GSTR 2012/5EC - Compendium

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Ruling Compendium – GSTR 2012/5

This is a compendium of responses to the issues raised by external parties to draft GSTR 2011/D2 and draft GSTR 2012/D1 – *Goods and services tax: residential premises and commercial residential premises* that are applicable to GSTR 2012/5 *Goods and services tax: residential premises.*

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

Any legislative references are to *A New Tax System (Goods and Services tax) Act 1999* unless otherwise indicated. Paragraph or example references under 'issue raised' are to GSTR 2011/D2 or GSTR 2012/D1 as applicable. Paragraph or example references under 'ATO Response/Action taken' are to GSTR 2012/5 unless otherwise indicated. Where the term 'residential premises' is used under 'ATO Response / Action taken', it refers to 'residential premises to be used predominately for residential accommodation' unless otherwise indicated.

Summary of issues raised and responses

GSTR 2011/D2

Issue No.	Issue raised	ATO Response/Action taken
D2 1.1	**Physical characteristics** The Draft Ruling begins with the statement in paragraph 6 that the requirement in sections 40-35, 40-65 and 40-70 that premises are residential premises to be used predominantly for residential accommodation is to be interpreted 'as a single test' that looks to the 'characteristics' of the property. In doing so, the Draft Ruling ignores various aspects of those sections which are important for a proper understanding of how the provisions work, for example, the definition of residential premises which is incorporated in each of those provisions and, in addition, issues surrounding apportionment.	A discussion on the definition of residential premises has been added to the Ruling – see paragraphs 6 - 8 and 61 - 64.
D2	**Physical characteristics**	

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1.2	The Draft Ruling should make it clear what are 'the characteristics of the property' that are referred to in the suggested single test as stated in paragraph 6. The comment identified wording within paragraphs 6 and 7 which created confusion concerning the expressed view.	The Ruling has been updated to clarify that it is the physical characteristics of the premises which is relevant in determining whether the premises are residential premises – see paragraphs 9 - 13 and 65 - 73.
D2 1.3	**Physical Characteristics** It was submitted that the approach taken in the draft Ruling focused only on the physical characteristics of a premises, rather than also considering objective evidence to determine 'use' of the premises, and that this was inconsistent with observations made by Jessup J in the Full Federal Court's decision in *Sunchen Pty Ltd v. Federal Commissioner of Taxation* [2010] FCAFC 138 (*Sunchen*). It was submitted that objective evidence could include the following: • what else is being supplied by the same entity at the same premises (for example other leases of strata-titled apartments); • council zoning (which is referred to in Example one, paragraph 9); • occupancy permit/certificate; • agreement for lease; • lease; • business plan; • finance applications. With respect to paragraphs 8 and 128, it was queried	The Commissioner considers that the Full Federal Court decisions in *Marana Holdings v. Commissioner of Taxation* [2004] FCFCA 307 (*Marana)* and *Sunchen* support the view that it is the physical characteristics of the premises which are relevant in determining whether the premises is residential premises. The joint decision in *Sunchen,* which is discussed at paragraphs 66 - 70 of the Ruling, did not adopt the same reasoning as Jessup J. However, where it is doubtful whether premises are residential premises to be used predominantly for residential accommodation, design or construction documents (such as architectural plans) may assist in characterising the premises (see paragraph 35 of the Ruling). The other forms of evidence referred to in the submission are not sufficiently connected to the premises' physical characteristics to be relevant in characterising the premises as residential premises.

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	as to why there should be limited circumstances where the premises' physical characteristics do not conclusively demonstrate suitability for occupation as a residence or for residential accommodation? The word 'limited' should be deleted as the physical characteristics of the premises either do or don't conclusively demonstrate suitability for occupation.	The reference to 'limited circumstances' has not been retained in the Ruling.
D2 1.4	**Physical characteristics** The Draft Ruling has replaced the tests described in *Marana* and *Sunchen*, in the broad terms of 'attributes', 'character' and 'characteristics' with a test based on the narrower term of 'physical characteristics'. Terms such as 'attributes', 'character' and 'characteristics' can include things in addition to physical characteristics. For example, the Draft Ruling does not address any other objective factors relevant to the character of the property – for example. zoning, neighbouring properties/environment, how the property is marketed for sale/lease etcetera as per the decision of Jessup J in *Sunchen*. The *Marana* decision is not sufficiently all encompassing that these objective factors are not relevant.	See response to comment D2 1.3.
D2 1.5	**Physical characteristics** The ATO's approach (confined to physical characteristics on their own) is not supported by the decision in *Sunchen*. The consideration of physical characteristics and other objective factors including usage is the correct approach endorsed by *Sunchen*. Specifically, the Full Court made reference to the fact	We consider that the views expressed in the ruling are supported by the *Sunchen* decision. The Ruling specifically considers the reference to 'actual use' within the joint decision of *Sunchen* at paragraphs 68 to 70 of the Ruling. The reference to 'the nature of the premises' within the DIS for the *Sunchen* decision should be read as referring

