GSTR 2011/1 - Goods and services tax: development, lease and disposal of a retirement village tenanted under a 'loan-lease' arrangement

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Goods and Services Tax Ruling

Goods and services tax: development, lease and disposal of a retirement village tenanted under a 'loan-lease' arrangement

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What this Ruling is about

1. This Ruling considers the goods and services tax (GST) implications of the development and supply of a retirement village tenanted under a 'loan-lease' arrangement.

2. In particular, this Ruling considers:

   (a) the consideration for and price of a taxable or GST-free supply of a retirement village for the purposes of section 9-15 and subsection 9-75(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act); and

   (b) the extent to which input tax credits are available for acquisitions or importations made by the developer to construct or develop the village under Division 11 or Division 15 of the GST Act

for retirement villages that have the features set out in paragraph 6 of this Ruling.

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

Class of arrangement

4. This Ruling applies to entities supplying a retirement village in the circumstances set out in paragraph 6 of this Ruling. This Ruling also applies to entities acquiring a retirement village, for the purposes of working out the price of the supply under Division 135.

5. In this Ruling the term 'retirement village' has its general or industry meaning and is not limited to the statutory definition of 'retirement village' in section 195-1.

6. This Ruling applies to arrangements that have the following features:

(a) An entity ('the vendor') acquires land and makes acquisitions or importations in order to develop a retirement village.

(b) The vendor enters into residence contracts with incoming residents in relation to a residential unit or apartment in the retirement village (a 'unit').

(c) The unit is, or is intended to be, occupied as a residence or for residential accommodation.

(d) An amount ('ingoing contribution') is paid by the incoming resident to the vendor, to secure the right to reside in the village. The right to reside takes the form of a lease or licence (for convenience, 'lease') of extended duration.

(e) The ingoing contribution is in the form of an interest-free loan. The vendor is contractually obliged to repay the amount of the loan in full when the lease terminates.

(f) The vendor then supplies all or part of the village by way of sale or long-term lease as a taxable supply (or as a GST-free going concern)[1] to another entity (for convenience, 'purchaser') as 'new residential premises' for the purposes of section 40-75.[2] The vendor may or may not have had the intention to sell the retirement village at the time it was first developed.

(g) The sale arrangement contemplates, either expressly or by implication, that the purchaser will repay ingoing contributions outstanding at the time of sale.

[1] Subdivision 38-J; Goods and Services Tax Ruling GSTR 2002/5 Goods and services tax: when is a 'supply of a going concern' GST-free?
[2] See 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?

7. The arrangements covered by this Ruling can also include the following features:

(a) There are contractual or statutory requirements relating to the time and manner in which ingoing contributions are repaid by the current operator of the retirement village.

(b) Repayment of the ingoing contributions may be funded, in whole or in part, by money received by the operator as ingoing contributions from new incoming residents.

(c) Under the residence contracts, the operator of the retirement village ('operator') may be entitled to receive certain amounts from a resident when the resident's lease terminates. These amounts can include:

(i) fees based on the term of residence often referred to as deferred management fees or exit fees; and

(ii) an amount reflecting an agreed proportion of any decrease in the market value of the right to reside during the outgoing resident's occupation, determined by reference to the amount of a new ingoing contribution paid by a new incoming resident.

(d) The operator may be liable to pay an outgoing resident an amount reflecting an agreed proportion of any increase in the market value of the right to reside occurring during the outgoing resident's occupation.

(e) The operator may be entitled to receive amounts from residents during the term of the lease, which may be described as rent, maintenance or service fees.

(f) The operator may be entitled to set-off repayment of the ingoing contribution against the receipt of some or all of the amounts referred to above.

(g) In each State and the Northern Territory, legislation regulates the rights of outgoing residents to be repaid ingoing contributions.[3] In general terms, the effect of the legislation is to require the current operator or owner of the retirement village to repay ingoing contributions paid to a previous owner or operator of the retirement village upon termination of each lease. Despite this, the legislation does not relieve the previous operator or owner of its contractual obligation to repay ingoing contributions it has received.

[3] *Retirement Villages Act 1986* (Vic); *Retirement Villages Act 1999* (NSW); *Retirement Villages Act 1999* (Qld); *Retirement Villages Act 2004* (NT); *Retirement Villages Act 1992* (WA); *Retirement Villages Act 1987* (SA); *Retirement Villages Act 2004* (Tas).

8. In this Ruling:

(a) references to acquisitions include importations.

(b) references to tenancy or leasing include occupation under licence.

(c) references to a retirement village include part of a retirement village arrangement covered by this Ruling.

(d) references to sale include supply by way of a lease which is a 'long-term lease' according to section 195-1. Further, references to the vendor include a lessor under such a lease, and references to purchaser include the lessee under such a lease.

Ruling

9. In the circumstances in paragraph 6 of this Ruling,[4] the vendor receives a benefit by being effectively relieved of their obligation to repay ingoing contributions received from residents. The benefit associated with not being required to repay ingoing contributions is referred to as the 'repayment benefit' in this Ruling.

