GSTR 2009/4DC - Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose

This cover sheet is provided for information only. It does not form part of *GSTR 2009/4DC - Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose*

This document has been finalised by GSTR 2009/4.

There is a Compendium for this document: **GSTR 2009/4EC2** .

Status: **draft for comment**

Draft Goods and Services Tax Ruling

Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose

Relying on this draft Ruling

This is a draft consolidation outlining proposed changes to GSTR 2009/4 to reflect the Administrative Appeals Tribunal's (AAT's) decision in *Domestic Property Developments Pty Ltd as trustee for the Dals Property Trust and Commissioner of Taxation* [2022] AATA 4436. In particular, the updates reflect that the AAT confirmed our view that marketing premises for sale is a 'use' of premises. However, the AAT clarified that the meaning of 'used' and 'applied' should not be interpreted consistently as a matter of course, and that 'used' takes its ordinary meaning. The Addendum which makes these changes, when finalised, will be a public ruling for the purposes of the *Taxation Administration Act 1953*.

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

Table of Contents **Paragraph**

What this draft Ruling is about 1
Date of effect 4
Background 7
Previous Rulings 10
Legislative context 11
Ruling with explanation 23
Determining whether an acquisition made in constructing new residential premises is a creditable acquisition for the purposes of Division 11 23
Example 1 – partly input taxed and partly creditable planned use 26
When is a thing applied in carrying on an entity's enterprise? 30
Determining the extent to which new residential premises have been applied for a creditable purpose 36
Example 2 – premises not held for the purpose of sale as part of an enterprise 42
Demonstrating that new residential premises are being held for sale in an entity's enterprise 44
Partially completed residential property developments 47A
Example 2A – application for a creditable purpose of acquisitions incorporated into partially completed residential premises 47G

Partially completed multi-stage residential property developments 47J

Dual applications of new residential premises 48

Example 3 – dual concurrent applications – new residential premises applied for creditable and non-creditable purposes at the same time 54

Example 3A – dual concurrent application – partially completed multi-stage development comprising residential units being concurrently applied for creditable and non-creditable purposes 57A

Example 4 – consecutive different applications – new residential premises applied for a creditable purpose and then for a non-creditable purpose 58

Example 4A – consecutive different applications – multi-stage development comprising new residential premises that are applied for a creditable purpose and then for a non-creditable purpose 60A

Calculating adjustments under Division 129 61

The meaning of 'the thing' for the purposes of Divisions 11 and 129 62

Example 5 – Division 129 and acquisitions made on a progressive basis 65

How does Division 129 apply with respect to the different types of acquisitions that can relate to the construction, sale and leasing of new residential premises? 67

Example 6 – acquisitions made in constructing new residential premises subject to adjustments 69

Example 7 – adjustments for repairs 72

Example 8 – acquisitions related solely to the creditable purpose of sale 75

Example 9 – overhead acquisitions related to the enterprise as a whole 79

Reasonable method of apportionment 81

Example 10 – output-based indirect method after the premises have been sold 84

Example 11 – premises applied for a creditable purpose, to some extent, for the entire relevant period 92

Example 12 – premises applied for 100% creditable purpose for part of the relevant period, and then subsequently applied for 0% creditable purpose for the remainder of the period 98

Example 13 – premises applied for a creditable purpose, to some extent, for part of the relevant period, and then subsequently applied for 0% creditable purpose for the remainder of the period 103

Apportionment of the extent of creditable purpose of acquisitions relating to a residential unit complex that comprises multiple stratum units 108

Example 14 – multiple stratum units constructed for sale with only some applied partly to a creditable purpose and partly to a non-creditable purpose – acquisitions relating solely to one of the units and acquisitions relating equally to all units 110

Example 15 – multiple stratum units constructed for sale with only one applied partly to a creditable purpose and partly to a non-creditable purpose – acquisition relating to the units in different proportions 116

Application of residential premises to a private or domestic purpose 121

Example 16 – application to a private or domestic purpose 122
Summary of the output-based indirect method 125
Other methods of apportionment 126
Effective life 128
Depreciation 130
Change in projected sale price 131
Interaction between Division 129 and the '5-year rule' in subsection 40-75(2) 132
Alternative view 136
Example 17 – premises applied for the purpose of sale which do not satisfy the requirements of the '5-year rule' 139
Example 18 – premises held for the purpose of sale for a period of time and then used only to make input taxed supplies by way of lease 142
Further example 145
Example 19 – property development where premises are constructed for sale but leased prior to sale – worked example 146
Appendix – Your comments **185**

What this draft Ruling is about

1. This draft Ruling[A1] explains the Commissioner's view of when an adjustment for a change in extent of creditable purpose arises under Division 129 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) in relation to acquisitions made in constructing new residential premises.

2. This Ruling provides guidance on how to determine the extent to which an acquisition made in constructing new residential premises is applied for a creditable purpose where the new residential premises are being held for sale as part of an entity's enterprise, but prior to their sale the new residential premises are leased for a period of time.

3. Unless otherwise stated, all legislative references in this Ruling are to the GST Act.

Date of effect

4. When finalised, this Ruling is proposed to apply to tax periods commencing both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

5. The Commissioner's previous view on the application of Division 129 where an entity constructs new residential premises for sale but subsequently leases the premises was set out in *Property and Construction Industry Partnership – Issues Register – Section 04 – Adjustments for Input Tax Credit Claims* (Issues Register). An entity that has

[A1] For readability, all further references to 'this Ruling' refer to the Ruling as it will read when finalised. Note that this Ruling will not take effect until finalised.

calculated adjustments under Division 129 in relation to a particular acquisition based on the Commissioner's previous view in the Issues Register will be protected in respect to what it has done up to the date of issue of this Ruling. In addition, if an entity has relied on the Commissioner's previous view in the Issues Register to make adjustments under Division 129 with respect to an acquisition, prior to the date of issue of this Ruling, the entity can continue to calculate subsequent adjustments under Division 129 relating to that particular acquisition on the basis of the Commissioner's previous view. Under the previous view, if new residential premises were being leased then the premises were considered to be only being applied in making input taxed supplies even if the premises were also being held for sale. If an entity continues to rely on the previous view, then consistent with this previous view the Commissioner accepts that the premises have also only been used for making input taxed supplies by way of lease for the purposes of subsection 40-75(2), subject to there being any other additional use of the premises.

6. If an entity revises prior adjustments[2] relevant to an acquisition, based upon the views in this Ruling, the entity will also be required to calculate all adjustments arising in relation to that acquisition on that same basis.

Background

7. An entity that is registered or required to be registered for goods and services tax (GST) is liable for the GST payable on the taxable supplies that it makes. An entity is also entitled to input tax credits for creditable acquisitions made in carrying on its enterprise.[3] An entity may also be entitled to an input tax credit for the GST payable on goods it imports in carrying on its enterprise (creditable importations).[4]

8. The amount of the input tax credit to which an entity is entitled depends on the extent to which the acquisition or importation is for a creditable purpose. The Commissioner's view is that the creditable purpose tests in sections 11-15 and 15-10 focus on an entity's intended use of an acquisition[5] or, in other words, an entity's planned use.[6] After an acquisition or importation is made, the extent to which it is actually applied or used for a creditable purpose may be different from the intended use. Adjustments for changes in the extent of creditable purpose are provided for in Division 129.

9. An entity that is registered for GST may construct new residential premises for the purpose of sale as part of an enterprise that the entity is carrying on and would be entitled to input tax credits for the acquisitions relating to the construction of the new residential premises. However, circumstances may arise such that the premises are leased prior to their sale. In such a case, consideration must be given to the application of Division 129. This is because the sale of new residential premises is a taxable supply[7] but the lease of new residential premises is an input taxed supply[8] and an acquisition is not applied for a creditable purpose to the extent that its application relates to making input taxed supplies.[9]

---

[1] [Omitted.]
[2] An entity may not be able to revise adjustments where the relevant tax periods are outside the relevant time limits specified in section 105-55 of Schedule 1 of the *Taxation Administration Act 1953.*
[3] Section 11-20.
[4] Section 15-15.
[5] See paragraph 49 of Goods and Services Tax Ruling GSTR 2008/1 *Goods and services tax: when do you acquire anything or import goods solely or partly for a creditable purpose?*
[6] See, for example, paragraph 17 of Goods and Services Tax Ruling GSTR 2006/4 *Goods and services tax: determining the extent of creditable purpose for claiming input tax credits and for making adjustments for changes in extent of creditable purpose*.
[7] Section 40-65.
[8] Section 40-35.
[9] Section 129-50.

Previous Rulings

10. The Commissioner's previous view on the application of Division 129 to circumstances where an entity constructs new residential premises for sale but subsequently leases the premises was set out in section 4 of the Issues Register. This view was amended with effect from 19 August 2008. This section of the Issues Register has been withdrawn with the publication of this Ruling.

Legislative context

11. An entity is entitled to input tax credits for any creditable acquisition that it makes.[11] An entity makes a creditable acquisition if:

- the entity acquires anything solely or partly for a creditable purpose;
- the supply of the thing to the entity is a taxable supply;
- the entity provides, or is liable to provide, consideration for the supply; and
- the entity is registered or required to be registered.[12]

12. The meaning of 'creditable purpose' is given by section 11-15. Similar provisions apply in relation to creditable importations.[13] However, under the GST Act adjustments may arise for input tax credits to which an entity was previously entitled.

13. An adjustment under Division 129 arises for an acquisition[14] in an adjustment period where:

- there is a difference between the actual application and the planned (or intended) application of the thing for a creditable purpose, or
- there is a difference between the actual application of the thing up to the end of one adjustment period and the actual application of the thing up to the end of the previous adjustment period.[15]

[10] [Omitted.]
[11] Section 11-20.
[12] Section 11-5.
[13] Sections 15-5, 15-10 and 15-15.
[14] Adjustments under Division 129 can also arise in relation to importations. Therefore, for the purposes of this Ruling a reference to an acquisition is equally applicable to an importation.
[15] See paragraph 45 of Goods and Services Tax Ruling GSTR 2000/24 *Goods and services tax: Division 129 – making adjustments for changes in extent of creditable purpose*.

14. Division 129 provides for adjustments in relation to things in tax periods that are adjustment periods.[16] The number of adjustment periods that relate to a thing are determined by the GST-exclusive value of the acquisition. The number of adjustment periods for acquisitions (that do not relate to business finance)[17] are set out in Table 1 of this Ruling:

Table 1: Number of adjustment periods for acquisitions

GST-exclusive value of the acquisition	Adjustment periods
$5,000 or less	2
$5,001 to $499,999	5
$500,000 or more	10

15. However, an adjustment cannot arise under Division 129 for an acquisition (that does not relate to business finance) unless the acquisition had a GST-exclusive value of more than $1,000.

16. Subsection 129-40(1) sets out a method statement for determining whether an entity has an increasing or decreasing adjustment under Division 129. The actual application of a thing is determined in accordance with step 1 of the method statement which requires an entity to work out the extent (if any) to which it has applied the thing acquired for a creditable purpose during the period of time:

(a) starting when the entity acquired the thing; and

(b) ending at the end of the adjustment period.

17. Step 2 of the method statement provides what is the 'intended or former application of the thing'. The intended or former application of a thing is either:

- the planned application for a creditable purpose as at the time the entity acquired the thing (that is the intended application); or
- if there has been a previous adjustment under Division 129 for the thing – the actual application of the thing in respect of the previous adjustment period (that is the former application).[18]

18. Subsection 129-50(1) provides that an entity applies a thing for a creditable purpose to the extent that the entity applies it in carrying on its enterprise. However, subsection 129-50(2) provides that an entity does not apply a thing for a creditable purpose to the extent that the application relates to making supplies that are input taxed or the application is of a private or domestic nature.