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	that actual use may be relevant and illustrative of a property's character. The submission queried why the decision impact statement (DIS) for the *Sunchen* decision referred to 'the nature of the premises' whereas the Draft Ruling referred to the 'characteristics' of the property. The submission inferred from the *Sunchen* decision that the use of a property is a factor relevant to its 'nature' (per the DIS) or to the 'characteristics' of the property (per paragraph 6).	to the physical characteristics of the premises.
D2 1.6	**Physical characteristics** Paragraph 15 states that if it is clear from the physical characteristics of the premises that any suitability for living accommodation is ancillary to the premises' prevailing function, the premises are not residential premises to be used predominantly for residential accommodation. This statement highlights the ATO's inconsistent approach to determining the 'nature' or 'characteristics' of premises. This is because when it comes to looking at other premises and whether they are residential premises to be used predominantly for residential accommodation, the ATO resorts to examining the prevailing function of the premises, which requires an examination of the usage to which the premises are put. The submission put forward the view that this is precisely what Jessup J was referring to in *Sunchen* but which the ATO has ignored in the Draft Ruling.	We do not consider that there is an inconsistency with approach as it is the premises' physical characteristics that determine whether the provision of living accommodation is ancillary to the premises' prevailing function.
D2 2.1	**Suitability/capability** Paragraphs 13 and 135 of the Draft Ruling state that a	We note that the Full Federal Court observed in the

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	partially built building is not residential premises until the premises are 'suitable' for human habitation. It was submitted that, in general, there is some erroneous inter-changing of the terms 'suitable' and 'capable' in the Draft Ruling. 'Suitability' is not referred to in the legislation, but was a term used in the *Marana* and *Sunchen* decisions when referring to the 'is intended to be occupied' part of the section 195-1 definition of residential premises and the 'to be used' part of sections 40-65 and 40-70 focusing on how the premises were designed, built or modified (the objective test which the ATO says just looks at the physical characteristics). 'Capable' is, however, actually used in the section 195-1 definition of residential premises in paragraph (b) for premises that are not being occupied at the time of the supply. It not only must be intended to be occupied (that is, suitable) but it must also be capable of being occupied. 'Capable' is a further requirement and is a broader term covering more than just the element of shelter and basic living facilities and the physical condition of the premises.	*Marana* decision at [62] that the suitability for occupation as a residence or for residential accommodation may overlap with the further requirement that the premises be capable of such use – see paragraph 63 of the Ruling. The Ruling has been updated to refer to both 'suitable' and 'capable' where appropriate.
D2 2.2	**Suitability/capability** The comment at paragraphs 13 and 135 of the Draft Ruling that contractual or legal prohibitions do not prevent premises from being suitable for residential accommodation might be correct although it was queried whether, if suitable means 'fitted for use', premises could ever be suitable for residential accommodation if such contractual or legal	See the response to comment D2 1.3. We consider that it is the physical characteristics of the premises which determine whether the premises are capable of being occupied as a residence or for residential accommodation (regardless of the term of the occupation or intended occupation).

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	prohibitions exist. However, even if they are 'suitable' for occupation as a residence or for residential accommodation, they are not legally 'capable' of being occupied as a residence or for residential accommodation. They are not then residential premises within section 195-1. It is recommended that the appropriate use of the words 'suitable' or 'suitability' in the Draft Ruling should be reviewed.	
D2 2.3	**Suitability/capability** If paragraph 13 is intended to rule that contractual or legal prohibitions are not relevant in determining whether land and buildings are intended to be occupied and to be used predominantly for residential accommodation, or capable of being so occupied, it should be reconsidered. Also, it appears that the ATO takes a different view in relation to such matters when it comes to determining whether premises are commercial residential premises without explaining this position.	See the response to comment D2 1.3. The statutory test contained in section 40-35 differs to the statutory test as to whether premises are commercial residential premises. The use of premises is a relevant factor in determining whether premises fall within the definition of commercial residential premises – that is, whether they are, or are sufficiently similar to, a hotel, motel, inn, hostel, or boarding house. See GSTR 2012/6 *Goods and services tax: commercial residential premises*.
D2 2.4	**Suitability/capability** With respect to the comments under the heading 'Fit for human habitation' (paragraph 13), it was submitted the Draft Ruling should expand the discussion regarding when premises first become capable of occupation as a residence. For example, many councils do not issue occupation certificates any more and only in rare circumstances will they withdraw them. Rather, developers are required to engage	Premises that display physical characteristics evidencing their suitability and capability to provide residential accommodation are residential premises. The Ruling has been updated at paragraphs 20 and 80 to state that an objective consideration of the relevant facts and circumstances determines whether residential premises are fit for human habitation in the sense that they are suitable for and capable of being occupied as a