Consideration for the sale of a tenanted retirement village

10. The repayment benefit is included in the consideration for the supply of the village under the inclusive definition in section 9-15.

11. The repayment benefit is consideration which is 'expressed as an amount of money' within paragraph 9-75(1)(a). The 'amount' of money is the face value of the ingoing contributions received by the vendor which the purchaser effectively assumes responsibility for repaying.

Determining creditable purpose or application

12. In the circumstances described in paragraph 6 of this Ruling the operator makes input taxed or GST-free leasing supplies[5] and a taxable or GST-free sale of new residential premises. It is therefore necessary for the vendor to determine the extent to which the acquisitions it makes are for a creditable purpose. It is also necessary to determine the extent to which those acquisitions are then applied for a creditable purpose.

[4] Refer to paragraph 6(g) in particular.
[5] Refer to section 40-35 and subsection 38-25(4A).

Fair and reasonable method of apportionment

13. Acquisitions made in carrying on an enterprise that relate only to taxable or GST-free supplies are fully creditable. Acquisitions that relate only to making supplies that are input taxed are not creditable.

14. Acquisitions made in developing a retirement village in the circumstances described in this Ruling may relate to making taxable or GST-free supplies as well as input taxed supplies. These acquisitions are referred to as 'development acquisitions' in this Ruling. They are creditable to the extent that they do not relate to making supplies that would be input taxed. The extent of creditable purpose must be determined on a fair and reasonable basis having regard to the planned or intended use when the acquisitions are made.

15. The Commissioner will accept as fair and reasonable a method which determines the extent of creditable purpose for development acquisitions based on the following formula:

$$1 - \frac{\text{Total value of economic benefits reasonably expected to be obtained from making input taxed supplies}}{\text{Total value of economic benefits reasonably expected to be obtained in respect of the arrangement}}$$

Value of economic benefits to be obtained from input taxed supplies

16. For the purposes of paragraph 15 of this Ruling, the numerator of the fraction includes the value of economic benefits the operator reasonably expects to obtain from the input taxed leasing of the village before sale.

17. These benefits include the benefit to the vendor of having access to the ingoing contribution amounts, interest-free. The benefit is calculated for the period between the date when the ingoing contribution is received and the date when the ingoing contribution is repaid, or the retirement village is sold, whichever is earlier.

18. This benefit can be valued by using a reasonable estimate of the additional financing costs the vendor would incur over the relevant period if it borrowed an amount equal to the ingoing contribution under an arm's length interest bearing loan from a commercial financier. The Commissioner will accept a calculation that relies on the base interest rate used to calculate the general interest charge.

19. The value of benefits obtained from making input taxed supplies also includes a reasonable estimate of any other amounts which will be paid to the vendor in respect of the lease of the unit, performance of lease terms or covenants, or for anything which can reasonably be regarded as incidental to the supply of accommodation by way of lease. These benefits do not include the face value of ingoing contributions which the vendor has borrowed from residents.

Value of all economic benefits to be obtained in respect of the arrangement

20. For the purposes of paragraph 15 of this Ruling, the denominator of the fraction includes:

(a) the value of economic benefits reasonably expected to be obtained from input taxed supplies, referred to in paragraph 16 of this Ruling;

(b) the face value of ingoing contributions reasonably expected to be included in consideration for the supply of the village in accordance with paragraphs 10 and 11 of this Ruling;

(c) the amount of money and the value of other assets reasonably expected to be received by the vendor on sale of the village; and

(d) the value of any other economic benefits reasonably expected to be received from the arrangement.

Fair and reasonable method of adjustment

21. Where the actual application of the vendor's acquisitions differs from its planned or intended application, an adjustment may be required under Division 129.

22. Where the vendor did not initially intend to sell the village, but forms that intention while the village remains new residential premises, adjustments will be required under Division 129 to reflect a change in the application of the vendor's acquisitions when an adjustment period occurs.

23. Where the method in paragraph 15 of this Ruling is used for apportionment, the same method must be used for the purposes of Division 129 to calculate the extent of creditable purpose based on the actual application of the things acquired. An apportionment method used to calculate an adjustment that does not reflect the apportionment method used to calculate the input tax credit entitlement is not a fair and reasonable basis of apportionment.

Additional circumstances

24. The method set out in paragraphs 15 to 23 of this Ruling represents a fair and reasonable method based on the arrangements described in paragraphs 6 and 7 of this Ruling. If additional circumstances exist, the fairness and reasonableness of using the method would need to be assessed having regard to those circumstances.

Alternative methods

25. A method other than that set out in paragraphs 15 to 23 of this Ruling can be applied where it provides a fair and reasonable basis of apportionment or adjustment.

26. An output based indirect method which disregards the benefit of having interest-free loans is not fair and reasonable because it does not take into account all significant economic benefits obtained by the operator as a direct result of making input taxed supplies.