19. Subsections 129-50(1) and 129-50(2) include the term 'apply'. The meaning of 'apply' in relation to a thing acquired is set out in section 129-55 as including:

(a) supply the thing; and

(b) consume, dispose of or destroy the thing; and

(c) allow another entity to consume, dispose of or destroy the thing.

[16] The operation of Division 129 including the identification of adjustment periods for an acquisition or importation is discussed in GSTR 2000/24.
[17] 'Relates to business finance' in relation to an acquisition has the meaning given by subsection 129-10(3). Such acquisitions are not addressed in this Ruling.
[18] See paragraph 56 of GSTR 2000/24.

20. In the circumstances considered in this Ruling, the nature of supplies of residential premises and new residential premises is also relevant. A supply of residential premises by way of lease, hire or licence is input taxed if the requirements of section 40-35 are satisfied.[19]

21. Also, a sale of real property is input taxed to the extent that the property is residential premises to be used predominantly for residential accommodation (regardless of the term of occupation).[20] However, the sale is not input taxed to the extent that the residential premises are:

(a) commercial residential premises; or

(b) new residential premises other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998.[21]

22. 'New residential premises' has the meaning given by section 40-75. Given the exception in subsection 40-65(2), a supply of new residential premises is a taxable supply if the requirements of section 9-5 are satisfied.

Ruling with explanation

Determining whether an acquisition made in constructing new residential premises is a creditable acquisition for the purposes of Division 11

23. Prior to an entity considering whether or not it has to make adjustments under Division 129, the entity will have determined its planned extent of creditable purpose for a thing to determine its entitlement to input tax credits under Division 11 for the acquisition of the thing. This planned extent of creditable purpose for which the entity acquired the thing is an important element in determining whether an adjustment subsequently arises under Division 129.

24. If an entity constructs new residential premises and the entity plans, as evidenced by an objective assessment of the facts and circumstances, to only sell those premises by way of a taxable supply as part of its enterprise, the acquisitions made in constructing the premises will be for a creditable purpose.[22] Assuming all of the other requirements in section 11-5 are satisfied, the acquisitions will be creditable acquisitions and the entity will be entitled to input tax credits.[23]

25. Alternatively, if an entity constructs new residential premises for the purpose of sale but intends to lease the premises for a period of time prior to the sale, and an objective assessment of the facts and circumstances supports this dual planned use, the entity's acquisitions will be partly creditable. The entity will therefore be entitled to only a proportion of the full input tax credit.[24]

[19] Throughout this Ruling, all references are to an entity making input taxed supplies by way of lease. However, the Ruling also applies equally if an entity makes input taxed supplies of residential premises by way of hire or licence.
[20] Subsection 40-65(1).
[21] Subsection 40-65(2).
[22] See GSTR 2008/1 for a discussion of the creditable purpose tests in section 11-15.
[23] If, prior to completion of construction, the entity decided to use the premises for residential rental rather than for the purpose of sale, then some of the acquisitions may not be made solely for a creditable purpose. Refer to paragraphs 25 and 29 of this Ruling.
[24] See section 11-30.

Example 1 – partly input taxed and partly creditable planned use

26. *Kim is a property developer. Kim recognises that the market for selling new residential premises has slowed significantly but is expected to pick-up in approximately two years. She decides to build new residential premises for sale as part of her property development enterprise but makes a decision to lease the premises for 2 years in order to allow the market to improve. An objective assessment of the facts and circumstances supports this dual planned use. In particular, Kim's business plan at the time of making the acquisition and the loan application documents reflect this intended use of the premises.*

27. *The acquisitions Kim makes in constructing the new residential premises are for two purposes – being the making of an input taxed supply of residential premises by way of lease*[25] *and a taxable supply of new residential premises.*[26]

28. *Kim's acquisitions are made in carrying on her enterprise and are for a creditable purpose except to the extent they relate to the making of the input taxed supplies. That is, the acquisitions are partly creditable.*[27] *Kim will need to determine the extent of creditable purpose using a fair and reasonable method of apportionment.*

29. If an entity constructs new residential premises to use solely by way of leasing the residential premises, and this planned use is supported by an objective assessment of the surrounding facts and circumstances, the entity's acquisitions will relate solely to making supplies that would be input taxed,[28] and will not be made for a creditable purpose. The entity will not be entitled to input tax credits in relation to the acquisitions.[29] Although the acquisitions in these circumstances are not creditable acquisitions, adjustments can still arise under Division 129 if the entity subsequently applies the residential premises for a creditable purpose.[30]

When is a thing applied in carrying on an entity's enterprise?

30. At the end of each adjustment period[31] for relevant acquisitions, an entity will have to consider whether or not it is required to make an adjustment under Division 129 for a change in extent of creditable purpose.

31. To ascertain whether an adjustment arises for a change in extent of creditable purpose under Division 129, it is necessary to determine the extent to which a thing[32] has been applied for a creditable purpose up until the end of the relevant adjustment period.[33]

32. Subsection 129-50(1) provides that an entity applies a thing for a creditable purpose to the extent that the entity applies it in carrying on its enterprise. However, subsection 129-50(2) provides that an entity does not apply a thing for a creditable purpose to the extent that the application relates to making supplies that are input taxed or

[25] Section 40-35.
[26] Paragraph 40-65(2)(b) and section 9-5.
[27] Section 11-30.
[28] Section 40-35.
[29] For further detail on creditable purpose in the context of Division 11, refer to GSTR 2008/1.
[30] Refer to paragraphs 13 and 14 of GSTR 2000/24.
[31] Section 129-20.
[32] For discussion on the meaning of a 'thing' in the context of Divisions 11 and 129, see paragraphs 62 to 64 of this Ruling.
[33] Step 1 of the method statement in subsection 129-40(1).

the application is of a private or domestic nature. The meaning of the term 'apply' is central to determining the extent to which an acquisition has been applied for a creditable purpose, and whether or not an adjustment arises under Division 129.

33. The meaning of the term 'apply', in relation to a thing acquired or imported, for the purposes of the GST Act is provided in section 129-55 (set out in paragraph 19 of this Ruling). The meaning of apply in section 129-55 is an inclusive definition. Therefore, in addition to the specific references incorporated in the provision, the meaning of apply in section 129-55 also encompasses the ordinary meaning of the term. The ordinary meaning of 'apply' relevantly includes 'to put to use; employ'[34] or 'to devote to some specific purpose'[35] or 'make use of as relevant or suitable; employ'.[36] This indicates the similarity and relevance of 'use' to the meaning of 'apply'.

34. In accordance with the specific references to supply, consume, dispose of and destroy in section 129-55, a thing will be applied in carrying on an entity's enterprise when it is sold, or otherwise disposed of in the course of the entity's enterprise. For example, the sale of a thing constituting part of an entity's trading stock will be an application of that thing pursuant to section 129-55.

35. In accordance with the ordinary meaning of 'apply', a thing that is being held in connection with an entity's enterprise, even though it may not yet have been supplied, consumed or physically utilised, will have been devoted to or put to use in the entity's enterprise. In other words, the thing will have been applied in the entity's enterprise if an objective assessment of the facts and circumstances demonstrates that the thing has been allocated or dedicated to a particular use (or uses) in the enterprise. For example, the holding of trading stock for the purpose of sale in an entity's enterprise will be an application of the trading stock. Similarly, the holding of spare parts in reserve to repair enterprise machinery, as required, will be an application of the spare parts.

Determining the extent to which new residential premises have been applied for a creditable purpose

36. Applying the analysis at paragraphs 30 to 35 of this Ruling, new residential premises held in connection with an entity's enterprise are being applied in carrying on the entity's enterprise. For the purpose of considering whether or not any adjustment arises under Division 129, in relation to new residential premises, it is necessary to determine the extent to which that application is for a creditable purpose.

37. The sale of new residential premises is a taxable supply.[37] Therefore, the holding of new residential premises for the purpose of sale as part of an entity's enterprise, based on an objective assessment of the facts and circumstances, will be an application of the premises for a creditable purpose.[37A] However, the supply of residential premises by way of lease is an input taxed supply.[38] Consequently, the holding of new residential premises for the purpose of leasing, or the supply of new residential premises by way of lease, will

[34] *Macquarie Dictionary*, 2005, 4th edn, The Macquarie Library Pty Ltd, NSW.
[35] *Macquarie Dictionary*, 2005, 4th edn, The Macquarie Library Pty Ltd, NSW.
[36] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.
[37] Sections 40-65 and 9-5.
[37A] As discussed at paragraphs 132 to 135 of this Ruling, if an entity has applied new residential premises for a creditable purpose in accordance with Division 129, the premises will also have been used other than for making supplies that are input taxed under paragraph 40-35(1)(a) and the requirements of the '5-year rule' in subsection 40-75(2) will not be satisfied.
[38] Section 40-35.

be an application that relates to making input taxed supplies and will not be an application of the premises for a creditable purpose.[39]

38. New residential premises will not be applied for a creditable purpose, to any extent, when they are being used exclusively as part of an enterprise of leasing residential premises. However, the new residential premises would not be precluded from being applied for a creditable purpose in the future if the entity subsequently decided to sell the new residential premises as part of its enterprise activities and, based on an objective assessment of the facts and circumstances, the entity commenced holding the new residential premises for the purpose of sale.

39. The analysis at paragraphs 36 to 38 of this Ruling, in part, focuses on whether or not the new residential premises are being held for the purpose of sale. A distinction can be made between things that are being held for the purpose of sale as part of an enterprise being carried on by an entity, and things such as business plant and machinery used by an entity in carrying on an enterprise.

40. For example, a property developer involved in leasing residential premises and selling new residential premises may have a motor vehicle that is used exclusively by the manager of the leasing arm of the enterprise for the purpose of managing the residential leases. The property developer may intend to sell the motor vehicle in three years time and replace it with a new motor vehicle. The motor vehicle is not being held for the purpose of sale, but rather is being used by the property developer in carrying on its enterprise relating to leasing residential premises. The motor vehicle is not being applied, to any extent, for the purpose of sale.

41. The concept of holding a thing for the purpose of sale as part of an enterprise is similar to holding a thing for the purpose of trade.[40] The characteristics of trade, including the 'badges of trade', are discussed in the context of an adventure or concern in the nature of trade at paragraphs 243 to 261 of Miscellaneous Taxation Ruling MT 2006/1 *The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number*. MT 2006/1 discusses a number of factors which help identify whether or not an entity is engaged in trade or, rather in the context of this Ruling, holds a thing for the purpose of sale, including:

- the subject matter – if a thing provides either a regular or periodic income (such as through rental income) or personal enjoyment to the owner it is more likely to be an investment rather than a trading asset; however, a large quantity of goods is likely to point towards trade;
- the length of period of ownership – trading assets are generally traded within a short time after acquisition;
- the frequency or number of similar transactions – the greater the frequency of transactions the greater the likelihood of trade;
- improving a property beyond merely preparing it for sale – this suggests an element of trade;
- the circumstances responsible for a sale; and
- motive (if an objective assessment of the other factors is not conclusive).

[39] Subsection 129-50(2).
[40] Refer to comments of Bowen CJ in *Ku-Ring-gai Co-Op Building Society (No 12) Limited* [1978] FCA 107; 36 FLR 134 at [139].

Example 2 – premises not held for the purpose of sale as part of an enterprise

42. *Leaser Pty Ltd (Leaser) holds new residential premises as part of an enterprise of leasing residential premises. It intends to sell the premises after ten years to fund the purchase of new premises.*

43. *Leaser is not holding the premises for the purpose of sale as part of its enterprise. The premises is a capital asset held for the purpose of deriving income from leasing, that is, it is more like an asset being held for investment purposes. In this case, the length of time for which Leaser intends to hold the premises also suggests the premises are not being held as a trading asset. Leaser is applying the premises solely in relation to making input taxed supplies of residential premises by way of lease. The intention to sell the premises in the future is not an application for a creditable purpose.*[41]

43A. The example at paragraphs 42 to 43 of this Ruling is consistent with the Administrative Appeals Tribunal's decision in *GXCX and Commissioner of Taxation*[41A] (*GXCX*), where the Tribunal considered that an intention to sell, at some indefinite time in the future, strata-titled residential units that were being leased to tenants, without more, was insufficient to establish that the units were being held for the purpose of sale and applied for the creditable purpose of sale during the relevant adjustment period.