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	independent certifiers to issue the certificates. There are many buildings around the country where, for whatever reason, occupation certificates were issued before buildings were completed or were fit for occupation. In most cases, councils issue directives to correct defective or incomplete work rather than withdrawing the certificates. In many cases, owners, through their body corporate, have been required to complete work after purchase to ensure that the certificates will not be withdrawn. Given that the issue of an occupation certificate does not provide the level of comfort of occupancy as it did previously, the ATO is encouraged to provide further explanation of the circumstances when premises first become capable of occupation as a residence.	residence or for residential accommodation. Paragraph 81 has been updated to state that an occupancy permit/certificate, a certificate of final inspection, or similar document issued by the relevant authorised person or authority may provide evidence that the premises are fit for human habitation. Example 3 (at paragraphs 23 - 24) has also been inserted in the Ruling to provide further clarification.
D2 2.5	**Suitability/capability** With respect to paragraphs 13 and 134, the Draft Ruling provides 'residential premises in a temporary state of disrepair remain residential premises'. Obviously there will be different states of disrepair - should this statement be prefixed by the words 'based on the facts and circumstances prevailing at the time'? With respect to paragraphs 13, 135 and 136, the submission considered the following two statements made in these paragraphs conflict with each other: • 'A partially built building is not residential premises until it becomes fit for human habitation' • 'Contractual or legal prohibitions against	Paragraphs 20 and 80 of the Ruling have been updated to state that an objective consideration of the relevant facts and circumstances determines whether residential premises are fit for human habitation. The view expressed is that it is the physical characteristics of the premises which determine whether the premises are suitable for, and capable of providing residential accommodation. An occupancy permit/certificate, a certificate of final inspection, or similar document issued by the relevant authorised person or authority may evidence that the premises are fit for human habitation (see paragraph 81 of the Ruling).

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	residential occupation do not prevent premises from being suitable to provide residential accommodation.' The first statement infers that an occupancy certificate/permit needs to be issued by the relevant authority before the premises can become fit for human habitation. Paragraph 135 supports this point. However, the second statement indicates the opposite. That is, premises can be suitable for residential accommodation notwithstanding a legal prohibition which it is suggested would include the absence of an occupancy certificate/permit. It is suggested that you may need to clarify what is a contractual and/or legal prohibition.	
D23	Should the phrase 'when viewed as a whole' be inserted in the third line of paragraph 15 after the words 'the physical characteristics of the premises'?	We do not consider that the suggested change is necessary.
D24	There are some inconsistencies and inaccuracies in paragraph 143 in relation to the policy for input taxing residential premises. The ATO states that those renting a house, flat or home are on the same footing as persons that own their own homes; neither is to bear the cost of GST in connection with such occupation. However, it is not technically correct to say that such persons do not bear any GST in connection with such an occupation. Home owners will bear GST on maintenance and other costs associated with ownership. Renters may also indirectly bear such	This general statement of policy is sourced from paragraphs 5.164 to 5.168 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998 and was referenced by the Full Federal Court in *Marana* – see footnote 36 in paragraph 87.

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	GST costs in the rental paid. Further, the statement that premises such as a factory that is being used as residential accommodation will not be treated as residential accommodation is also inconsistent with this policy expressed. It would be expected that, based on this policy informing the interpretation of the legislation, any type of premises being occupied as a residence would be treated as residential premises, even if the structure itself is non-residential as the policy says nothing about the physical characteristics of the premises. It was observed that the legislation may not provide for such an outcome, if references are made to the policy behind input taxing, this must be followed through to the scenario where an individual lives in a factory or office. What happens if such an individual was living in a factory or office under a residential tenancy agreement?	The Ruling has been updated to address this issue – see paragraph 11.
D2 5.1	**Apportionment** (a) *Commercial and residential premises* A common property type is a ground floor shop with premises originally designed to be residential on the first floor. The ATO's default position appears to be that apportionment is required because a sale or lease will be a mixed supply. It is our view that in some, perhaps many, cases the supply of the residential component, no matter how valuable it might appear in its own right, is in fact ancillary or subsidiary to the	We do not agree that the residential section of the premises is ancillary or subsidiary to the supply of the commercial section of the premises. We consider the appropriate treatment is that set out in paragraph 90 of the Ruling. We note that this position is consistent with paragraph 5.164 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