Whether the repayment benefit is a creditable acquisition by the vendor

27. The repayment benefit is not a creditable acquisition of the vendor because it is not a supply to the vendor.[6] From the purchaser's perspective, the repayment benefit is not a supply which is separate from the repayment itself.

Purchaser of a GST-free going concern

28. Where a retirement village is supplied to a purchaser as a going concern, paragraphs 10 and 11 of this Ruling apply in order to determine the supply price for the purposes of any increasing adjustment under Division 135.

Date of effect

29. This Ruling applies 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).

Transitional arrangements

30. Pre-existing arrangements for the development of a retirement village covered by paragraph 6 of this Ruling may be subject to transitional administrative treatment.

[6] Refer to paragraph 11-5(b).

Consideration for the supply of the retirement village

31. Goods and Services Tax Ruling GSTR 2004/9 sets out the Commissioner's views on the application of the GST Act where some or all of an entity's liabilities are imposed on or effectively assumed by the purchaser of the entity's enterprise. The Commissioner has reviewed the application of the principles in GSTR 2004/9 to retirement village arrangements and published an Addendum to GSTR 2004/9, which takes effect from the date of issue of this Ruling.

32. The Commissioner accepts that, prior to the issue of the Addendum to GSTR 2004/9, a reasonable interpretation of that Ruling was that liabilities to repay ingoing contributions which the purchaser of a retirement village became exposed to as a result of statute would not be included in the vendor's consideration for the supply of the village.

33. Accordingly, the vendor of a retirement village can apply the interpretation in paragraph 32 of this Ruling to the supply of a village which occurs before the date of issue of this Ruling.

34. Furthermore, the vendor of a retirement village will be permitted to apply the interpretation in paragraph 32 of this Ruling where it can be objectively determined that before the date of issue of this Ruling, the vendor became commercially committed to construct and develop a retirement village in accordance with the arrangement in this Ruling.

35. Eligibility for this transitional arrangement is based on commitment to the construction and development of the village. It does not require the vendor to establish that it was commercially committed to selling the village before the issue of this Ruling.

36. For the purposes of paragraph 34 of this Ruling, an entity will be commercially committed before the date of issue of this Ruling where, before that time, they have incurred, or become legally required to incur, significant financial costs for the purposes of entering into or carrying out an arrangement covered by this Ruling. An entity will only be considered to have incurred significant financial costs for these purposes where they have evidence which establishes an objective intention to enter into or carry out an arrangement of the relevant kind at the time the expenditure was incurred.

37. Accordingly, the transitional arrangements will not apply merely because an entity has purchased or contracted to purchase land, purchased an option over land or incurred costs in commissioning a feasibility study. Additional factors would be necessary in such cases in order to demonstrate that the taxpayer's commercial commitment relates to an arrangement covered by this Ruling. Such factors may include business plans, zoning approvals, development agreement approvals, or finance approvals which evidence an objective intention to enter into an arrangement of the relevant kind at the time the expenditure was incurred.

38. The transitional arrangements in paragraphs 33 and 34 of this Ruling do not apply if the vendor determines the extent of their creditable purpose and application using an output based indirect method[7] which effectively recognises ingoing contributions as an economic benefit associated with the taxable or GST-free supply of the village.

39. The use of another method of apportionment will not affect an entity's entitlement to apply the transitional arrangements in paragraphs 33 and 34 of this Ruling.

Input tax credits

40. It has not previously been the Commissioner's administrative practice to require retirement village operators to reduce their extent of creditable purpose by reference to the benefit associated with the interest-free use of borrowed money.

41. Accordingly, an operator will be permitted to apply a method of apportionment or adjustment which does not take into account the benefit associated with the interest-free use of money where:

(a) it can be objectively determined that before the date of this Ruling, the vendor became commercially committed to construct and develop a retirement village in accordance with the arrangement in this Ruling; and

(b) that method is otherwise fair and reasonable.

42. Eligibility for this transitional arrangement is based on commitment to the construction and development of the village. It does not require the vendor to establish that it was commercially committed to selling the village before the issue of this Ruling.

43. This transitional treatment only applies to a vendor to the extent that they determine creditable purpose by reference to an output based indirect method of apportionment and adjustment.

44. The principles contained in the transitional arrangements should be applied consistently for any subsequent adjustments required for changes in the extent of creditable purpose under Division 129.

45. The use of the transitional arrangement relating to the interest-free use of money in paragraph 41 of this Ruling is not dependent on the use of the transitional arrangements for consideration for the supply of the village in paragraphs 33 and 34 of this Ruling.

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[7] Refer to 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 at paragraphs 111-115 and 120 for output based indirect methods.

Purchaser of a GST-free going concern

46. The purchaser of a retirement village covered by this Ruling may be required to determine the supply price of the retirement village for the purposes of calculating the adjustment for supplies of a going concern under Division 135. Such a purchaser will not be required to take into account its obligation to repay ingoing contributions received by the vendor where it can be objectively determined that the purchaser became commercially committed to the purchase before the issue of this Ruling.