43B. In *GXCX*, the strata-titled units in question were originally constructed for the purpose of sale as part of the taxpayer's property development enterprise. However, the taxpayer subsequently decided to rent the apartments to tenants in the short term. Whilst the taxpayer had maintained an intention to sell the apartments in the medium to long term, when expected capital growth could be realised, the time when the apartments would be sold was not set.

43C. In reaching its decision, the Tribunal referred to the language in Division 129 and the method statement in section 129-40 which focuses on the application of a thing during the period from when it was acquired up until the end of the relevant adjustment period. The Tribunal found that the application of the apartments during the part of the relevant period subsequent to the taxpayer's decision to rent the 22 unsold apartments was entirely for a non-creditable purpose. The Tribunal considered that an intention to sell at some time in the future, without more, did not amount to an application of the apartments.[41B]

Demonstrating that new residential premises are being held for sale in an entity's enterprise

44. An objective assessment of the facts and circumstances will demonstrate whether or not new residential premises are being held for the purpose of sale as part of an entity's enterprise. Such an assessment requires a weighing up of the evidence that supports a

[41] In these circumstances, subsection 40-75(2) may apply when the premises are finally sold such that the premises are not new residential premises and the sale of the premises will be input taxed. Refer to paragraphs 132 to 135 of this Ruling and paragraphs 89 to 93 of Goods and Services Tax Ruling GSTR 2003/3 *Goods and services tax: when is a sale of real property a sale of new residential premises?*

[41A] [2009] AATA 569.

[41B] In circumstances where an entity has applied premises for both a creditable and non-creditable purpose, to some extent during a relevant period, the extent of creditable purpose of the relevant acquisitions may be determined by apportioning the creditable and non-creditable applications of the premises, using a fair and reasonable method of apportionment. Refer to paragraphs 81 to 131 of this Ruling.

finding that the premises are being held for the purpose of sale or that the premises are being held as an investment asset or for some other purpose. There must be satisfactory evidence to support a conclusion that the premises are being held for the purpose of sale, or for some other purpose. A single piece of evidence may not be sufficient where there is other evidence which suggests a contrary purpose. In such cases, all of the evidence must be considered and weighed up in reaching a decision.

45. Although any one factor may not be sufficient on its own, the following are some examples of objective facts and circumstances that the Commissioner would expect to be present to conclude that premises are being held for the purposes of sale. The following is not an exhaustive list and there may be other facts and circumstances in individual cases that will also be relevant to determining if the particular premises are being held for the purposes of sale. In any particular case, the Commissioner would expect there to be a preponderance of relevant factors to support a conclusion that premises are being held for the purposes of sale. Some of the factors that may be relevant include:

- marketing of the premises for sale, such as, listing the premises for sale with a real estate agent or agents, advertising the premises for sale in relevant publications or via Internet advertising websites for real property, arranging 'open for inspection' times, and showing prospective buyers through the premises;
- income tax treatment of the development as trading stock rather than as a capital asset (since treatment as a capital asset would imply that the premises are being held for investment or leasing purposes);
- finance documents including loan applications and documentation provided as part of the loan application process supporting the planned sale of the premises;
- business plans, feasibility studies or minutes of meetings supporting the holding of the premises for sale;
- accounting reports and financial statements supporting the holding of the premises for sale;
- past activities of the entity in carrying on the enterprise of selling new residential premises (however, it is noted that, in some cases, special purpose vehicle entities may be established for the express purpose of undertaking a single residential property development for the purpose of sale); and
- in the case of a building or complex made up of multiple stratum units, actual arm's length sales of some of the listed units (although, in some cases this may be countered by evidence that the entity only intended to sell some of the premises while intending to lease others).

46. Similarly, evidence that the premises has been applied, to some extent, in relation to making input taxed supplies includes, for instance:

- business plans, feasibility studies or minutes of meetings demonstrating that the entity has determined to use the premises for lease;
- finance documents including loan applications and documentation provided as part of the loan application process supporting the intention to lease the premises;
- periods of actual leasing of the premises; and

- marketing of the premises for lease.

47. It is considered that the period of time for which premises remain unsold or for which the premises are intended to be held by the entity is a relevant factor in determining whether the premises are being held for the purpose of sale. In particular, if the premises are intended to be sold within a short timeframe this supports a finding that the premises are being held for the purpose of sale. Alternatively, if the premises are intended to be held for a substantial period of time or in fact remain unsold for an extended period of time this may suggest that the entity is holding the premises as an investment asset or for some other purpose. This is a question of fact in each case and must be weighed up with the other available evidence.

Partially completed residential property developments

47A. As part of its enterprise activities, an entity may be developing and/or constructing new residential premises. In some cases, the premises may be incomplete and still under construction at the end of a relevant adjustment period that applies for the purposes of Division 129. In these cases, an examination of the objective facts and circumstances will also be required in order to determine the extent to which, if any, the relevant acquisitions incorporated into the partially completed development have been applied for a creditable purpose during the adjustment period.

47B. In some instances, an objective assessment of the facts and circumstances may demonstrate that the premises are being constructed for the purpose of sale when complete. This being the case, the acquisitions that have been incorporated into the partially completed development will have been allocated or dedicated to the creditable purpose of selling new residential premises as part of the entity's enterprise,[41C] and pursuant to section 129-50, will have been applied, to some extent, for a creditable purpose.

47C. Alternatively, an objective assessment of the facts and circumstances may demonstrate that the premises are being constructed for the purpose of leasing the premises to tenants, upon completion, for an indefinite period. In these cases, the acquisitions that have been incorporated into the partially completed development will have been exclusively allocated or dedicated to the non-creditable purpose of leasing residential premises as part of the entity's enterprise and, pursuant to section 129-50, will not have been applied for a creditable purpose.

47D. Acquisitions incorporated into partially developed or constructed new residential premises will not be applied for a creditable purpose to any extent, when the premises are being constructed exclusively for leasing purposes. However the acquisitions would not be precluded from being applied for a creditable purpose in the future if, based on an objective assessment of the facts and circumstances, the entity subsequently decides to construct the premises for the purpose of sale, or subsequent to completion of the premises, the entity commences holding the premises for the purpose of sale.

47E. Paragraphs 45 and 46 of this Ruling set out some factors relevant to determining whether completed new residential premises are being held for the purpose of sale and/or being applied in relation to making input taxed supplies. In the case of incomplete residential premises under construction, actual sales or leasing of the premises will not be applicable, and there may not have been any marketing of the premises for sale. However the Commissioner considers that the remaining factors set out at paragraphs 45 and 46 of this Ruling, together with any other applicable facts and circumstances, will also be

[41C] See paragraphs 30 to 35 of this Ruling for discussion and explanation of the meaning of 'apply' in section 129-55.

relevant in determining whether residential premises that are still under construction are being constructed for the purpose of sale or for the purpose of leasing.

47F. Any one relevant factor may not be sufficient on its own to demonstrate whether residential premises are being constructed for the purpose of sale or for the purpose of leasing. Determining whether residential premises under construction are being developed for the purpose of sale and thereby concluding that the related acquisitions are being applied, at least to some extent, for a creditable purpose, will require a weighing up of all the available evidence.

Example 2A – application for a creditable purpose of acquisitions incorporated into partially completed residential premises

47G. *Build-up is carrying on an enterprise of property development. Build-up has previously undertaken several residential property developments, and the residential premises have been sold upon completion of each development.*

47H. *Build-up commences development and construction of a residential building that will comprise several residential units. Build-up will sell the newly constructed residential units upon completion of the development, as part of its enterprise of developing residential premises for sale. Finance documentation pertaining to the development indicates that interest-only finance provided with respect to the development is conditional upon Build-up selling all of the residential units upon completion of construction.*

47I. *At the end of the first relevant adjustment period, for Division 129 purposes, the residential building remains incomplete, and construction is continuing. Although Build-up has not commenced marketing the residential units for sale, the relevant facts and circumstances are sufficient to demonstrate that Build-up is constructing the residential units for the purpose of sale. Therefore, the acquisitions incorporated into the partially completed development have been applied for the creditable purpose of sale during the first adjustment period.*

Partially completed multi-stage residential property developments

47J. In some cases, residential property developments may be undertaken in stages, with completed individual residential units constructed in the earlier stages of the development being leased to tenants prior to the completion and sale of the entire property. Depending upon the magnitude of the development being undertaken, the staged development process may mean that the development may take a number of years to complete. A common example of residential property developments that are undertaken in multi-stages is that of retirement village complexes, where individual independent living units completed in the earlier stages of the development are made available to tenants under loan-lease arrangements[41D] while the construction of the later stages of the development is being completed.

47K. In the context of multi-stage developments, the leasing of individual residential units to tenants prior to the completion of the entire development will mean that up to the end of the relevant adjustment period the development has been applied, to some extent, for the non-creditable purpose of leasing residential premises. However, the Commissioner

[41D] Similar to the type of arrangement set out in paragraph 6 of Goods and Services Tax Ruling GSTR 2011/1 *Goods and services tax: development, lease and disposal of a retirement village tenanted under a 'loan-lease' arrangement*.

considers that the development will also be being concurrently applied for a creditable purpose, to some extent, if, based on an assessment of the relevant facts and circumstances, the entire development is being constructed for the purpose of sale rather than for the purpose of leasing or as a capital asset of a business to be carried on by the entity, for example the operation of a retirement village. In these circumstances, the acquisitions pertaining to the development will have also been allocated or dedicated, to some extent, to the creditable purpose of sale as part of the entity's enterprise of constructing the development for sale.[41E]

47L. As is the case with partially completed residential premises more generally, although there may be no actual sale or active marketing of the premises during an adjustment period, the remaining factors set out at paragraphs 45 and 46 of this Ruling, together with any other relevant facts and circumstances, will be applicable to determining whether a multi-stage development is being undertaken for the purpose of sale.[41F]

47M. There may be some factors, more specifically relevant to multi-stage residential developments, which will assist in determining the application of the acquisitions used in the construction of the development. For example, although not conclusive on its own, an absence of strata-titling of individual units within a multi-stage development, and the inability to sell units independently as each stage is completed, would be consistent with a conclusion that the development is being undertaken for the purpose of selling the entire development.

Dual applications of new residential premises

48. The phrase 'to the extent' in subsections 129-50(1) and 129-50(2) recognises that a thing may be applied partly to a creditable purpose.

49. An entity may apply new residential premises for the creditable purpose of sale where the premises are being held for sale as part of the entity's enterprise, whilst concurrently applying the new residential premises for the non-creditable purpose of making input taxed supplies of residential premises by way of lease under section 40-35.[42]

50. For example, an entity may construct new residential premises for the purpose of sale. The premises may continue to be held for sale as part of the entity's enterprise of constructing new residential premises for sale. However, due to a downturn in the property market, the entity may also make the premises available for lease for a period until the market conditions improve. This will be a dual application of the premises during the relevant period being the period of time between acquisition of the thing and the end of the adjustment period. An apportionment between the different applications will be necessary to determine the extent to which the new residential premises have been applied for a creditable purpose during the period of time that is relevant for step 1 of the method statement in subsection 129-40(1).[43]

[41E] As discussed at paragraphs 132 to 135 of this Ruling, if an entity has applied new residential premises for a creditable purpose in accordance with Division 129, the premises will also have been used other than for making supplies that are input taxed under paragraph 40-35(1)(a) and the requirements of the '5-year rule' in subsection 40-75(2) will not be satisfied.