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	supply of commercial premises below it. (b) *Garage* Paragraph 14 states that there is no requirement to apportion a garage but paragraph 145 suggests that an apportionment would be required if part of a premises was for a shop. The Draft Ruling should explain the distinction between these examples.	The discussion in paragraph 16 of the Ruling has been expanded to set out the reasoning as why a garage, car-parking space, or storage area is ancillary or incidental to the dominant component of the supply being the residential apartment.
D2 5.2	**Apportionment** I think you need to do a little bit more on the problem arising from the terms 'to the extent' and 'principally' in the one section. Is a single supply, of a single title, with a single building, which comprises shop/flat areas that are 49%/51% - seems principally residential to me (even though the shop of 49% is on ground level and flat 51% is upstairs). How do you justify splitting it into 2 effective supplies?	We consider the appropriate treatment is that set out in paragraph 90 of the Ruling. We note that this position is consistent with paragraph 5.164 of the Explanatory memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.
D2 6	Either in the Draft Ruling or in GSTR 2003/3, further guidance needs to be given to the question at what point does a conversion or other renovations cause a building to 'change in character' from being commercial/industrial to residential premises. That may help determine when the rental of former commercial premises becomes a section 40-35 input taxed residential supply. Similar, albeit more complex issues, arise for where there is a 'change in ownership' of premises as in the *South Steyne Hotel Pty Ltd v. FCT* 180 FCR 409 (*South Steyne*). Further guidance should be provided as to when a change in ownership results in different GST outcomes.	The determining factor is whether the physical characteristics of the premises evidence that the premises is suitable for, and capable of, providing residential accommodation. The Ruling is not able to provide a checklist of physical characteristics. The individual circumstances of each case need to be considered. The ATO has issued GSTD 2012/1 *Goods and services tax: what are the goods and services tax consequences following the sale of residential premises that are subject to a lease?* which sets out the Commissioner's views on the GST consequences following the sale of residential

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		premises that are subject to a lease.
D2 7	As paragraph 137 does not have an equivalent paragraph in the binding section of the Draft Ruling it may be better placed in the discussion on the relationship between residential premises and commercial residential premises in paragraphs 156 – 165.	Agreed - paragraph 8 of the Ruling has been inserted to refer to this interpretation within the Ruling section.
D2 8.1	**Garage/car parking** It was recommended that the binding section of the ruling (paragraph 14) addresses the scenario where a garage/car park is contained on a separate title to the premises which is elaborated on in the non-binding section of the ruling (paragraphs 138-139). Further, the ruling should ideally also confirm that the analysis set out in those paragraphs will also apply where the garage/car park is supplied under a separate (but related) document to the document under which the residential premises is supplied. This will help clarify the ATO's view of how the GST law applies in this situation.	Paragraphs 15 to 19 and 78 to 79 of the Ruling have been updated to clarify the view when a garage or car-parking space is separately titled to the residential premises. A supply of a garage or car-parking space that is supplied separately from the supply of a residential unit is not a supply of residential premises.
D2 8.2	**Garage/car parking** Paragraphs 14 and 139 should also refer to storage areas which in some developments can be separate from the apartment itself. Like the garage/car-parking scenario the storage area may or may not be on the same title as the residential accommodation.	Agreed – paragraphs 15 to 17 and 78 to 79 have been updated to refer to storage areas.
D2	**Examples**	

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9.1	In Example 1, it would be easy to conjure up a situation in which John's supply was actually taxable, but more usefully the example here (and elsewhere) could more informatively say that it is not a taxable supply rather than describe it as 'input taxed'.	We consider that referring to the supply in Example 1 (paragraphs 12 – 13) of the Ruling as an input taxed supply under section 40-65 of the *A New Tax System (Goods and Services Tax) Act 1999* provides guidance.
D2 9.2	**Examples** It was submitted that in Example Two (paragraph 17), crucially, the office building has no sleeping facilities essential to 'residential premises'. It was submitted that in Example Three, it can be argued that a hospital is intended and capable of being occupied for residential accommodation because it is being occupied by humans for residential accommodation, and therefore a hospital is residential premises, but its sale would be a taxable supply because it is not 'residential premises to be used predominantly for residential accommodation'. Its predominant use is for purposes other than residential accommodation, as confirmed by paragraphs 20 to 24. Supplies of accommodation in hospitals, retirement villages, charitable hostels and schools are specifically not taxable (being tax-free), and this suggests that they are residential premises capable of being used for residential accommodation, which is what the definition of residential premises requires.	Even though sleeping facilities (for example, a pull-out couch) may be used within the office, it is the physical characteristics of the premises which evidence that the premises are not residential premises to be used predominantly for residential accommodation. We consider that the physical characteristics of a hospital evidence that it is not residential premises to be used predominantly for residential accommodation.
D2 9.3	**Examples** Examples 5 and 6 (paragraphs 26-30) need to be introduced with some more detailed preamble giving	The purpose of Example 8 (paragraphs 41 - 43) of the Ruling is to illustrate that residential premises are able to