47. Where the purchaser becomes commercially committed to the purchase after the date of issue of this Ruling, the supply price for the purposes of Division 135 is the price of the supply as determined in accordance with this Ruling.

Commissioner of Taxation
27 April 2011

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.

48. The vendor of a retirement village with the features described in paragraph 6 of this Ruling either makes a taxable supply of new residential premises or a GST-free supply of a going concern.[8] The supply of a retirement village enterprise consists of the supply of real property rights and other things that go to make up the retirement village enterprise. The supply of a retirement village is not the supply of a revenue stream.[9]

Consideration for the sale of a tenanted retirement village

49. The vendor receives the repayment benefit as a result of entering into an arrangement which effectively relieves it of having to repay ingoing contributions. At the time of sale, the arrangement contemplates that the vendor will cease to have practical responsibility for repaying those amounts. Further, when the ingoing contributions are repaid, it is contemplated that the vendor will no longer be legally liable to repay those amounts.

50. In such a case, a repayment by either purchaser or vendor will satisfy the other party's obligation, whether because the payment is made in accordance with an agreement or arrangement between the parties[10] or because it is made under legal compulsion.[11]

51. However, in the circumstances covered by this Ruling, the arrangement contemplates that any statutory obligation of the purchaser will be satisfied by the purchaser rather than the vendor. Furthermore, the arrangement objectively contemplates that the purchaser's payments will discharge debts of the vendor. Accordingly, the purchaser is not merely satisfying its own legal obligation when it repays ingoing contributions received by the vendor.

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[8] Refer to section 38-325.

[9] See the comment of Mason CJ in *Booth v. Federal Commissioner of Taxation* (1987) 164 CLR 159 cited at paragraph 34 of Goods and Services Tax Ruling GSTR 2004/4 Goods and services tax: assignment of payment streams including under a typical securitisation arrangement.

[10] *Burness, In the matter of Denward Lane Pty Ltd (in liq)* [2009] FCA 893; (2009) 259 ALR 339; (2009) 74 ACSR 1; *Emanuel (No 14) Pty Ltd (in liq), Re; Macks v. Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281; (1997) 24 ACSR 292; (1997) 15 ACLC 1099; *FC of T v. Orica Ltd* (1998) 98 ATC 4494 at 4502-4503; *Simpson v. Eggington* (1855) 156 ER 683 at 684.

[11] *Brooks Wharf & Bull Wharf Ltd v. Goodman Brothers* [1937] 1 KB 534; [1936] 3 All ER 696; 106 LJKB 437.

The repayment benefit is consideration

52. Subsection 9-15(1) defines 'consideration' on an inclusive rather than an exhaustive basis. The definition includes, payments, acts and forbearances referred to in paragraphs 9-15(1)(a) and (b), as well as anything else which is 'consideration' for the purposes of general law.[12]

53. The purchaser's effective undertaking to repay the ingoing contributions received by the vendor falls within the inclusive definition of 'consideration'[13] for the supply of the retirement village as that term has been interpreted by the courts in a revenue law context.[14]

54. In this regard, it is noted that the repayment benefit:

(a) has a close legal connection to the supply of the retirement village;

(b) has a close practical or business connection to that supply; and

(c) has an independent value and identity – rather than being an incidental aspect of the thing supplied or the process of supply.

Legal connection to the supply

55. The repayment benefit forms an integral part of the legal framework within which the parties transact.

56. In some cases, the parties' intention for the vendor to receive the repayment benefit will be reflected expressly or by implication in the contractual arrangements between the parties. Those arrangements may:

(a) give rise to a novation of liabilities to repay ingoing contributions to the purchaser;

(b) require the purchaser to repay those liabilities; or

(c) require the purchaser to indemnify the vendor in respect of any ingoing contributions the vendor is required to repay.

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[12] See, for example, *Currie v. Misa* (1875) LR 10 Exch 153 where Lush J stated that consideration may consist of 'some … responsibility, given, suffered, or undertaken… '.

[13] Refer to subsection 9-15(1).

[14] *Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 at 152; *Chief Commissioner of State Revenue (NSW) v. Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496; 2005 ATC 4052; (2005) 58 ATR 241.

