GSTD 2012/11 - Goods and services tax: have new residential premises been used for residential accommodation before 2 December 1998 for the purposes of paragraph 40-65(2)(b) of the A New Tax System (Goods and Services Tax) Act 1999 where the premises were only operated as commercial residential premises before that date?

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There is a Compendium for this document: **GSTD 2012/11EC** .

Generated on: 25 November 2026, 04:15:45 AM

Goods and Services Tax Determination

Goods and services tax: have new residential premises been used for residential accommodation before 2 December 1998 for the purposes of paragraph 40-65(2)(b) of the *A New Tax System (Goods and Services Tax) Act 1999* where the premises were only operated as commercial residential premises before that date?

This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953.*

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

Ruling

1. No. New residential premises as referred to in paragraph 40-65(2)(b)[1] will only have been 'used for residential accommodation (regardless of the term of occupation) before 2 December 1998' where the premises, at the time of use before 2 December 1998, were residential premises but not commercial residential premises. That is, the prior use for residential accommodation does not encompass prior use for making supplies of accommodation in commercial residential premises.

[1] All legislative references in this Determination are to the *A New Tax System (Goods and Services Tax) Act 1999* unless otherwise stated. The view in this Determination in respect of paragraph 40-65(2)(b) also applies equally to the equivalent requirement in paragraph 40-70(2)(b).

Example

2. KCMF Enterprises constructs and strata titles premises which it commences operating as a hotel in January 1997. Operating the premises involves making supplies of accommodation in commercial residential premises.

3. In December 2008, KCMF Enterprises sells one of the strata titled units to Tom.

4. *Under subsection 40-65(1), the sale of real property is input taxed, but only to the extent that the property is residential premises to be used predominantly for residential accommodation (regardless of the term of occupation). In this case the strata titled unit is residential premises to be used predominantly for residential accommodation.*[2]

5. *However, under subsection 40-65(2) the sale is not input taxed to the extent that the residential premises are commercial residential premises or new residential premises other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998. The single strata titled unit is not commercial residential premises.*[3] *However, the premises have not previously been sold and are new residential premises under section 40-75. Thus, it is necessary to consider whether the strata titled unit has been used for residential accommodation before 2 December 1998.*

6. *The use of the premises for providing accommodation in commercial residential premises before 2 December 1998 does not mean that they have been used for residential accommodation for the purpose of paragraph 40-65(2)(b). This is because the use of the premises to supply accommodation in commercial residential premises is not the same as using the premises for residential accommodation as required by paragraph 40-65(2)(b).*

7. Therefore, the sale of the strata titled unit to Tom is not an input taxed supply under section 40-65 because it is a sale of new residential premises that have not been used for residential accommodation before 2 December 1998. Assuming the other requirements of section 9-5 are satisfied, the sale to Tom is a taxable supply.

Date of effect

8. This Determination applies both before and after its date of issue. However, this Determination 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 Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
19 December 2012

[2] See Goods and Services Tax Ruling GSTR 2012/5 *Goods and services tax: residential premises* for discussion of this requirement.
[3] See Goods and Services Tax Ruling GSTR 2012/6 *Goods and services tax: commercial residential premises*.

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Explanation

9. Subsection 40-65(1) provides that 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).

10. However, subsection 40-65(2) provides that the sale of real property 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.

11. The effect of paragraph 40-65(2)(b) is that a sale of new residential premises that have been used for residential accommodation (regardless of the term of occupation) before 2 December 1998 is an input taxed supply where the premises are to be used predominantly for residential accommodation.

12. The reference to prior use for residential accommodation in paragraph 40-65(2)(b) is construed as applying only where the premises at the time of use before 2 December 1998 were residential premises but not commercial residential premises. That is, the prior use referred to in paragraph 40-65(2)(b) does not encompass prior use for making supplies of accommodation in commercial residential premises.

13. In *South Steyne Hotel Pty Ltd v. Commissioner of Taxation*[4] Edmonds J considered that the legislative policy perceived from the statutory context supported this view.[5] His Honour noted that the definition of new residential premises in section 40-75 made it clear that the fact that premises have previously been sold as commercial residential premises does not preclude them from being new residential premises. Additionally, a supply of premises by way of lease, hire or licence that is a supply of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises is not input taxed.[6] His Honour then concluded that the policy underlying the 'carve-out' for premises used for residential accommodation before 2 December 1998 was to be found in a use of the premises that would be input taxed if the subject of a current supply. Therefore, the 'carve-out' in paragraph 40-65(2)(b) should be construed as not extending to a use prior to 2 December 1998 which would not now be an input taxed supply.

14. At first instance, Stone J in *South Steyne Hotel Pty Ltd v. Commissioner of Taxation*[7] reached a similar conclusion with reference to 'slight but clear' textual support in the Act and relevant extrinsic materials, in particular, paragraph 11.21 of the Revised Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000 and example 15.4 of the Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006.[8]

[4] [2009] FCAFC 155; (2009) 180 FCR 409; 2009 ATC 20-145; (2009) 74 ATR 41.
[5] At FCAFC [96]–[102] ; FCR 429-430; ATC 10347-10348; ATR 61-62.
[6] See paragraph 40-35(1)(a).
[7] [2009] FCA 13; 2009 ATC 20-090; (2009) 71 ATR 228.
[8] At FCA [68]–[69] ; ATC 9337; ATR 246.

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; GSTR 2003/3; GSTR 2012/5; GSTR 2012/6

Subject references:

- Goods and services tax
- GST commercial residential premises
- GST new residential premises
- GST residential premises
- GST sale of real property
- GST sale of residential premises

Legislative references:

- ANTS(GST)A 1999
- ANTS(GST)A 1999 9-5
- 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 40-70(2)(b)
- ANTS(GST)A 1999 40-75
- TAA 1953

Case references:

- South Steyne Hotel Pty Ltd v. Commissioner of Taxation [2009] FCA 13; 2009 ATC 20-090; (2009) 71 ATR 228
- South Steyne Hotel Pty Ltd v. Commissioner of Taxation [2009] FCAFC 155; (2009) 180 FCR 409; (2009) 74 ATR 41

Other references:

- Revised Explanatory Memorandum to the Indirect Tax Legislation Amendment Bill 2000
- Revised Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006

ATO references

NO:	1-4AI3BL
ISSN:	1443-5179
ATOlaw topic:	Goods and Services Tax ~~ Property and construction ~~ commercial residential premises Goods and Services Tax ~~ Property and construction ~~ new residential premises Goods and Services Tax ~~ Property and construction ~~ other Goods and Services Tax ~~ Property and construction ~~ real property