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	principles for which the examples are merely illustrative. Reference was made to Example 5 of the Draft Ruling and the comments above regarding the test as endorsed by the Full Court in *Sunchen*. It was submitted that the objective physical characteristics of the property in this example cannot be determinative of the GST treatment of the property and the actual use in this case is relevant. While it is stated that significant modifications have been undertaken, the property would objectively still be a house and, therefore, it has been the use of the property that has influenced the outcome on the GST treatment (which is considered to be the correct application of *Sunchen* but not consistent with the approach as contained in the Draft Ruling). What are the critical physical characteristics that determine treatment? Would an architect's office in a house with a waiting room, car park and meeting room be different to the doctor's office in Example 5? Would the absence of hygiene facilities make a difference? It was submitted that the default position in the business community is to treat leases and sales of the entirety of houses used for business premises as taxable (see Example 6). The submission was not convinced that a Court would treat a building as residential premises where it is located in a business district, zoned to allow business use, owned by a business, leased to and occupied by a business and sold to a business just because it looks like a house. Even where the building had elements of shelter and basic living facilities, it has objective attributes of	be modified so that part of the premises ceases to be residential premises. As noted at paragraph 72 of the Ruling, the reference in *Marana* to premises being modified recognises that the physical characteristics of premises may be altered after the time when the premises are first designed and built. In each case it is necessary to determine the suitability for, and capability of, the premises to be occupied as a residence or for residential accommodation by reference to their physical characteristics at the time the relevant supply is made. The Ruling is not able to set out a checklist of physical characteristics to be considered. The specific facts of each situation need to be considered. We consider this position to be consistent with the Full Federal Court decisions in *Marana* and *Sunchen*.

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	commercial premises. The submission was sceptical as to whether anyone will undertake the apportionment exercise that the ATO has suggested in Example 5. On the contrary, the dedication of some rooms in houses as being for business purposes is treated as input taxed (and no apportionment is undertaken as suggested in Example 5).	
D2 9.4	**Examples** In the context of Examples 6 and 7: 1. The use of the phrase 'commercial part' in paragraph 27, could be misleading due to the definition of 'commercial residential premises' in the Act. The business use of the residence is not a defined item under the definition, 'commercial residential premises'. The terminology appears to suggest that the rooms excluded from input taxed treatment are commercial premises. Perhaps other wording should be used to avoid confusion. The division of part residential and part not residential appears to be at odds with the *Sunchen* principle. 2. The emphasis in the paragraphs is on the use. This appears contrary to the *Sunchen* principle. The rooms, which were changed in paragraph 26 of the example, may still have characteristics suitable for residential use. The room used as an operating theatre may become a home theatre room should the premises revert to a residence. It appears that the basic presumption should be that once used as a residence, it is always capable of being a residence.	Example 8 (paragraphs 41 - 43) of the Ruling has been updated and no longer refers to the 'commercial part'. The example illustrates that the physical characteristics of the premises can be modified so as to no longer characterise that part of the premises as residential premises to be used predominantly for residential accommodation. We consider that this position is consistent with the Full Federal Court decisions in *Marana* and *Sunchen*.

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	3. The draft ruling appears to introduce a new concept that if the modifications are substantial then the property is no longer a residential premises. I believe that this requirement, which I call 'substantiality of modification', is not a requirement in the legislation to determine if the residence is to be used predominantly for residential purposes. 4. It appears that the basic presumption should be that once used as a residence, it is always capable of being a residence and therefore treated as input taxed.	
D2 9.5	**Examples** With regard to paragraphs 29 and 30 (Example 6), this example is not very convincing, especially coming after the example of dealing with apportionment. If Rebecca sets aside and fits out a part of her house as an office and gets a council DA to run a business from home and charges GST for her legal services and then sells the house with the DA in place, I would look for apportionment as the premises have been used in an enterprise. It is only 'to the extent that the property is residential premises to be used predominantly for residential accommodation' that part of the sale could escape being a taxable supply. What would you say if Rebecca (sub-) leased the front room to another solicitor? I would call it residential premises, but not	We consider that the outcome in Example 9 (paragraphs 44 - 45) of the Ruling is consistent with the Full Federal Court decision in *Sunchen*. The physical characteristics of the terrace house evidence that it is residential premises to be used predominantly for residential accommodation.