[41F] See example 3A at paragraphs 57A to 57D of this Ruling.

[42] New residential premises may also be applied to a private or domestic purpose, which is also a non-creditable purpose. The principles discussed in this Ruling apply equally where the premises have been applied to a private or domestic purpose.

[43] A change in extent of creditable purpose may arise in relation to new residential premises after the end of the first adjustment period for some acquisitions. The principles discussed in this Ruling, including the method for apportioning between the creditable and non-creditable purposes, apply equally in these circumstances. However, the earliest adjustment period in which an adjustment is required will be the second or later adjustment period depending on the circumstances.

Status: **draft for comment**

51. A dual application of new residential premises may also arise where the premises are applied exclusively for the creditable purpose of sale for part of the relevant period and applied exclusively in relation to making input taxed supplies of residential premises by way of lease under section 40-35 for the remainder of the relevant period. Again, an apportionment between the different applications will be necessary to determine the extent to which the new residential premises have been applied for a creditable purpose during the period of time that is relevant for step 1 of the method statement in subsection 129-40(1).

52. Furthermore, there may be situations where during the relevant period an entity may have applied the premises to a dual concurrent application for part of the time and applied the premises exclusively to sale and/or leasing for part of the time. This essentially combines the situations described in paragraphs 49 to 51 of this Ruling.

53. Where an apportionment is necessary, the entity will have to apply a fair and reasonable method of apportionment. For further details, see paragraphs 81 to 131 of this Ruling.

Example 3 – dual concurrent applications – new residential premises applied for creditable and non-creditable purposes at the same time

54. *Dee Veloper Pty Ltd (Dee Veloper) constructs a building of six stratum units. During the construction stage, Dee Veloper planned to sell each of the premises upon their completion. However, by the time the premises are almost complete, the market has slowed significantly. Dee Veloper decides to lease each of the six stratum units until the market improves.*

55. *Dee Veloper has a history of constructing and selling new residential premises. Its business plan is to construct and sell premises as quickly as possible to permit it to raise capital to commence new projects. Dee Veloper has decided to enter into six-month lease agreements with tenants as it hopes that the market will improve before too long. The tenants have been notified of Dee Veloper's continuing intention to sell the premises and the lease agreements allow for access to the property upon reasonable notice so that potential purchasers can inspect the premises. Dee Veloper's financing arrangements with respect to the project entail an interest-only loan based upon the new residential premises being sold within the next twelve months. Dee Veloper's cash flow projections relating to the project demonstrate that Dee Veloper intends to commence marketing the premises for sale one month prior to the expiry of the lease agreements with tenants. This evidence objectively supports Dee Veloper's ongoing plan to sell the premises.*

56. *Dee Veloper is applying each of the premises in carrying on its enterprise. This includes the application of the new residential premises to the purpose of sale. However, Dee Veloper is also applying each of the premises in relation to making input taxed supplies of residential premises by way of lease.*[44] *Dee Veloper is required to determine its extent of creditable purpose by apportioning between its creditable and non-creditable purposes on a fair and reasonable basis.*

57. *However, the extent to which the premises were applied for a creditable purpose would be different if the facts were changed as follows. After six months of leasing the premises, Dee Veloper decides that it would be more profitable to continue to lease the premises indefinitely and changes its business plan in accordance with this decision. Dee Veloper also revises its financing arrangements and commences making principal and interest repayments of the loan. Dee Veloper undertakes no marketing of the premises for*

[44] Section 40-35.

sale after the decision to lease has been made. From this time, Dee Veloper no longer holds the premises for the purpose of sale as part of its enterprise. The premises would be applied from this time solely in relation to making input taxed supplies of residential premises by way of lease.

Example 3A – dual concurrent application – partially completed multi-stage development comprising residential units being concurrently applied for creditable and non-creditable purposes

57A. *XYZ Pty Ltd is carrying on a property development enterprise and has a history of constructing and developing new residential premises for sale. It commences a multi-stage development of a retirement village, which when complete will comprise 100 independent living units. The entire development, comprising 4 separate stages, is expected to take six years to complete.*

57B. *XYZ Pty Ltd's business plan is to not strata-title the independent living units. XYZ Pty Ltd will market and sell the entire completed development as a whole. To fund the development and to enhance the prospects of sale, XYZ Pty Ltd will lease the independent living units completed in the earlier stages to tenants under loan-lease arrangements.*

57C. *XYZ Pty Ltd's business plan is supported by other evidence consistent with a conclusion that the development is being undertaken for the purpose of selling the completed retirement village as a whole. This other evidence includes minutes of directors' meetings and relevant accounting information. The development has been classified as trading stock in XYZ's accounting and taxation reports.*

57D. *On an objective assessment of the facts and circumstances in this case, XYZ Pty Ltd is constructing the entire retirement village for the purpose of leasing and for sale on completion. This is a concurrent application for the creditable purpose of sale and the non-creditable purpose of leasing residential premises. XYZ Pty Ltd is required to determine its extent of creditable purpose, under Division 129, by apportioning between its creditable and non-creditable purposes on a fair and reasonable basis.*[44A]

Example 4 – consecutive different applications – new residential premises applied for a creditable purpose and then for a non-creditable purpose

58. *Bilder Pty Ltd (Bilder) constructs new residential premises with the intention of selling the premises as soon as possible following completion. The premises were completed in September and Bilder had started marketing the premises for sale in August. However, by the end of November, Bilder had been unable to sell the premises. Bilder investigated the market for leasing similar premises and decided that it could profitably retain the premises and use them solely for leasing.*

59. *In December, Bilder commenced leasing the premises for residential accommodation. Bilder took the premises off the market and no longer planned to sell the premises at any particular time. Since this time, Bilder has devoted the premises solely to making input taxed supplies.*

60. *Up until the end of November, Bilder was holding the premises for the purpose of sale as part of its enterprise. This is an application for a creditable purpose. From December, when Bilder commences leasing the premises, Bilder is not applying the*

[44A] Refer to paragraph 81A of this Ruling regarding apportionment methodologies that may be appropriate to determine the extent of creditable purpose in the context of a retirement village comprising new residential premises.

premises for a creditable purpose to any extent. Therefore, looking back over the relevant period in its entirety, Bilder has applied the premises for a creditable purpose for part of the period, and for the remainder of the period Bilder has applied the premises for a non-creditable purpose. At the end of the relevant adjustment period, Bilder is required to determine its extent of creditable purpose by apportioning between its creditable and non-creditable purposes on a fair and reasonable basis.

Example 4A – consecutive different applications – multi-stage development comprising new residential premises that are applied for a creditable purpose and then for a non-creditable purpose

60A. *Entity Pty Ltd commences a multi-staged development of a retirement village in June 2009. As demonstrated by the objective facts and circumstances, Entity Pty Ltd is undertaking the development for the purpose of selling the fully-tenanted retirement village in its entirety, when complete. The independent living units completed in the earlier stages of the development will be made available to tenants under a loan-lease arrangement whilst the later stages of the development are continuing to be developed.*

60B. *During October 2010, Entity Pty Ltd receives detailed financial projections which show that better long-term investment rates of return can be achieved by holding the premises indefinitely. The financial projections are tabled and discussed at the next directors' meeting, with the directors resolving to alter their business strategy to one of solely supplying the independent living units (as and when completed) for lease rather than holding the entire retirement village development for the purpose of sale.*

60C. *Up until October 2010, Entity Pty Ltd has applied the development for the dual purpose of sale and lease. However, after that time, the development will no longer be being applied for the purpose of selling the fully-tenanted retirement village in its entirety. At the end of the relevant adjustment period, Entity Pty Ltd is required to determine its extent of creditable purpose by apportioning between its creditable and non-creditable purposes on a fair and reasonable basis.*

Calculating adjustments under Division 129

61. This section of the Ruling provides guidance on the following issues which are relevant to calculating adjustments under Division 129:

- identifying 'the thing' (paragraphs 62 to 66 of this Ruling);
- identifying the types of different acquisitions that may be subject to adjustments under Division 129 (paragraphs 67 to 80 of this Ruling); and
- identifying reasonable methods of apportionment to calculate an entity's extent of creditable purpose (paragraphs 81 to 131 of this Ruling).

The meaning of 'the thing' for the purposes of Divisions 11 and 129

62. Divisions 11 and 129 operate in respect of a 'thing'. Before applying each Division, an entity must determine what is being acquired. For example, where an entity contracts for the construction of a house, the entity is acquiring the house and not all the individual elements that go into the construction of it. If an entity is the builder who constructs the building, it is the individual acquisitions of goods or services that the entity acquires that are the 'things' for the purposes of Divisions 11 and 129 (for example, 1,000 bricks, 100

litres of paint or the services of the electrician).[45] It is necessary to identify the actual acquisition that the entity has made.

63. However, to determine how an entity has applied the thing acquired it is necessary to look at how the thing into which the acquisition has been incorporated has been applied. For example, to determine how bricks have been applied it is necessary to determine how the building in which they have been incorporated has been applied. Where the method statement in subsection 129-40(1) refers to 'thing', it is not referring to bits and pieces of the building, but to the thing to which the original thing has been incorporated.

64. While it is necessary to look at the application of the 'thing' into which the individual acquisitions have been incorporated, it is the individual acquisitions that are subject to adjustments under Division 129. Also, section 156-20 provides that for the purposes of Division 129 an acquisition by an entity that accounts otherwise than on a cash basis that is made:

(a) for a period or on a progressive basis; and

(b) for consideration that is to be provided on a progressive or periodic basis;

is treated as if each progressive or periodic component of the acquisition were a separate acquisition.

Example 5 – Division 129 and acquisitions made on a progressive basis

65. *An entity enters into a contract for the construction of new residential premises. The contract price is $220,000 (GST-inclusive). Under the contract, the consideration is to be provided in four progress payments based on stages of construction as follows:*

- *Progress payment 1 – $45,000*
- *Progress payment 2 – $45,000*
- *Progress payment 3 – $65,000*
- *Progress payment 4 – $65,000.*

66. *The acquisition is made on a progressive basis as the contract provides for stages of supply during the course of the supply.*[46] *Also, the consideration has been provided on a progressive basis that reflects the stages of the supply.*[47] *For the purposes of Division 129, each of the four progress payments is treated as a separate acquisition. Five adjustment periods will apply to each progress payment and the first adjustment period for each progress payment is the tax period ending 30 June which commences at least 12 months after the end of the tax period to which the progress payment is attributable.*

How does Division 129 apply with respect to the different types of acquisitions that can relate to the construction, sale and leasing of new residential premises?

67. There are numerous types of acquisitions that can arise in the course of the construction of new residential premises and in the course of subsequent use of the premises.

[45] This is subject to the operation of section 156-20 which is discussed at paragraph 64 of this Ruling.
[46] See paragraph 27 of Goods and Services Tax Ruling GSTR 2000/35 *Goods and services tax: Division 156 – supplies and acquisitions made on a progressive or periodic basis*.
[47] See paragraph 28 of GSTR 2000/35.

68. Many relevant acquisitions will relate to the construction of particular premises. If the constructed premises are applied differently to the intended or former application and provided that the GST-exclusive value of the acquisition is greater than $1,000, an adjustment under Division 129 can arise in relation to this type of acquisition. This extends to all acquisitions of goods and services made in constructing the premises which provide an enduring benefit in the form of the completed premises. It also includes consumable type acquisitions such as electricity used during the construction of the premises where such costs are absorbed into the completed premises. Other acquisitions that are of this nature would include:

- acquisitions of goods related to the construction of premises, for example, construction materials such as bricks, concrete, roofing, paint, etcetera; and
- acquisitions of services related to the construction of premises, for example, services of an electrician, plumber, brick layer, architect, engineer, surveyor or an entire construction contract.

