartments. In paragraph 52 of the draft Ruling, the Commissioner refers to 'an arrangement in place whereby the retirement village operator provides **all** of a resident's daily meal requirements' [emphasis added]. The reference to 'all' and meal requirements significantly extends the conclusion and is not supported by the legislation. Reference to daily meals should be taken to be a reference to meals (plural, meaning more than one) on a daily basis. It would be satisfied where the operator provided more than one meal on a daily basis. It does not require the operator to satisfy all of the resident's meal requirements. The draft Ruling offers no explanation as to why the word 'all' should be read into paragraph 38-25(3A)(b) when it is not in the text of the legislation. In addition, paragraphs 53 and 56 of the draft Ruling are inconsistent. In paragraph 53, the Commissioner in effect adopts the view that 'provides' means to make available (as opposed to actual provision). In paragraph 56, the Commissioner says that to make meals available is not sufficient. The position cannot be reconciled. 'Provide' means either to make available or to actually provide. Given this is intended to be a concession, in our view the Commissioner should adopt the former view.	We consider that the term 'daily meals' in paragraph 38-25(3A)(b) is a reference to a resident's daily meal requirements rather than being a reference to more than one meal per day being provided to a resident. This is consistent with paragraph 1.12 of the Explanatory Memorandum to the Tax Laws Amendment (Retirement Villages) Bill 2004 which states: 1.12 A serviced apartment resident might enter into arrangements for the retirement village operator to supply them with breakfast each day but the resident may cook their own lunch and dinner. This would not be considered to the provision of daily meals, it would normally be expected that the retirement village operator would supply all of the daily meals for the resident. This test would also be met if, in addition to providing lunch and dinner, provisions for breakfast were also supplied by the operator. Paragraphs 53 to 55 of the Ruling have been revised to explain that because of periods of temporary absence from the retirement village, or subject to medical needs and religious or cultural observance, there may be times when meals are not actually provided to a resident. Paragraph 55 of the Ruling explains that, in these cases, the 'daily meals' requirement will still be satisfied if there is an ongoing obligation under a written agreement for the operator to provide the resident's daily meals. Paragraph 53 of the Ruling has also been revised to explain that the 'daily meals' requirement will be satisfied in cases where the operator provides meals of adequate variety, quality and quantity for each resident of the serviced apartment, served each day at times generally acceptable to both residents and management, and which will generally consist of three meals per day plus morning tea, afternoon tea and supper. This is consistent with item 1.10 of Schedule 1 to the Minister's Determination[*] referred to in paragraph 38-25(3)(b).

[*] GST-free supply (Residential Care - Non-Government-Funded Supplier) Determination 2000 ('the Minister's Determination').

Issue No.	Issue raised	ATO Response/Action taken
5	**Package of services** Sections 4 and 5 of the *GST-free Supply (Residential Care — Non-Government-Funded Supplier) Determination 2000* determine that for services to be covered by section 38-25 they must be supplied under a written agreement with the supplier as a package made up of the services mentioned in item 2.1 or item 3.8 of Schedule 1, other services mentioned in Schedule 1 that are needed by the care recipient, and accommodation. In paragraph 74 of the draft Ruling, the Commissioner requires the written agreement to stipulate the *specific package* of services to be provided. No such requirement appears in the legislation or the Determination. The Determination merely requires that 'the services are supplied, under a written agreement with the supplier, as a package of ... 'that is, it is enough for the services to be supplied under the agreement, and it is not necessary for the services to be specified.' Contrary to what the Commissioner says in the second sentence, a general provision in the written agreement would be sufficient to satisfy the Determination.	References to a 'specific' package of services have been removed from the ruling. However, as explained at paragraph 80 of the Ruling, in accordance with item 5 of the Minister's determination, there must be a written agreement under which an operator is obligated to supply a package of item 2.1 or item 3.8 services and other Schedule 1 services that are appropriate to the care needs of the recipient.