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	used predominantly for residential accommodation.	
D2 9.6	**Examples** Example 7 (paragraphs 32 - 35) is concerned with residential premises supplied with farmland. It addresses an 80 hectare parcel where 77 hectares are used in a farming enterprise, the 3 hectares are fenced off as a residential homestead. Is the treatment of the farmland in the example based solely on its physical characteristics as land for farming or is it treated in that way because it is land on which a GST registered farming enterprise is carried on? The example may need to be made clearer to address or distinguish differences where a GST registered farmer sells a farm house and a 'Pitt Street farmer' sells a hobby farm. It was also noted that Example 7 of the Draft Ruling apparently contradicts GSTA TPP 092 which continues to be a public ruling after the indirect tax rulings regime changes from 1 July 2010. In that public ruling, the ATO relevantly states as follows: '...if the residence is used as part of the farming enterprise of the supplier, then the supply of the residence forms part of the GST-free supply of the going concern.... In these circumstances, an adjustment is not required under Division 135 if the going concern is a faming business and the residence forms part of land that has the essential characteristics of farmland...'	The Ruling sets out the view at paragraph 46 that a relevant factor in determining the extent to which land forms part of residential premises is the extent to which the physical characteristics of the land and building as a whole indicate that the land is to be enjoyed in conjunction with the residential building. The example concerning residential premises supplied with farmland has not been retained in the Ruling. The application of Division 135 is outside the scope of the Ruling. Taxpayers are able to rely upon the views set out in GSTA TPP 092.

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	In other words, despite the house having the physical characteristics of a residence, the fact that it is used as part of the farming business means that it is not an input taxed supply and consequently, no Division 135 adjustment is required. The ATO needs to reconcile its approach and explain whether or not apportionment is required.	
D2 9.7	**Examples** With regard to paragraph 34 (Example 7), if Bob has a nine hole golf course, or a horse riding paddock, would all of his non- farm area be residential premises? I would say 'Yes'.	As noted in the response to D2 9.6, the example was not retained in the Ruling.
D2 9.8	**Examples** The split between binding and non-binding examples is confusing. It was recommended that the ruling include an explanation of the difference between binding and non-binding rulings and how that works practically. An example of a non-binding example is contained in paragraphs 138 –139 of the ruling dealing with supplies of garages/car parking.	The preamble to the Ruling explains the level of protection that is provided with respect to the publication. The preamble to the Ruling explains the level of protection that is provided with respect to the publication. The preamble to Appendix 1 (Explanation) refers to the Appendix as providing information to help you understand how the Commissioner's view has been reached. Agreed – Example 2 at paragraphs 18 and 19 of the Ruling has been inserted to include this example into the ruling section.
D2	**Vacant land**	

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10	With respect to paragraph 36, if residential premises means 'land or a building' and commercial residential premises includes 'a camping ground', then I think that vacant land can be residential premises as defined but it cannot on supply be used predominantly for residential accommodation and therefore its supply is taxable. The Act says that residential premises means land or a building, and subdivided farmland is 'potential residential land'. A camping ground out of season looks like vacant land. *Vidler v. FC of T* [2010] FCFC 59 *(Vidler)*, concludes that vacant land cannot be residential premises entitled to input taxation. Yet vacant land can be commercial residential premises in the form of caravan parks and camping grounds.	The Full Federal Court in *Vidler* supports the view expressed in paragraphs 47 and 92 that vacant land cannot be residential premises.

GSTR 2012/D1

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D1 1	The Draft Ruling discusses what happens when residential premises are actually used for commercial purposes but it fails to address in detail where premises that are not residential in nature are actually occupied as a residence. The Draft Ruling confirms that premises will meet the first limb of the residential premises definition if they are occupied as a residence or for residential accommodation. It was considered that the squatter example is largely irrelevant, because squatters don't pay rent. It was requested that a more realistic and practical example be included, such as where, despite council regulations, a residential tenant occupies an old shop and uses it for residential accommodation. While such use would satisfy the first limb, unlike the squatter, rent is being collected and so there is a supply for consideration. Is the rent subject to GST (assuming the other elements of section 9-5 are satisfied)? It is assumed it is because the shop is not objectively to be used predominantly for residential accommodation, despite its actual use. Therefore the rent is not consideration for an input taxed supply of residential premises to be used predominantly for residential accommodation.	Example 7 at paragraphs 36 to 39 of the Ruling has been added to address the scenario of a person occupying premises designed as a shop as a residence.
D1 2	Whether or not premises are habitable is an important issue as it determines the timing at which an unoccupied premise will become residential premises or cease being residential premises	The Ruling has been updated at paragraph 20 and 80 to state that an objective consideration of the relevant facts and circumstances determines whether residential premises are fit for human habitation.