57. In other circumstances, where the obligation to repay ingoing contributions is secured by a statutory or contractual charge over retirement village land, the law may imply a term into the supply agreement, requiring the purchaser to indemnify the vendor for any ingoing contributions the vendor is required to repay. Such a term is implied on the basis that it would be against good conscience for the purchaser, who has acquired the retirement village land for a price which reflects the obligations secured by the charge, to allow those obligations to be satisfied by the vendor.[15]

58. In some jurisdictions, the existence of a charge may lead to a similar indemnity being implied into the supply agreement by statute.[16] The existence of this implied term confirms that the repayment benefit forms part of the consideration for the supply of the retirement village.[17]

59. Where ingoing contributions are not secured by a charge over retirement village land, the law may nonetheless recognise that the purchaser would be unjustly enriched if the vendor were to be required to repay the ingoing contributions. Where both purchaser and vendor owe co-ordinate liabilities to residents under contract and statute, the vendor may be entitled to seek recoupment from the purchaser in respect of any ingoing contributions the vendor is compelled to repay.[18]

Practical and business connection to the supply

60. The concept of consideration under the GST is very broad and extends beyond the notion of consideration in contract law.[19] In determining whether a benefit is consideration for a supply, it is also relevant to consider the closeness of its relationship to the supply in a practical and business sense.[20]

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[15] *Waring v. Ward* [1802] EngR 288; (1802) 7 Ves 332; (1802) 32 ER 136; *Adair v. Carden* (1892) 29 LR Ir (Ch D) 469; *Mills v. United Counties Bank Ltd* [1912] 1 Ch 231 at 237; *Fink v. Robertson* (1907) 4 CLR 864; [1907] VLR 610b; (1907) 13 ALR 157; [1907] HCA 7; *Simpson v. Forrester* (1973) 132 CLR 499 at 522-523.

[16] Refer to section 76, *Real Property Act 1900* (NSW); section 59, *Land Titles Act 1980* (Tas); section 97, *Real Property Act 1886* (SA); section 63, *Land Title Act* (NT).

[17] *Finance Corporation of Australia Ltd v. Commissioner of Stamp Duties* [1981] Qd R 493; (1981) 81 ATC 4396; (1981) 12 ATR 112.

[18] *Brooks Wharf & Bull Wharf Ltd v. Goodman Brothers* [1937] 1 KB 534; [1936] 3 All ER 696; 106 LJKB 437.

[19] Explanatory Memorandum to A New Tax System (Goods and Services Tax) Bill 1999, at paragraph 3.9; *TT-Line Company Pty Ltd v. Commissioner of Taxation* [2009] FCA 658 at paragraphs 27-28.

[20] *Berry v. Federal Commissioner of Taxation* (1953) 89 CLR 653 at 659 per Kitto J.

61. In this regard, the repayment benefit is integral to the commercial framework within which the parties transact. It is a known and intended feature of the arrangement between purchaser and vendor covered by this Ruling, and, as such, constitutes an advantage which is taken into account in determining the total consideration for the supply. It forms part of the value passing to the vendor which 'moves' the supply of the retirement village to the purchaser,[21] in that it reduces the amount of money, or the value of other assets, which a rational vendor would need to receive before being willing to supply the retirement village.

62. Viewed in the context of the sale as a whole, the repayment benefit is part of the exchange of value or 'quid pro quo'[22] which is a hallmark of consideration in a contractual context.

63. A payment by the purchaser to an outgoing resident does not merely satisfy the purchaser's statutory obligation. It also operates to extinguish the vendor's contractual liability to repay the ingoing contributions and, as such, confers a real benefit on the vendor.[23]

64. The repayment benefit is of value to the vendor since the vendor becomes subject to an arrangement under which they will be relieved of a presently existing and non-contingent liability. Such a liability exists because the ingoing contributions are loans. A contractual promise to repay a particular amount of money in the future is legally a loan, whether or not it is given that label by the parties.[24]

65. Although consideration for a supply does not need to be given voluntarily the repayment benefit is a known and intended feature of the supply arrangement described in paragraph 6 of this Ruling. In that sense, the purchaser's exposure to a statutory obligation to repay ingoing contributions is comparable to an entity's exposure to a contractual obligation, the essence of which entails the 'voluntary assumption of a legally enforceable duty'.[25] While a purchaser may become exposed to a liability to repay ingoing contributions as a result of statute, it is the arrangement between the parties which ensures that it is the purchaser, rather than the vendor, who ultimately satisfies that liability.

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[21] *Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW)* (1948) 77 CLR 143 at 152; *Chief Commissioner of State Revenue (NSW) v. Dick Smith Electronics Holdings Pty Ltd* (2005) 221 CLR 496; 2005 ATC 4052; (2005) 58 ATR 241.

[22] *Australian Woollen Mills Pty Ltd v. Commonwealth* (1954) 92 CLR 424; [1954] ALR 453; (1954) 28 ALJR 94.

[23] Compare the treatment of a long-service leave liability by Wilson J in *Federal Commissioner of Taxation v. Foxwood (Tolga) Pty Ltd* (1981) 147 CLR 278; (1981) 11 ATR 859; (1981) 81 ATC 4261.

[24] For example, *Richard Walter Pty Ltd v. Federal Commissioner of Taxation* (1995) 95 ATC 4440 at 4450; *Re Securitibank Ltd (No. 2)* [1978] 2 NZLR 136 at 167; *Federal Commissioner of Taxation v. Radilo Enterprises Pty Ltd* (1997) 97 ATC 4151 at 4161; Taxation Ruling TR 2002/14 Income tax: taxation of retirement village operators at paragraph 29.