Example 6 – acquisitions made in constructing new residential premises subject to adjustments

69. *Alex is registered for GST and carries on an enterprise of constructing new residential premises for the purpose of sale. On one project, Alex made a number of acquisitions including the services of an architect to design and draw the plans for the new premises, the services of an engineer, subcontractors' services in constructing the premises and acquisitions of varying construction materials.*

70. *After the premises were completed, Alex attempted to sell the premises but was unable to sell the premises quickly, so he decided to apply the premises solely to making input taxed supplies by way of lease. This is a change in the extent of creditable purpose of the things. Alex may be required to make adjustments under Division 129 in relation to each of the acquisitions described above.*

71. Repairs and improvements to new residential premises are also considered to be acquisitions of a nature that provide an enduring benefit in the form of the premises. Therefore, an acquisition made in undertaking repairs or improvements to residential premises may be subject to an adjustment under Division 129 if the application of the premises changes after the acquisition is made.

Example 7 – adjustments for repairs

72. *Assume the same facts as for Example 6 of this Ruling. While leasing the premises, Alex is required to acquire the services of a plumber to repair extensive damage to the plumbing system. The acquisition is not made for a creditable purpose and Alex is not entitled to any input tax credits.*

73. *However, after leasing the premises for two years, Alex decides to sell the premises. The premises are sold as new residential premises. As the premises have been applied for a creditable purpose, the acquisition of the plumber's services will be subject to an adjustment under Division 129 provided that the relevant adjustment periods still apply.*

74. Some other acquisitions directly relate to either the sale of the new residential premises or the leasing of the premises. These acquisitions would not be subject to an adjustment under Division 129 as a result of a subsequent change of purpose to leasing or sale, for example:

- acquisitions of services related to the sale of the premises, such as real estate agent and marketing services acquired in relation to selling the premises; and
- acquisitions of services related to the leasing of the premises, such as real estate agent and marketing services acquired in relation to the leasing of the premises.

Example 8 – acquisitions related solely to the creditable purpose of sale

75. *Assume the same facts as for Example 6 of this Ruling. When Alex first attempted to sell the premises, he acquired the services of a real estate agent in undertaking an extensive marketing campaign outside the commission agreement. This acquisition related solely to the creditable purpose of selling the new residential premises. This acquisition is not subject to an adjustment under Division 129 when Alex subsequently uses the premises to make input taxed supplies by way of lease.*

76. A property development enterprise may also involve making acquisitions in the nature of overhead or enterprise costs or acquisitions that relate to making many different supplies as part of the enterprise. Photocopiers and computers acquired for the office, general taxation and legal services, and possibly goods such as tools and machinery (if not related to the construction of particular premises) would be examples of these types of acquisitions.

77. It is possible for an adjustment under Division 129 to arise in relation to these types of acquisitions where there is a change in the extent to which the acquisitions are applied in carrying on an enterprise or in relation to making input taxed supplies. In such a case, the adjustment would not be calculated with reference to the application of particular premises but would be calculated with reference to the application of the things in the enterprise as a whole, which may involve making input taxed and taxable supplies.

78. For example, if the entity's enterprise changes from one involving an intention to make only taxable supplies to one involving the making of both input taxed and taxable supplies, for the purposes of Division 129 there will be a corresponding change in extent of creditable purpose of the relevant acquisitions that are in the nature of overhead or enterprise costs.[48]

Example 9 – overhead acquisitions related to the enterprise as a whole

79. *Assume the same facts as for Example 6 of this Ruling. As part of Alex's enterprise, he has an office from which he runs his business. Before he commenced the*

[48] See paragraphs 136 to 148 of GSTR 2008/1 for further explanation of overhead or enterprise costs.

construction of the particular premises referred to above, all previous projects had resulted in the new residential premises he had constructed being sold shortly after construction. Also, just before the construction of the particular premises, he made an acquisition of a new computer system for use in his office.

80. *When Alex starts leasing the residential premises, the extent of creditable purpose for the acquisition of the computer system changes. Alex may be required to make adjustments under Division 129 in relation to acquisition of the computer system. Any required adjustment will be calculated with reference to the application of the things in the enterprise as a whole.*

Reasonable methods of apportionment

81. If an entity is required to apportion its creditable purpose, it must do so by applying a method that is fair and reasonable in the circumstances of each case. Guidance on appropriate methods of apportionment for determining extent of creditable purpose is provided in Goods and Services Tax Ruling GSTR 2006/4 *Goods and services tax: determining the extent of creditable purpose for claiming input tax credits and for making adjustments for changes in extent of creditable purpose*.

81A. Goods and Services Tax Ruling GSTR 2011/1 *Goods and services tax: development, lease and disposal of a retirement village tenanted under a 'loan-lease' arrangement* considers how to determine the extent to which input tax credits are available for acquisitions or importations made by a developer to construct or develop a village that has the features set out in the class of arrangement described in that Ruling. GSTR 2011/1 must be considered when determining a fair and reasonable method of apportionment in relation to the arrangements covered by that Ruling. The views and examples that follow do not specifically consider partially completed developments (as discussed in paragraphs 47A to 47I of this Ruling) or the facts of multi-stage developments (as discussed in paragraphs 47J to 47M of this Ruling).

82. In circumstances where an entity constructs new residential premises for sale but they are subsequently leased, it is necessary to consider the different applications of the premises up to the end of the relevant adjustment period.

83. If the premises have been applied in relation to the creditable purpose of sale and the non-creditable purpose of making input taxed supplies during the relevant period and the premises have been sold prior to the end of the relevant adjustment period, one reasonable method of apportionment is an output-based indirect method.[49] This method is based on the consideration[50] received or liable to be received in respect of any taxable supply as compared to any input taxed supply. Thus, the extent to which new residential premises were applied for a creditable purpose under Division 129 can be determined by the following formula:

consideration for the taxable supply of the premises ÷ (consideration for the taxable supple of the premises + consideration for the input taxed supplies of residential premises by way or lease)

[49] See also paragraphs 120 and 143 to 153 of GSTR 2006/4 for a broad explanation and examples of this type of method.

[50] 'Consideration' in the apportionment methods discussed in this Ruling refers to the gross income from the different types of supplies.

Example 10 – output-based indirect method after the premises have been sold

84. *Jane is registered for GST and constructed new residential premises for sale and was* entitled *to full input tax credits on her acquisitions. However, because the market for new premises was slow, Jane leased the premises for six months before the premises were finally sold. Jane received $15,000 in rent over the six months. The premises were sold for $500,000. There had been no private or domestic use of the premises.*

85. *At the end of the next adjustment period following the sale, Jane calculates the extent of creditable purpose using the formula in paragraph 83 of this Ruling as $500,000 ÷ ($500,000 + $15,000) = 97.09%.*

86. *This percentage is the actual application of the thing for the purposes of step 1 of the method statement in subsection 129-40(1). Jane's intended application of the thing for the purposes of step 2 of the method statement was 100%. As the actual application of the thing is less than its intended application, Jane has an increasing adjustment for her acquisitions in accordance with step 3 of the method statement.*

87. If the premises remains unsold at the end of the relevant adjustment period, the actual consideration for the taxable supply of the premises on sale will not be known. Where the premises have been applied for a creditable purpose, to some extent, for the entire relevant period, using estimated consideration for the taxable supply of the premises on sale (rather than the actual consideration for the sale) in the output-based indirect formula set out in paragraph 83 of this Ruling will be an appropriate basis of apportionment.

88. For example, during the relevant period between the time of acquisition and the end of the adjustment period being considered, there may be a period of time when the premises are being applied solely in carrying on the enterprise for a creditable purpose, and then for the remainder of the relevant period there may have been a dual concurrent application of the premises to the creditable purpose of sale as well as to the non-creditable purpose of making input taxed supplies. In these circumstances, the output-based indirect method using the estimated sales consideration will be an appropriate basis of apportionment.

89. The output-based indirect method using estimated sales consideration will also be an appropriate basis of apportionment when there has been a dual concurrent application of the premises to the creditable purpose of sale as well as the non-creditable purpose of making input taxed supplies for the entirety of the relevant period.

90. An entity should determine the estimated sales consideration for the purposes of the formula by reference to objective evidence. In particular, the sales consideration could be estimated by using evidence such as:

- comparative sales price analyses prepared by real estate agents when listing the premises for sale;
- market valuations prepared for finance or other purposes; and
- in the case of stratum unit developments, recent sales of other units in the development.

91. The estimated sales consideration should be assessed for each relevant adjustment period. For instance, at the first adjustment period an entity may determine that

the estimated sales consideration for a property is $600,000. If the premises remain unsold at the end of the second adjustment period, but are still being held for the purpose of sale, the entity will need to reassess the estimated sales consideration. The available objective evidence may suggest that the estimated sales consideration is now only $580,000. In such a case, the entity should use $580,000 in the formula to determine the apportionment between creditable and non-creditable purposes for the second adjustment period.

Example 11 – premises applied for a creditable purpose, to some extent, for the entire relevant period

92. *John is registered for GST and has quarterly tax periods. He constructed new residential premises for the purpose of sale and was entitled to full input tax credits on his acquisitions. One particular acquisition of construction services was made on 1 October 2006 for $55,000 (GST-inclusive). The premises were completed on 1 February 2007. John continued to hold the premises for the purpose of sale but also commenced leasing the premises for residential accommodation on 1 April 2007. John received rental income of $2,500 per month and expected to sell the premises for $500,000. John has continued to retain the dual concurrent application since 1 April 2007.*

93. *The first adjustment period in relation to the acquisition of construction services is the period ending 30 June 2008. There are 21 months in the relevant period between the time of the acquisition on 1 October 2006 and the end of the first adjustment period on 30 June 2008.*

94. *For the six months from 1 October 2006 to 31 March 2007, John applied the premises solely for a creditable purpose, that is, an extent of creditable purpose of 100%.*

95. *For the 15 months from 1 April 2007 to 30 June 2008, John has applied the premises for both a creditable purpose and a non-creditable purpose. John works out the extent of creditable purpose for the relevant period by using an indirect method (using estimated sales consideration) of $500,000 ÷ ($500,000 + $37,500) = 93.02%.*

96. *This percentage is the actual application of the thing for the purposes of step 1 of the method statement in subsection 129-40(1).*

97. In circumstances where the premises have not been applied for a creditable purpose, to some extent, for the entire period, the output-based indirect method (using estimated sales consideration) would be one possible fair and reasonable basis of apportionment. However, it would need to be modified with an additional time-based apportionment to reflect the fact that the premises have been applied for a creditable purpose for only part of the relevant period. The measure of time used should be appropriate for the circumstances of each case. For example, using either days or months may be appropriate to provide a fair and reasonable basis of apportionment depending on the circumstances.

Example 12 – premises applied for 100% creditable purpose for part of the relevant period, and then subsequently applied for 0% creditable purpose for the remainder of the period

98. *Assume the facts are the same as for Example 11 of this Ruling. However, rather than continuing to hold the premises for sale as part of the enterprise John decided on 1 April 2007 to hold the premises solely for the purpose of leasing.*

99. *As in paragraph 94 of this Ruling, for the six months from 1 October 2006 to 31 March 2007, John applied the premises solely for a creditable purpose, that is, an extent of creditable purpose of 100%.*

100. *For the 15 months from 1 April 2007 to 30 June 2008, John has applied the premises solely in relation to making input taxed supplies, that is, an extent of creditable purpose of 0%.*

101. *John applies a time-based apportionment to the application for a creditable purpose to ascertain the extent of creditable purpose for the relevant period (this is because for the rest of the period the extent of creditable purpose is 0%):*

= (6 months ÷ 21 months × 100%)

= 28.57%.