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	(paragraphs 153 - 155). However, little guidance is given in determining habitability, other than the existence of an occupancy certificate at one end and demolition order at the other. Otherwise, it is left as a potentially subjective matter. It was requested that a statement be provided as to the ATO-approved test and preferably some guidelines for applying it. Whether it is a 'reasonable person' test or the test has a low threshold for habitability, the ruling needs to set out a test or tests. It was submitted that the existence of a demolition order should not be the only test.	Example 3 at paragraphs 23 to 24 of the Ruling has been added to demonstrate the objective consideration of the relevant facts and circumstances for whether premises that have been subject to damage from natural elements remain residential premises.
D13	The Draft Ruling indicates that the ATO will accept that a separately titled garage, car parking space, etc can form part of a supply of 'residential premises' (and hence may be input taxed). However, this view would only appear to apply where the separately titled car park, garage etcetera is supplied at the same time as the residential premises. There are instances where a separately titled garage, car park etcetera may be supplied at a later point of time, and under a separate document, to the main body of the residential premises. An example may be where a retirement village operator supplies accommodation to residents in independent living units (ILUs). As an optional extra, the resident can also apply, at any time, for a separate car parking space that is separately supplied by the same operator. In the above example, the supply of the car parking	We do not consider that a supply of a separately titled garage, car-parking space, or storage area that is made separately to the supply of residential premises can be characterised as part of the separate supply of residential premises. A garage, car parking space or storage area is not, by itself, residential premises but can form part of a supply of residential premises. This is clarified at paragraphs 16 to 19 and 78 to 79 of the Ruling.

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	space should be input taxed, irrespective of when the resident applies for the car parking space because it is still incidental to the lease of the ILU. It would seem an odd result if the supply of the parking space may be input taxed if it is provided together with the ILU from the outset, but that the supply of the same parking space may be taxable if the resident applies for the space later having already moved into the ILU.	
D14	It was submitted that clearer principles need to be stated as to when to apportion the supply of residential premises and when to combine ancillary or incidental premises. The submission agreed with the analysis at paragraph 17 regarding the supply of a separately titled garage as having the same GST treatment as the residential premises when it is an ancillary component of a supply of residential premises. It was acknowledged that the 'to the extent' wording of sections 40-35 and 40-65 means that some apportionment may be required on the supply of premises to the extent that part of the premises is not to be used for residential accommodation (that is, the discussion at paragraphs 29 to 34). As you will be aware, the original Explanatory Memorandum specifically used an example of 'a flat on top of a shop' to illustrate when such apportionment would be required (EM, paragraph 5.164). However, it was thought that some principles	It is a question of degree as to when physical modifications will result in premises ceasing, either in whole or part, to be residential premises. We agree that making minor modifications to adapt a bedroom into a waiting room, office or meeting room will typically not change the character of the room from being residential premises.

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	are required in the ruling to determine if and when apportionment may be required apart from such an obvious example. As noted in our earlier submission, it is our experience that apportionment of residential premises would not be expected to be undertaken unless there have been very significant physical modifications to a house. Example 5 dealing with modifying a house to include an operating theatre as well as a consulting room, office, waiting room and storage is likely to be the minimum physical modifications required before apportionment is necessary. In contrast, modifications merely to turn a bedroom into a waiting room, office or meeting room would not, in our view, be considered significant enough compared to the physical characteristics of rooms in normal houses. A farm and farm house example is provided at paragraphs 35 to 41 but there is no explanation as to why apportionment is required. Why isn't it treated as a single supply of what is overall a 'farm' where no apportionment is required. Where the value of the farm house is a minor part of the contract price why is apportionment needed? The ruling should explain this. It was suggested that stronger principles be provided in the ruling in relation to when things such as separately titled garages are considered ancillary and have the same GST treatment as the sale of the residential premises (or houses on farms) in contrast	The example concerning residential premises supplied with farmland has not been retained in the Ruling. We do not agree that a supply of a farm including a farm house is a composite supply. We consider that, applying the principles set out in GSTR 2001/8 *Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts*, the supply of a farm including a farm house is a mixed supply (assuming that the supply is not GST-free under either Subdivision 38-J or Subdivision 38-O).

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	to when parts of residential premises are so significantly modified so as to require separate apportionment. For completeness, it was noted that the Commissioner has just published a large addendum to GSTR 2001/8 on mixed supplies, composite supplies and apportionment post-*Luxottica* and *Food Supplier*. The final should demonstrate how the views expressed in the draft ruling accord with the views expressed in revised GSTR 2001/8.	Paragraphs 16 and 78 have been updated to include further explanation as to when a garage, car-parking space or storage area forms part of a composite supply of residential premises.
D15	The Draft Ruling requires taxpayers to distinguish between residential premises that have been completely converted, residential premises that have been temporarily converted and residential premises that have been partially converted. As the distinctions are important in classifying supplies (and in deciding if Division 135 applies to a subsequent purchase), the ATO was requested to include broad guidelines, acknowledging that each case is ultimately to be decided according to its own facts. It was noted that paragraph 31 discusses the result of converting residential premises partly for business use as impacting the GST treatment on a subsequent sale or lease of the premises. However there is no direct analysis or commentary on the impact on an existing supply of leased premises of a change in the status of the premises during the lease.	Determining whether the character of a supply can change over time has broader application to the issues considered in this Ruling and has not been addressed within the scope of the Ruling.