[25] *Australian Woollen Mills Pty Ltd v. Commonwealth* (1954) 92 CLR 424 at 457.

Independent identity

66. The repayment benefit has a value and identity independent of the things supplied and is not merely an incidental feature of the supply arrangement.

67. An asset may carry an inherent burden or disadvantage which affects its value. A vendor of such an asset may not receive consideration merely because, by supplying the asset, it stops being exposed to that burden or disadvantage. In such a case, the burden or disadvantage is not consideration, because it lacks an identity which is independent of the asset.[26]

68. However, the obligation to repay an ingoing contribution is a presently existing debt, recoverable at law. As such, it is not merely incidental to, or inseparably connected with, the assets comprising the retirement village.[27]

69. The obligation to repay ingoing contributions is separable from the retirement village assets even if the liability is secured over the assets of the retirement village. It is capable of being discharged while leaving the essential character of the retirement village assets unchanged.[28]

70. Since the vendor's obligation to repay ingoing contributions has an independent identity, it follows that the purchaser's effective undertaking to repay those amounts also has an independent identity.

71. An incidental term or condition relating to the process of making a supply is not consideration. However, the repayment benefit does not represent a mere incidental term or condition. It arises from an understanding between the parties relating to the repayment of separately identifiable debts of significant value.

Amount of consideration

72. The purchaser's effective assumption of responsibility for repaying outstanding ingoing contributions is consideration which is 'expressed as an amount of money'. It is therefore monetary consideration.[29]

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[26] See further, Goods and Services Tax Ruling GSTR 2001/6 Goods and services tax: non-monetary consideration at paragraphs 80 to 85.

[27] *Swayne v. Commissioners of Inland Revenue* [1899] 1 QB 335 at 341. Since the obligation to repay an ingoing contribution is a debt, it is not akin to a liability that will arise in the future because of the continuation of an executory contract; compare with Goods and Services Tax Ruling GSTR 2004/9 Goods and services tax: GST consequences of the assumption of vendor liabilities by the purchaser of an enterprise at paragraphs 115-118.

[28] Compare *Swayne v. Commissioners of Inland Revenue* [1899] 1 QB 335 at 341-342; see also *Kemtron Industries Pty Ltd v. Commissioner of Stamp Duties* [1984] 1 Qd R 576 at 590.

[29] Refer to paragraph 9-75(1)(a).

73. The 'amount of money' is the face value of the ingoing contributions received by the vendor which it is effectively relieved from having to repay. From the vendor's perspective, this is the value obtained from the ingoing contributions as a result of supplying the village to the purchaser. Where the supply is taxable, that amount is included in the price of the supply.[30]

74. Not all monetary consideration need itself be money. 'Consideration expressed as an amount of money' is consideration that sounds in[31] or finds expression in money.[32] Such consideration is 'concerned only with' or has reference to 'the essential character of' money.[33] The benefit obtained by the vendor from the discharge of its debts is 'money's worth', or 'the equivalent of money'.[34] The repayment benefit is expressed as an amount of money because it involves nothing more than paying money in amounts which are known or readily quantifiable.[35]

75. It is not necessary that the amount of the ingoing contributions be explicitly referred to by the parties to the supply arrangement. Whether a benefit is 'expressed as an amount of money' does not turn on whether it has actually been ascribed a monetary amount or value.[36]

Determining creditable purpose or application

76. An entity is entitled to input tax credits for the creditable acquisitions it makes.[37] An acquisition is not creditable to the extent that it relates to making supplies that would be input taxed.[38]

77. In the circumstances described in paragraph 6 of this Ruling, the vendor makes:

(a) input taxed supplies – comprising the leases of residential premises;[39] and

(b) one or more other supplies – including the taxable supply of the retirement village as new residential premises[40] or supplies which are GST-free.

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[30] Refer to subsection 9-75(1).
[31] *Burrill v. Commissioner of Taxation* (1996) 33 ATR 133; (1996) 96 ATC 4629; (1996) 67 FCR 519.
[32] See GSTR 2001/6 at paragraph 32.
[33] *Butterworth's Australian Legal Dictionary*, 1997, Butterworths, Sydney. Also, Garner, B 1995, *A Dictionary of modern legal usage*, 2nd edn, Oxford University Press, New York.
[34] *Federal Commissioner of Taxation v. Orica Ltd* (1998) 98 ATC 4494 at 4503; (1998) 39 ATR 66 at 76.
[35] Refer to GSTR 2004/9 at paragraphs 27-28.
[36] Refer to GSTR 2001/6 at paragraph 40.
[37] Refer to section 11-20.
[38] Refer to paragraph 11-15(2)(a).
[39] Refer to section 40-35.
[40] Refer to paragraph 40-65(2)(b) and section 40-75.

78. It is therefore necessary for the vendor to apportion input tax credits for its development acquisitions by reference to its intended or planned use for the retirement village[41] and to make adjustments under Division 129 to account for differences between the intended and the actual application of the things acquired.