102. *This percentage is the actual application of the thing for the purposes of step 1 of the method statement in subsection 129-40(1).*[51]

Example 13 – premises applied for a creditable purpose, to some extent, for part of the relevant period, and then subsequently applied for 0% creditable purpose for the remainder of the period

103. *Assume the facts are the same as for Example 11 of this Ruling. John continued to apply the premises for the dual concurrent application of the creditable purpose of sale and the non-creditable purpose of leasing from 1 April 2007 to 31 December 2007. However, on 1 January 2008 John decided to hold the premises solely for the purpose of leasing.*

104. *For the 15 months from 1 October 2006 to 31 December 2007, John applied the premises for a creditable purpose to some extent. For the remainder of the relevant period, John applied the premises solely in relation to making input taxed supplies, that is, an extent of creditable purpose of 0%.*

105. *John works out the extent of creditable purpose for the relevant period in two steps. First, John uses an output-based indirect method (using estimated sales consideration) of $500,000 ÷ ($500,000 + $37,500) = 93.02%.*

106. *John now needs to undertake a further apportionment to reflect the fact that the premises were not held for the purpose of sale for the entire relevant period. This is calculated by adjusting the percentage in paragraph 105 of this Ruling by the proportion of the relevant period for which the premises were being held for the purpose of sale – being 93.02% × 15 months ÷ 21 months = 66.44%.*

107. *This percentage is the actual application of the thing for the purposes of step 1 of the method statement in subsection 129-40(1).*

[51] John will need to make further adjustments in any subsequent relevant adjustment periods if he continues to apply the premises solely in relation to making input taxed supplies. If John later sells the premises, he may need to consider whether he is entitled to make a decreasing adjustment or whether subsection 40-75(2) applies if for at least five years the premises have only been used for making supplies by way of lease that are input taxed. See paragraphs 132 to 144 of this Ruling for further discussion of subsection 40-75(2).

Apportionment of the extent of creditable purpose of acquisitions relating to a residential unit complex that comprises multiple stratum units

108. There will be circumstances where a developer constructs a new residential unit complex comprising multiple stratum units. Some of the units may be applied solely for the creditable purpose of sale, whereas some of the units may be applied for a concurrent dual purpose of holding the premises for sale and making input taxed supplies by way of lease. For those acquisitions that relate solely to a particular stratum unit, it is the application of that unit that is relevant in determining the actual application of the thing. However, for those acquisitions that relate equally to all of the units constructed, it is the average application of all of the units that is relevant in determining the actual application of the thing.

109. In some cases, an acquisition may relate to individual units in a residential unit complex in unequal proportions (rather than relating equally to each unit). For example, the acquisition of construction services with respect to the construction of a multiple unit complex may relate to a greater extent to the larger sized units in the complex, as compared with smaller units in the same complex. In these circumstances, as well as determining the average application of all the units, it is also necessary to take into account the different proportions to which the relevant acquisition relates to each of the units in order to determine the extent to which an acquisition has been applied for a creditable purpose.

Example 14 – multiple stratum units constructed for sale with only some applied partly to a creditable purpose and partly to a non-creditable purpose – acquisitions relating solely to one of the units and acquisitions relating equally to all units

110. *Phillip is registered for GST and has quarterly tax periods. Phillip constructed a complex of four stratum units for the purpose of sale. During the construction of the units, Phillip made a number of acquisitions that relate equally to each of the four units and some acquisitions that relate specifically to one of the four units. In particular, Phillip acquired the services of a subcontractor for $55,000 in relation to the construction of the entire complex. This acquisition relates equally to each of the four stratum units. Phillip also acquired a spa related only to unit 4 for $6,600.*

111. *On completion of the construction, unit 1 was sold within a short period of time for $1,500,000. However, units 2, 3 and 4 were not able to be sold and Phillip started to lease these units while continuing to hold them for the purpose of sale. Units 2, 3 and 4 remained unsold at the end of the first relevant adjustment period in relation to the acquisition of the subcontractor's services and the acquisition of the spa. Each of these units had been leased for six months at a rental income of $6,250 per month and the estimated sales consideration for each of the units was $1,500,000 at the end of the relevant adjustment period.*

112. *Using the output-based indirect method, the extent of creditable purpose to which each of the units has been applied is $1,500,000 ÷ ($1,500,000 + $37,500) = 97.56%.*

113. *This is the actual application of the thing for the purposes of step 1 of the method statement in subsection 129-40(1) for the acquisitions that relate only to one of these three units, including the acquisition of the spa related to unit 4.*

114. *However, as unit 1 was applied solely for a creditable purpose it is necessary to ensure this is taken into account in determining the actual application of all of the four units*

for the purposes of determining the extent to which the acquisitions that relate equally to each of the four units have been applied for a creditable purpose. This is calculated by averaging the extent of creditable purpose calculated for each of the four units. That is:

Average = (Unit 1 + Unit 2 + Unit 3 + Unit 4) ÷ 4

= 98.17%

where:

- *Unit 1 – 100%*
- *Unit 2 – 97.56%*
- *Unit 3 – 97.56%*
- *Unit 4 – 97.56%.*

115. *This is the actual application of the thing for the purposes of step 1 of the method statement in subsection 129-40(1) for the acquisitions that relate equally to all four units including the acquisition of the subcontractor's services.*

Example 15 – multiple stratum units constructed for sale with only one applied partly to a creditable purpose and partly to a non-creditable purpose – acquisition relating to the units in different proportions

116. *Gary is registered for GST and has quarterly tax periods. Gary constructed a complex of two stratum units for the purposes of sale. One of the units was larger than the other. Some of the acquisitions Gary made in constructing the premises related to both units but related to the larger unit to a greater extent. In particular, Gary acquired the services of a subcontractor for $55,000. The acquisition related 40% to unit A (the smaller unit) and 60% to unit B (the larger unit).*

117. *On completion of the construction, unit A was sold for $400,000. However, Gary was not able to sell unit B and, after a period of attempting to sell the unit, Gary commenced leasing the unit while continuing to hold it for the purpose of sale. Unit B remained unsold at the end of the first relevant adjustment period in relation to the acquisition of the subcontractor's services. Unit B had been leased for nine months at a rental income of $2,500 per month and the estimated sales consideration for the unit was $600,000 at the end of the relevant adjustment period.*

118. *Using the output-based indirect method, the extent of creditable purpose to which unit B has been applied is $600,000 ÷ ($600,000 + $22,500) = 96.39%.*

119. *However, as unit A was applied solely to a creditable purpose and the relevant acquisition related 40% to unit A, it is necessary to ensure that this is taken into account in determining the actual application of the thing for the purposes of step 1 of the method statement in subsection 129-40(1) in relation to the relevant acquisition. This is calculated by averaging the extent of creditable purpose based on the different proportions to which the acquisition related to each of the units. That is:*

(Extent of creditable purpose for unit A using the output-based indirect method × proportion of acquisition related to unit A) + (Extent of creditable purpose for unit B using the output-based indirect method × proportion of acquisition related to unit B)

= (100% × 40%) + (96.39% × 60%)

= 40% + 57.83%

= 97.83%.

Status: **draft for comment**

120. *This is the actual application of the thing for the purposes of step 1 of the method statement in subsection 129-40(1) for the acquisition of the subcontractor's services which relates differently to each of the two units.*

Application of residential premises to a private or domestic purpose

121. In some cases, residential premises may also be applied for a private or domestic purpose such as where the entity lives in the premises (a non-creditable purpose). In these situations, the apportionment methodologies discussed in paragraphs 83 to 120 of this Ruling may be adapted by imputing a market rental to represent the application for a private or domestic purpose. It is considered that such an approach will provide a fair and reasonable apportionment.

Example 16 – application to a private or domestic purpose

122. *Mary is registered for GST and has quarterly tax periods. She constructed new residential premises for the purpose of sale as part of her enterprise. However, due to a change in her personal circumstances, not long after the premises were completed Mary required a place to live for three months. Mary continued to hold the premises for sale as part of her enterprise and continued to market the premises for sale. The market value for rent for similar premises was $2,500 per month. Before the end of the adjustment period Mary sells the premises for $500,000.*

123. *At the end of the next adjustment period following the sale, Mary calculates the extent of creditable purpose using the formula set out in paragraph 83 of this Ruling for the output-based indirect method but uses the market value of rent as a notional value for her private and domestic application of the premises. So, $500,000 ÷ ($500,000 + $7,500) = 98.52%.*

124. *This percentage is the actual application of the thing for the purposes of step 1 of the method statement in subsection 129-40(1).*

Summary of the output-based indirect method

125. In summary, one possible appropriate method of apportionment where premises have been applied to both a creditable purpose of sale and a non-creditable purpose of leasing during the relevant period is based on an output-based indirect method. This method will apply such that:

- if the premises have been sold before the end of the relevant adjustment period, the output-based indirect method can be applied by comparing the consideration received for the taxable supply of the premises with the consideration received for both the taxable supply and the input taxed supplies of residential premises by way of lease (paragraphs 83 to 86 of this Ruling);
- if the premises have not been sold but have been applied, to some extent, for the creditable purpose of sale for the entire relevant period, the output-based indirect method can be applied using the estimated sales consideration for the premises (paragraphs 87 to 96 of this Ruling); and

- if the premises have not been sold but have been applied, to some extent, for the creditable purpose of sale for only part of the relevant period and solely to a non-creditable purpose for part of the relevant period, the output-based indirect method can be applied using the estimated sales consideration for the premises but should be modified with an additional time-based apportionment (paragraphs 97 to 107 of this Ruling).

Other methods of apportionment

126. The Commissioner considers that the output-based indirect method discussed in paragraphs 83 to 125 of this Ruling is an appropriate method to provide a fair and reasonable basis of apportionment in the circumstances discussed in this Ruling. Other methods may also be acceptable in providing a fair and reasonable basis of apportionment and the principles discussed in GSTR 2006/4 should be referred to for further information.

127. However, there are some methods of apportionment that the Commissioner considers do not provide a fair and reasonable basis of apportionment in the circumstances discussed in this Ruling.

Effective life

128. An apportionment method based upon the estimated effective life of the premises is one of the methods that the Commissioner does not accept as being a fair and reasonable method of apportionment. Division 129 requires an entity to look back over the relevant period and apportion the application of the premises during that period between creditable and non-creditable purposes. Contrary to this, an apportionment method based on the effective life of the premises contemplates the entire life span of the premises rather than the actual use of the premises by the entity in the relevant period. Furthermore, residential premises include the land on which the relevant building is constructed. Land is generally an appreciating asset, and the effective life of the relevant building is considered too remote and arbitrary to reasonably reflect the application of the residential premises, comprising both the land and buildings, during the relevant period.

129. The Commissioner would reject this method, notwithstanding that the estimated effective life may be based upon the statutory rates provided for the purpose of calculating capital works deductions under Division 43 of the *Income Tax Assessment Act 1997*.[51A]

Depreciation

130. For the same reasons, the Commissioner does not accept that depreciation-based methods provide a fair and reasonable basis of apportionment. In broad terms, a depreciation-based method considers the extent to which the leasing of the premises has depreciated or diminished the value of the property. This is used as the basis of apportioning the application of the premises between creditable and non-creditable uses.

Change in projected sale price

131. Comparing the estimated selling price of residential premises before and after the premises have been leased is a third method that the Commissioner does not accept as

[51A] In *A Taxpayer and Commissioner of Taxation* [2011] AATA 160 at [27], the Administrative Appeals Tribunal accepted the reasoning as set out in paragraph 128 of this Ruling as to why an apportionment method based on the effective life of residential premises is not considered to be fair and reasonable.

providing a fair and reasonable basis of apportionment. The change in value of residential premises over time will be driven by many factors that are not related to the use of the premises to make supplies by way of lease. Therefore, changes in the estimated sale price of the premises do not provide an appropriate reflection of the use of the premises over the relevant period.