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	For example, if Shannon in Example 5 had been leasing her house from a GST registered landlord at the time the modifications were made, would the lease of the residential premises become partly taxable from the point in time in which the modifications were finished (or indeed, when they were commenced, on the basis that from that point in time they could not objectively be used for residential premises). A common scenario that can arise is the lease of vacant land on which a house is subsequently built. The Draft Ruling appears to suggest that supplies under such a lease would be taxable until the residential premises are occupied or capable of occupation. It is suggested that the principles underpinning the GST impact of such a change in status should be set out in the ruling and an example included.	
D16	While the Draft Ruling clarifies the treatment of residential premises it also entrenches an absence of competitive neutrality when the entire impact of GST is considered. Two examples follow below: • where a fully taxable commercial business acquires new residential premises for use as business premises, it can claim full input tax credits. Similarly, it can claim credits for repairs and improvements to the premises. By contrast, a property trust that acquires the	The comment concerning the absence of competitive neutrality raises issues on matters of policy rather than the interpretation of the statutory provisions. We consider that the views expressed in the Ruling can be applied to the examples set out in the submission.

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	premises for lease to that business cannot claim GST credits as its rental supplies are input taxed. GST necessarily becomes embedded in the property trust's cost base and/or is partially passed on to the business tenant in the form of higher rental for which credits cannot be claimed • a GST registered home builder who constructs a display home, holds it for six years then sells it will be subject to GST on the sale. It has not used the premises to make input taxed supplies of residential accommodation. By contrast, if that property were leased to another entity for use as a display home and sold six years later, it would be input taxed per section 40-65. Previous submissions have raised the anomalies associated with business use of residential premises for business purposes. If the ATO does not believe this ruling is a vehicle for its views on these entrenched anomalies, it was suggested that another product be considered to clarify those views.	
D17	With respect to paragraph 145, design and construction documents, such as architectural plans, are unlikely to assist in those 'limited circumstances where the premises' physical characteristics do not conclusively demonstrate their suitability for occupation as a residence or for residential accommodation'. It was suggested that this paragraph be amended to	Paragraphs 35 and 88 of the Ruling refer to design or construction documents, such as architectural plans, as these documents have an objective link to the premises' physical characteristics.

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	read: 'In limited circumstances where the premises' physical characteristics do not conclusively demonstrate their suitability for occupation as a residence or for residential accommodation, **objective factors such as** design or construction documents **and** architectural plans may evidence whether the premises are suitable for...'	
D18	Suggest paragraph 154 is changed to include the phrase 'at the time of supply' in the last sentence of this paragraph – to read: '... whether the physical characteristics of the premises demonstrate that, **at the time of supply**, the premises are suitable for, and capable of, being occupied as residential premises.'	Paragraph 81 of GSTR 2012/5 has not been amended for this suggestion as the sentence already has a condition that '… the premises are supplied'.
D19	With respect to paragraph 28 – I would find it more informative to say 'the facility is residential premises but its use is not predominantly for residential accommodation.' With respect to paragraph 42 – the first sentence is sufficient for GST purposes. The second sentence is unnecessary and inconsistent with the Act.	Example 6 (paragraphs 30 - 34) of the Ruling, which incorporates the sentence referred to in the comment (paragraph 34), has not been amended as the expression 'residential premises to be used predominantly for residential accommodation' is to be interpreted as a single test that looks to the physical characteristics of the property (see paragraph 9). The second sentence (paragraph 47) is a conclusion that vacant land by itself does not satisfy the definition of 'residential

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		premises'. This position is consistent with the decision in *Vidler v. Federal Commissioner of Taxation* [2010] FCAFC 59 at (38).
D1 10	The ruling is over 82 pages, it is complex and difficult to understand.	GSTR 2012/D1 has been broken up into four products: • GSTR 2012/5 *Goods and services tax: residential premises*; • GSTR 2012/6 *Goods and services tax: commercial residential premises*; • GSTR 2012/7 *Goods and services tax: long-term accommodation in commercial residential premises*; and • GSTD 2012/11 *Goods and services tax: have new residential premises been used for residential accommodation before 2 December 1998 for the purposes of paragraph 40-65(2)(b) of the A New Tax System (Goods and Services Tax) Act 1999 where the premises were only operated as commercial residential premises before that date?*