79. The extent of creditable purpose and application must be determined on a fair and reasonable basis.[42] The basis of apportionment or allocation needs to make sense in the context of the enterprise and should not produce significant distortions.[43]

Reasonable method of apportionment or adjustment

80. Paragraphs 15 to 23 of this Ruling set out an apportionment and adjustment method which the Commissioner considers to be fair and reasonable.

81. The method compares projected economic benefits obtained from making input taxed supplies with projected economic benefits in respect of the arrangement overall.

82. This approach is an output based indirect method.[44] The premise behind methods of this kind is that expected economic benefits associated with an entity's acquisitions provide an objective measure of an entity's purpose.

Values of economic benefits to be obtained from input taxed supplies

83. In applying the method referred to in paragraphs 15 to 19 of this Ruling, it is necessary to take into account all significant economic benefits reasonably expected to be obtained from residents under the lease of their units prior to the date of sale.

84. These benefits are relevant to apportionment since they are advantages sought by the vendor in making acquisitions.

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[41] Refer to GSTR 2006/4 at paragraphs 17 and 25-30.
[42] Refer to GSTR 2006/4 at paragraphs 30-38 and 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 at paragraphs 136-146.
[43] Refer to GSTR 2006/4 at paragraphs 121-123.
[44] Refer to GSTR 2006/4 at paragraphs 120, 143-153 for a broad explanation and examples of this type of method.

Benefit of interest-free finance

85. The advantage associated with obtaining access to ingoing contributions on an interest-free basis is a benefit which is objectively sought by the vendor.[45] As such, that advantage must be taken into account in determining the extent of creditable purpose and application.

86. In this context, the interest-free feature of the loans is an objective indication of a relationship between the vendor's acquisitions and the making of input taxed supplies. The making of the interest-free loan is a condition of the grant of the lease. Accordingly, the significant economic benefit associated with the interest-free feature of the loan establishes an objective connection between development acquisitions and supplies by way of lease.

87. The method referred to in paragraph 18 of this Ruling involves calculating the value of this benefit by reference to the cost of obtaining equivalent interest-bearing finance at arm's length. The Commissioner will accept a valuation which relies on the base interest rate used to calculate the general interest charge.

Other benefits relating to input-taxed supplies

88. Paragraph 19 of this Ruling refers to the value of any other amounts which are reasonably expected to be paid to the vendor in respect of making input taxed supplies. These are amounts to be paid in respect of the lease of the unit, performance of lease terms or covenants, or for anything which can reasonably be regarded as incidental to the input taxed supply of accommodation by way of lease.

89. Such amounts may be referred to in the residence agreement as 'deferred management fees', 'maintenance fees', 'service fees', 'capital replacement charges', or 'rent'. However, the question whether an amount is covered by paragraph 19 of this Ruling depends on its true character, determined in accordance with the residence agreement, rather than the label given to it.

[45] There is judicial support for the view that such an advantage is consideration for the supply of the premises by way of lease: *Customs and Excise Commissioners v. Exeter Golf and Country Club Ltd* (1979) 1 BVC 316; *Exeter Golf and Country Club Ltd v. Customs and Excise Commissioners* (1981) 1 BVC 385; *South African Revenue Service v. Brummeria Renaissance (Pty) Ltd and others* (391/06) [2007] ZASCA 99; [2007] SCA 99 (RSA); [2007] 4 All SA 1338 (SCA) (13 September 2007).

90. The value of benefits obtained from making input taxed supplies excludes the value of benefits which the vendor does not reasonably expect to receive. Therefore, the value of benefits obtained from making input taxed supplies excludes deferred management fees which are expected to become payable to the purchaser as a result of the sale of the retirement village.

91. Benefits relating to the making of input taxed supplies do not include the face value of ingoing contributions borrowed from residents, since these amounts must be repaid.

Value of all economic benefits to be obtained in respect of the arrangement

92. The method in paragraph 15 of this Ruling requires the value of benefits reasonably expected to be obtained from making input taxed supplies to be compared with the value of all benefits reasonably expected to be obtained in respect of the arrangement as a whole.

93. This element in the calculation includes the amount of any ingoing contributions the vendor receives which the purchaser effectively assumes the responsibility for repaying. Objectively, this repayment benefit represents one of the advantages sought by the vendor in making its acquisitions.

Other methods of apportionment or adjustment

94. While other methods may provide a fair and reasonable basis of apportionment or adjustment,[46] there are some methods which the Commissioner considers are not fair and reasonable.

95. As explained in paragraph 82 of this Ruling, an output based indirect method seeks to determine the advantages objectively sought by an entity in making acquisitions. A method which disregarded the benefit of the interest-free use of the ingoing contributions obtained from residents would not be reliable since it would fail to take into account significant economic benefits which are directly associated with the use of the vendor's acquisitions.

96. For this reason, the Commissioner does not accept as fair and reasonable an indirect output based method which does not reflect the benefit of the interest-free use of the ingoing contributions obtained from residents. This benefit can be measured using the method set out in paragraph 18 of this Ruling, or by any other fair and reasonable method.