Interaction between Division 129 and the '5-year rule' in subsection 40-75(2)

132. [Omitted.]~~It is considered that the term 'used' in subsection 40-75(2) and the meaning of 'apply' for the purposes of Division 129 should be interpreted consistently. This means that if an entity has applied new residential premises for a creditable purpose in accordance with Division 129, the premises will also have been used other than for making supplies that are input taxed under paragraph 40-35(1)(a) and the requirements for subsection 40-75(2) to apply will not be satisfied.~~

133. The '5-year rule' in subsection 40-75(2) provides an exception to the meaning of new residential premises in subsection 40-75(1). The '5-year rule' is discussed in paragraphs 89 to 93 of Goods and Services Tax Ruling GSTR 2003/3 *Goods and services tax: when is a sale of real property a sale of new residential premises?* As discussed in paragraphs 89 and 90 of GSTR 2003/3, subsection 40-75(2) requires that for a period of at least 5 years since the premises became new residential premises, the premises have only been used for making supplies that are input taxed under paragraph 40-35(1)(a). The period must be a 5-year continuous period. However, it can be any continuous period between when the premises would otherwise have become new residential premises and when they are sold. If this requirement is satisfied, then the premises will not be new residential premises.

134. 'Used' is an important term in subsection 40-75(2). 'Used' takes its ordinary meaning in its context.[51B] As noted in paragraph 33 of this Ruling, there is a strong similarity between the ordinary meanings of 'use' and 'apply' in this context. That is, the relevant meanings are largely synonymous. If an entity has 'applied' new residential premises for a creditable purpose under Division 129 (for example, the entity held the premises for the purpose of sale), the premises will also have been 'used' other than for making supplies that are input taxed under paragraph 40-35(1)(a). In such circumstances, subsection 40-75(2) will not be satisfied.

135. [Omitted.]~~Adopting a consistent interpretation for the term 'used' in subsection 40-75(2) and the term 'apply' in Division 129 is consistent with the policy explained in the Revised Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 8) 2000 (the Explanatory Memorandum), which introduced section 40-75, that new residential premises will not be taxable if an entity is not entitled to input tax credits for acquisitions relating to the construction of the premises.~~

Alternative view

136. An alternative view is that the phrase 'the premises have only been used for making supplies that are input taxed' in subsection 40-75(2) only requires identification of the actual supplies that the premises have been used to make during the relevant period.

[51B] *Domestic Property Developments Pty Ltd as trustee for the Dals Property Trust and Commissioner of Taxation* [2022] AATA 4436 at [44–47].

[52] [Omitted.]~~Paragraphs 1.16 and 1.17 of the Revised Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 8) 2000.~~

137. On this alternative view, if the only supplies that the premises have been used to make during the specified period are input taxed supplies, then subsection 40-75(2) is satisfied. Other uses of premises such as private use or holding the premises for the purpose of sale do not preclude the application of subsection 40-75(2).

138. This alternative view is not the preferred view of the Commissioner. 'Used' is a word of wide import and its meaning depends to a large extent upon the context in which it is used.[53] It is considered that a broad interpretation of 'used' in subsection 40-75(2) ~~to~~ may extend to any uses of the premises by the entity including applications for a creditable purpose by way of holding premises for the purpose of sale is consistent with the intended policy. See ~~referred to in~~ the Revised Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 8) 2000, which introduced section 40-75.[53A] ~~(see paragraph 135 of this Ruling).~~ On the alternative view, contrary to this intended policy, an entity entitled to retain a significant portion of input tax credits in relation to the construction of new residential premises, on the basis that they were being held for the purpose of sale whilst being leased, may, due to the application of subsection 40-75(2), make an input taxed supply when the premises are sold. Thus, it would bear no GST on the supply despite having claimed substantial input tax credits on acquisitions that relate to the supply.

Example 17 – premises applied for the purpose of sale which do not satisfy the requirements of the '5-year rule'

139. *Matthew constructs new residential premises for the purpose of sale and is entitled to input tax credits on his acquisitions. On completion of the premises, Matthew decides to lease the premises because of a downturn in the property market. Matthew continues to hold the premises for the purpose of sale as part of his enterprise and does so until the premises are ultimately sold.*[54] *He is therefore applying the premises for two purposes under Division 129. He is required to make an increasing adjustment at the end of the first adjustment period because the actual application is less than the intended application. He will also need to consider whether further adjustments are necessary in each of the relevant adjustment periods.*

140. *Matthew sells the premises six years after they were completed. He has been leasing the premises for this whole period. However, the requirements of subsection 40-75(2) are not satisfied because the premises have not only been used for making supplies that are input taxed because of paragraph 40-35(1)(a). The premises have also been used for the purpose of sale because Matthew has been holding the premises for sale as part of his enterprise.*

141. *The premises are new residential premises and, provided all the requirements of section 9-5 are satisfied, Matthew makes a taxable supply of new residential premises when the premises are sold.*

[53] See, for example, *Newcastle City Council v Royal Newcastle Hospital* [1957] HCA 15; (1957) 96 CLR 493 at [515], per Taylor J; *Ryde Municipal Council v Macquarie University* [1978] HCA 58; (1978) 139 CLR 633 at [637] per Gibbs ACJ and at [651] per Stephen J.

[53A] The policy intent, as explained at paragraphs 1.16 and 1.17 of the Revised Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 8) 2000, was that new residential premises will not be taxable if an entity is not entitled to input tax credits for acquisitions relating to the construction of the premises.

[54] Determining that the premises are being held for the purpose of sale depends on an objective assessment of all of the facts and circumstances. See paragraphs 44 to 47 of this Ruling for some examples of relevant facts and circumstances. It is considered that it would generally be a rare situation where an entity would hold premises for the purpose of sale for such a long period of time as in this example without selling the premises.

Example 18 – premises held for the purpose of sale for a period of time and then used only to make input taxed supplies by way of lease

142. *Assume the same facts as for Example 17 of this Ruling. However, after continuing to hold the premises for the purpose of sale for six months after starting to lease the premises, Matthew decides to hold the premises as an investment asset to be used only for the purpose of leasing. Matthew continues to make increasing adjustments under Division 129 in each relevant adjustment period on the basis that he is now holding the premises solely for a non-creditable purpose.*

143. *Matthew sells the premises six years after they were completed. He has been leasing the premises for this whole period. For the first six months of this period, Matthew was applying the premises for a dual purpose. Therefore, this period does not count towards a continuous 5-year period of using the premises only for making input taxed supplies by way of lease. However, after this time there is a continuous 5-year period which satisfies the requirements of subsection 40-75(2).*

144. *Therefore, while Matthew will have made increasing adjustments under Division 129 for the majority of the input tax credits to which he was entitled on the relevant acquisitions made in constructing the residential premises, the sale of the residential premises will be an input taxed supply of residential premises under section 40-65.*

Further example

145. This worked example considers a scenario where a property developer constructs new residential premises for sale but leases the premises prior to selling them. The example considers the following issues:

- identifying the relevant adjustment periods for multiple acquisitions;
- identifying changes in extent of creditable purpose;
- calculating adjustments for adjustment periods while the premises continue to be leased; and
- calculating adjustments for the final adjustment period following the sale of the premises.

Example 19 – property development where premises are constructed for sale but leased prior to sale – worked example

Facts

146. *David, a property developer, is registered for GST and accounts for GST on a quarterly basis. David also accounts on a basis other than cash. The following occurs:*

Table 2: Sequence of events

Date	***Event***
30 August 2006	*David acquires a block of land for $220,000 (GST-inclusive). The margin scheme was not applied.*
10 September 2006	*David entered into a contract with a builder to construct new residential premises on the land. The contract price was $198,000 (GST-inclusive).*

Date	*Event*
10 October 2006	*David made a progress payment of $55,000.*
31 January 2007	*David made a progress payment of $77,000.*
2 April 2007	*David made a final payment of $66,000.*

147. *At the time of purchasing the block of land and throughout the period of construction, David planned to sell the premises on completion and thus make a taxable supply of new residential premises.*[55] *The acquisitions were creditable acquisitions in accordance with section 11-5. The input tax credit for the purchase of the land (that is $20,000) was attributed to the tax period ending 30 September 2006. As the construction services are a supply on a progressive basis and David provided consideration on a progressive basis, each progress payment and the final payment was attributable separately to the period in which the consideration was provided.*[56] *That is, an input tax credit of $5,000 was attributable to the tax period ending 31 December 2006 for the first progress payment, an input tax credit of $7,000 was attributable to the tax period ending 31 March 2007 for the second progress payment, and an input tax credit of $6,000 was attributable to the tax period ending 30 June 2007 for the final payment*.

148. *David started marketing the premises for sale prior to them being completed. However, after the premises were completed it was clear that the market had slowed significantly. David decided to lease the premises to cover some of the holding costs. The premises were leased from 1 August 2007 until 31 May 2010. David leased the premises for $2,000 per month. However, throughout this period David continued to hold the premises for the purpose of sale as part of his enterprise. This is supported by objective evidence. In particular, David's business plan did not change and was in accordance with past projects where premises were sold as soon as possible. David also continued to market the premises for sale.*

149. *David finally sold the premises on 31 May 2010 for $500,000.*

Identifying the adjustment periods

150. *Each of the progress payments will be treated as a separate acquisition for the purposes of Division 129.*[57] *The first adjustment period is a tax period that ends on 30 June and commences at least 12 months after the end of the tax period to which each acquisition was attributed. The relevant adjustment periods are as follows:*

Table 3: Relevant adjustment periods

Acquisition date	*Acquisition cost (GST-exclusive)*	*First adjustment period*	*Number of adjustment periods*
30 August 2006 (land)	*$200,000*	*Tax period ending 30 June 2008*	*5*
10 October 2006 (progress payment)	*$50,000*	*Tax period ending 30 June 2008*	*5*
31 January 2007 (progress payment)	*$70,000*	*Tax period ending 30 June 2008*	*5*

[55] Sections 40-75 and 9-5.
[56] Assuming David is provided with a tax invoice for each separate payment. See sections 156-10 and 29-10.
[57] Section 156-20.

Acquisition date	*Acquisition cost (GST-exclusive)*	*First adjustment period*	*Number of adjustment periods*
2 April 2007 (final payment)	*$60,000*	*Tax period ending 30 June 2009*	*5*

Adjustments for the tax period ending 30 June 2008

151. *Throughout the period between the acquisitions and the ultimate sale of the new residential premises, David has applied the premises in carrying on his enterprise for the creditable purpose of sale and has also applied the premises in relation to making input taxed supplies of residential premises by way of lease. David needs to determine the extent of creditable purpose for each of the acquisitions given the dual application throughout the period. This requires an apportionment on a fair and reasonable basis.*

152. *In relation to the acquisition of the land, from 30 August 2006 to 31 July 2007 the extent of creditable purpose is 100% (as it has been held for the purpose of sale of the new residential premises). From 1 August 2007 until 30 June 2008, there has been a dual application as the new residential premises have been held for the purpose of sale while also being applied in relation to making input taxed supplies of residential premises by way of lease. The extent of creditable purpose for the relevant period can be calculated by applying an output-based indirect method (using estimated sales consideration). During this period, David has leased the premises for 11 months at $2,000 per month. This is a total gross rental income of $22,000. The estimated selling value of the premises based on the real estate agent's comparative sales analysis was $550,000. The extent of creditable purpose for the relevant period up to 30 June 2008 is therefore $550,000 ÷ ($550,000 + $22,000) = 96.15%.*

153. *In relation to the acquisitions for which progress payments were made on 10 October 2006 and 31 January 2007, the process for determining extent of creditable purpose is the same as for the land. As set out in paragraph 152 of this Ruling, for the relevant period up to 30 June 2008 the extent of creditable purpose is 96.15% applying the output-based indirect method (using estimated sales consideration).*

154. *David will then need to apply the method statement contained in section 129-40 to each of the relevant acquisitions.*

155. *Applying the method statement in respect of the land:*

- *Step 1 – The extent to which the thing has been applied for a creditable purpose during the period 30 August 2006 to 30 June 2008 is 96.15%.*
- *Step 2 – The extent to which the thing was acquired for a creditable purpose is 100%, as the planned use at the time of the acquisition was not to make any input taxed supplies.*
- *Step 3 – As the actual application of the thing acquired is less than the intended or former application of the thing, David will have an increasing adjustment.*

156. *In relation to the progress payments of 10 October 2006 and 31 January 2007, the above steps also result in increasing adjustments.*

157. *Each increasing adjustment is calculated using the formula:*[58]

Increasing adjustment = full input tax credit × (intended application − actual application)

158. *Therefore, the increasing adjustment in respect of the land is calculated as follows:*

= $20,000 × (100% − 96.15%)

= $770.

159. *The increasing adjustment in respect of the first progress payment on 10 October 2006 is calculated as follows:*

= $5,000 × (100% − 96.15%)

= $192.50.

160. *The increasing adjustment in respect of the second progress payment on 31 January 2007 is calculated as follows:*

= $7,000 × (100% − 96.15%)

= $269.50.

161. *David has a total increasing adjustment of $1,232 for the tax period ending 30 June 2008 and must include the adjustment in his business activity statement (BAS) for this period.*

Adjustments for the tax period ending 30 June 2009

162. *As for the tax period ending 30 June 2008, adjustments need to be considered for each acquisition. This is the second adjustment period for the acquisition of the land and the first two progress payments. It is the first adjustment period for the final progress payment made on 2 April 2007.*

163. *In relation to the acquisition of the land, from 30 August 2006 to 31 July 2007 the extent of creditable purpose is 100% (as it has been held for the purpose of sale of the new residential premises). From 1 August 2007 until 30 June 2009, there has been a dual application as the new residential premises have been held for the purpose of sale while also being applied in relation to making input taxed supplies of residential premises by way of lease. The extent of creditable purpose for the relevant period up to 30 June 2009 can be calculated by applying an output-based indirect method (using estimated sales consideration). During this period, David has leased the premises for 23 months at $2,000 per month. This is a total gross rental income of $46,000. The estimated selling value of the premises was revised based on the real estate agent's updated comparative sales analysis to an amount of $480,000. The extent of creditable purpose for the relevant period up to 30 June 2009 is therefore $480,000 ÷ ($480,000 + $46,000) = 91.25%.*

164. *In relation to the acquisitions for which progress payments were made on 10 October 2006, 31 January 2007 and 2 April 2007, the process for determining extent of creditable purpose is the same as for the land. As set out in paragraph 163 of this Ruling, the extent of creditable purpose is 91.25% applying the output-based indirect method (using estimated sales consideration).*

165. *David will then need to apply the method statement contained in section 129-40 to each of the relevant acquisitions.*

[58] Section 129-70.

166. *Applying the method statement in respect of the land:*

- *Step 1 – The extent to which the thing has been applied for a creditable purpose during the period 30 August 2006 to 30 June 2009 is 91.25%.*
- *Step 2 – The intended or former application as calculated above for the adjustment period ending 30 June 2008 was 96.15%.*
- *Step 3 – As the actual application of the thing acquired is less than the intended or former application of the thing, David will have an increasing adjustment.*

167. *In relation to the progress payments of 10 October 2006, 31 January 2007 and 2 April 2007, the above steps also result in increasing adjustments.*

168. *The increasing adjustment in respect of the land is calculated as follows:*

= $20,000 × (96.15% − 91.25%)

= $980.

169. The increasing adjustment in respect of the first progress payment on 10 October 2006 is calculated as follows:

= $5,000 × (96.15% − 91.25%)

= $245.

170. *The increasing adjustment in respect of the second progress payment on 31 January 2007 is calculated as follows:*

= $7,000 × (96.15% − 91.25%)

= $343.

171. *The increasing adjustment in respect of the final progress payment on 2 April 2007 is calculated as follows:*

= $6,000 × (100% − 91.25%)

= $525.

172. *David has a total increasing adjustment of $2,093 for the tax period ending 30 June 2009 and must include the adjustment in his BAS for this period.*

Adjustments for the tax period ending 30 June 2010

173. *David sold the premises as new residential premises on 31 May 2010. The tax period ending 30 June 2010 is the final adjustment in relation to the acquisitions. Given that the premises have been sold, an output-based indirect method of apportionment provides a fair and reasonable basis of apportionment. The apportionment for extent of creditable purpose can be calculated according to the following formula:*

consideration for the taxable supply of the premises ÷ (consideration for the taxable supply of the premises + consideration for the input taxed supplies of residential premises by way of lease).

174. *The premises were sold for $500,000. The premises were leased for a total of 34 months up to the end of May 2010 – a total rental income of $68,000. The extent of creditable purpose under the formula is therefore $500,000 ÷ ($500,000 + $68,000) = 88.03%.*

175. *David will then need to apply the method statement contained in section 129-40 to each of the relevant acquisitions.*

176. *Applying the method statement in respect of the land:*

- *Step 1 – The extent to which the thing has been applied for a creditable purpose during the period 30 August 2006 to 30 June 2010 is 88.03%.*
- *Step 2 – The intended or former application as calculated above for the adjustment period ending 30 June 2009 was 91.25%.*
- *Step 3 – As the actual application of the thing acquired is less than the intended or former application of the thing, David will have an increasing adjustment.*

177. *In relation to the progress payments of 10 October 2006, 31 January 2007 and 2 April 2007, the steps in paragraph 176 of this Ruling also result in increasing adjustments.*

178. *In accordance with the formula in section 129-70, the increasing adjustment in respect of the land is calculated as:*

= $20,000 × (91.25% − 88.03%)

= $644.

179. *The increasing adjustment in respect of the first progress payment on 10 October 2006 is calculated as follows:*

= $5,000 × (91.25% − 88.03%)

= $161.

180. *The increasing adjustment in respect of the second progress payment on 31 January 2007 is calculated as follows:*

= $7,000 × (91.25% − 88.03%)

= $225.40.

181. *The increasing adjustment in respect of the final progress payment on 2 April 2007 is calculated as follows:*

= $6,000 × (91.25% − 88.03%)

= $193.20.

182. *David has a total increasing adjustment of $1,223.60 for the tax period ending 30 June 2010 and must include the adjustment in his BAS for this period.*

Summary

183. *David's overall GST position in relation to input tax credits and adjustments for the four acquisitions is as follows:*

- *Land:*
  - *$20,000 input tax credit (30 September 2006 BAS)*
  - *$770 increasing adjustment (30 June 2008 BAS)*

[59] [Omitted.]

  - *$980 increasing adjustment (30 June 2009 BAS)*
  - *$644 increasing adjustment (30 June 2010 BAS)*
  - *Net result – $17,606 credit*
- *10 October 2006 progress payment:*
  - *$5,000 input tax credit (31 December 2006 BAS)*
  - *$192.50 increasing adjustment (30 June 2008 BAS)*
  - *$245 increasing adjustment (30 June 2009 BAS)*
  - *$161 increasing adjustment (30 June 2010 BAS)*
  - *Net result – $4,401.50 credit*
- *31 January 2007 progress payment:*
  - *$7,000 input tax credit (31 March 2007 BAS)*
  - *$269.50 increasing adjustment (30 June 2008 BAS)*
  - *$343 increasing adjustment (30 June 2009 BAS)*
  - *$225.40 increasing adjustment (30 June 2010 BAS)*
  - *Net result – $6,162.10 credit*
- *2 April 2007 final progress payment:*
  - *$6,000 input tax credit (30 June 2007 BAS)*
  - *$525 increasing adjustment (30 June 2009 BAS)*
  - *$193.20 increasing adjustment (30 June 2010 BAS)*
  - *Net result – $5,281.80 credit.*

184. [Omitted.]

Commissioner of Taxation
9 July 2025

Appendix – Your comments

185. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

186. A compendium of comments is prepared when finalising this Ruling and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au. Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 8 August 2025

Contact officer details have been removed as the comments period has ended

References

Previous draft:

GSTR 2008/D5

Related rulings and determinations:

TR 2006/10
GSTR 2000/24
GSTR 2000/35
GSTR 2003/3
GSTR 2006/4
GSTR 2008/1
GSTR 2011/1
MT 2006/1

Legislative references:

- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 Div 11
- ANTS(GST)A 1999 11-5
- ANTS(GST)A 1999 11-15
- ANTS(GST)A 1999 11-20
- ANTS(GST)A 1999 11-30
- ANTS(GST)A 1999 15-5
- ANTS(GST)A 1999 15-10
- ANTS(GST)A 1999 15-15
- ANTS(GST)A 1999 29-10
- ANTS(GST)A 1999 40-35
- ANTS(GST)A 1999 40-35(1)(a)
- ANTS(GST)A 1999 40-65
- ANTS(GST)A 1999 40-65(1)
- ANTS(GST)A 1999 40-65(2)
- ANTS(GST)A 1999 40-65(2)(b)
- ANTS(GST)A 1999 40-75
- ANTS(GST)A 1999 40-75(1)
- ANTS(GST)A 1999 40-75(2)
- ANTS(GST)A 1999 Div 129
- ANTS(GST)A 1999 129-10(3)
- ANTS(GST)A 1999 129-20
- ANTS(GST)A 1999 129-40
- ANTS(GST)A 1999 129-40(1)
- ANTS(GST)A 1999 129-50
- ANTS(GST)A 1999 129-50(1)
- ANTS(GST)A 1999 129-50(2)
- ANTS(GST)A 1999 129-55
- ANTS(GST)A 1999 129-70
- ANTS(GST)A 1999 Div 156
- ANTS(GST)A 1999 156-10
- ANTS(GST)A 1999 156-20
- ITAA 1997 Div 43
- TAA 1953 Sch 1 105-55

Cases relied on:

- A Taxpayer and Commissioner of Taxation [2011] AATA 160; 2011 ATC 1-029
- Domestic Property Developments Pty Ltd as trustee for the Dals Property Trust and Commissioner of Taxation [2022] AATA 4436; 2022 ATC 10-661; 115 ATR 275
- GXCX and Commissioner of Taxation [2009] AATA 569; 2009 ATC 1-012; (2009) 73 ATR 380
- Ku-Ring-gai Co-Op Building Society (No 12) Limited [1978] FCA 107; 36 FLR 134
- Newcastle City Council v Royal Newcastle Hospital [1957] HCA 15; (1957) 96 CLR 493; [1957] ALR 277; 4 LGRA 69; 31 ALJ 20
- Ryde Municipal Council v Macquarie University [1978] HCA 58; (1978) 139 CLR 633; 53 ALJR 179; 23 ALR 41; 55 LGRA 373

Other references:

- Macquarie Dictionary, 2005, 4th edn, The Macquarie Library Pty Ltd, NSW
- Property and Construction Industry Partnership – Issues Register – Section 04 – Adjustments for Input Tax Credit Claims
- Revised Explanatory Memorandum to the Taxation Laws Amendment Bill (No. 8) 2000
- The Australian Oxford Dictionary, 1999, Oxford University Press, Melbourne

ATO references

NO:	2008/13265
ISSN:	1443-5160
BSL:	GST
ATOlaw topic:	Goods and services tax ~~ General rules and concepts ~~ Adjustments ~~ Change in creditable purpose Goods and services tax ~~ Property ~~ Premises ~~ New residential premises Goods and services tax ~~ General rules and concepts ~~ Creditable purpose

Status: **draft for comment**

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).