[46] Refer to GSTR 2006/4.

Whether the repayment benefit is a creditable acquisition by the vendor

97. The repayment benefit is not a creditable acquisition of the vendor because it is not a taxable supply to the vendor.[47]

98. From the purchaser's perspective, the acquisition of the retirement village will require the future payment of money to residents. Viewed from that perspective, the effective undertaking to make the payment does not have an economic value or identity which is independent from the payment itself. The effective undertaking to repay ingoing contributions is not a supply in its own right, but is incidental to the payment which the purchaser will ultimately make.[48]

[47] Refer to paragraph 11-5(b).
[48] The payment itself is not a supply because it is money: subsection 9-10(4); see also GSTR 2004/9 at paragraphs 56-61.

Appendix 2 – Alternative views

This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the binding public ruling.

Alternative view 1

99. An alternative view is that, where the sale of the retirement village occurs in an Australian State or the Northern Territory, the purchaser's assumption of responsibility for repayment of ingoing contributions is not consideration for the supply of the retirement village.

100. According to this alternative view:

(a) Becoming subject to a statutory liability does not constitute a 'payment, act, or forbearance' by the purchaser or any other person.

(b) The purchaser does not assume a liability to repay ingoing contributions, but has a liability imposed upon it. The purchaser's role is passive, and any mention by the parties of ingoing contributions merely reaffirms the operation of the legislation.

(c) The vendor obtains no benefit from the purchaser repaying ingoing contributions because the payments discharge the purchaser's obligation rather than the vendor's.

101. This alternative view is not preferred because:

(a) The definition of 'consideration' is broad and it extends beyond payments, acts and forbearances (see paragraphs 52 and 53 of this Ruling).

(b) The repayment benefit forms an integral part of the legal framework within which the parties transact (see paragraphs 55 to 59 of this Ruling).

(c) The legal effect of the purchaser repaying ingoing contributions received by the vendor is to discharge the vendor's contractual liability to repay those amounts (see paragraphs 50 and 51 of this Ruling).

Alternative view 2

102. The second alternative view is that the repayment benefit is of minimal value to the vendor and should therefore be regarded as merely incidental to, rather than part of the consideration for, the supply of the retirement village.

103. This view is based on the expected cash flow implications for a retirement village vendor, bearing in mind that:

(a) the ingoing contribution is not repayable until termination of the lease;

(b) conditions relating to repayment of ingoing contributions are such that repayment would ordinarily coincide with or follow receipt of an ingoing contribution from a new resident; and

(c) in some cases, an outgoing resident may bear, in whole or in part, the risk that the ingoing contribution from a new resident will be less than their own ingoing contribution.

104. This alternative view effectively regards the vendor as having obtained substantially all the benefit of the ingoing contributions when entering into a lease.

105. The benefit of the ingoing contribution would be attributable to the input taxed leasing of units, rather than to the sale of the retirement village, for the purposes of determining the extent of the vendor's creditable purpose.

106. This alternative view is not preferred because it has insufficient regard to the fact that the ingoing contribution is a loan that is repayable by the operator. A liability to repay an ingoing contribution is a non-contingent presently existing debt. It exists even though:

(a) there are contractual or statutory conditions which affect the timing of repayment;[49]

(b) it is likely that the operator will be able to fund the repayment by obtaining a new ingoing contribution; or

(c) the operator is able to repay all or part of its liability by way of set-off.[50]

Alternative view 3

107. The third alternative view is that any repayment benefit should be regarded as non-monetary consideration as it should be viewed in light of the practical benefit derived by the vendor rather than purely as a monetary benefit. It might be argued that the value of this practical benefit should be considered having regard to the features of the arrangement referred to in paragraph 103 of this Ruling. This view is not preferred because the ingoing contributions which the vendor benefits from not having to repay are an ascertainable, monetary amount.

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[49] *Federal Commissioner of Taxation v. Citylink Melbourne Ltd* [2006] HCA 35; (2006) 62 ATR 648; (2006) ATC 4404 at 4426.

[50] By definition, a set off can only occur where there is a 'sum certain, immediately payable' against which a right may be offset: *Commissioner of Stamp Duties (NSW) v. Perpetual Trustee Co Ltd* (1929) 43 CLR 247 at 262-263.

Appendix 3 – Detailed contents list

108. The following is a detailed contents list for this Ruling:

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References

Previous drafts:

GSTR 2010/D1

Related Rulings/Determinations:

GSTR 2001/6; GSTR 2002/5; GSTR 2003/3; GSTR 2004/4; GSTR 2004/9; GSTR 2006/4; GSTR 2008/1; TR 2002/14; TR 2006/10

Subject references:

- creditable purpose
- Goods and services tax
- GST retirement villages
- GST consideration
- GST input tax credits & creditable acquisitions
- GST new residential premises
- GST supplies & acquisitions
- GST supply of a going concern

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