GSTR 2012/4EC - Compendium

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Ruling Compendium – GSTR 2012/4

This is a compendium of responses to the issues raised by external parties to draft Goods and Services Tax Ruling GSTR 2012/D2 – Goods and services tax: GST treatment of fees and charges payable on exit by residents of a retirement village operated on a leasehold or licence basis

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

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1	**Leasehold or licence** The title of the draft Ruling 'leasehold or licence basis' appears to suggest that the leasing arrangements are mutually exclusive, being in the nature of either a 'lease' or 'licence' (not one within the other etc.). We have found that it is not uncommon for a resident to execute both a 'lease' agreement and a 'licence' agreement (either separately or included in the suite of documents). That is, whilst the lease agreement grants the resident the right to exclusive possession of their independent living unit for the term of the lease, the operator would also grant a 'licence' to the resident for example, for the use of common areas. For the sake of clarity, we would suggest the use of the words 'and/or' in the final Ruling.	Agreed in part. Paragraph 2 of the final Ruling was amended to refer to a right to use the communal facilities contained in the village.

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2	**Reliance on the ruling** The draft Ruling is primarily divided between the 'legally binding' and the 'non-legally binding' section. We found it somewhat disappointing, given the resources that the RVA and Australian Taxation Office (ATO) have committed to this consultation process that the 'general principles' and technical basis as contained in Attachments A and B could not form part of the public ruling and therefore cannot be relied upon. We believe that these paragraphs contain the very substance of the ruling itself and to not give the attachments the opportunity for reliance would, in our view, dilute the fundamental purpose of producing the public ruling for the Sector.	Attachments A and B have been re-labelled to form part of the final Ruling.
3	**Legal Citations & State Retirement Village Acts** We note that your office cites a number of cases to support your proposition in the ruling in examining as to whether there is a nexus between an exit payment to any supply, stating that it will require 'an objective evaluation' of the contractual arrangements between the parties. Whilst we agree with this general contract law proposition, we would question the relevance of the citation of *International Air Transport Association v Ansett Australia Holdings Limited* given that the citation is from Kirby J's judgment, where he was in dissent with the Court majority. In our view, a more relevant starting point to the examination of this 'resident contractual' relationship would be the various State Retirement Village Acts (which were also mentioned in our prior submissions). Given the State Acts overrule and replace any terms in the contracts that may exist between the parties, any 'objective evaluation' must embrace a vigorous examination of the State Retirement Village Statutes. Thus is our view the logical place in commencing a legal analysis would be these Acts with an overlay of contract law (and where appropriate relevant case law for support of positions taken.	The citation of the case *International Air Transport Association v Ansett Australia Holdings Limited* has been removed from the final Ruling and replaced with *Rinehart* v *Welker* [2012] NSWCA 95 at [115]. Disagree. The relevant starting point is the legal arrangements that are defined in footnote 5 of the final Ruling to be any contractual agreement between the parties and any legislation which applies in the circumstances.

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4	**Legal reasoning needs to be expanded** Whilst we agree that Deferred Management Fees charged will be for the supply of input taxed residential accommodation, we are perplexed as to why the Commissioner has not provided any substantive legal analysis dealing with the legal tensions between composite or mixed supplies. In our view, such an analysis would have been useful in providing the industry and your own staff with a greater understanding of the application of the law to this complex area and also of the ATO's internal machinations in arriving at the conclusion of a particular supply being an input taxed supply of residential accommodation. Whilst footnote 9 of the ruling refers to paragraphs 17 and 55 to 63 of GSTR 2001/8, we would think that in the spirit of providing guidance to the industry, it would be a more valuable approach to be more specific in expanding the legal reasoning with specific reference to the retirement village industry. Furthermore, whilst there may be limited precedential value in citing overseas precedents, we do think that in areas of complex tax matters it is reasonable to at least refer to the experience of our overseas colleagues as it may provide relevant perspective into how these things may be dealt with domestically. We would think that your office would agree with this approach, as GSTR 2001/8 also refers to overseas case law. Given the issue of composite and mixed supplies is not unique to Australia, we thought we would assist you in collating some of the relevant precedents, albeit not exhaustive. • Is the particular outcome such that it creates absurd or artificial consequences - *British Airways PLC v Customs & Excise Commissioners;* • Has there been effectively a bargain for one supply or multiple supplies. This is a question of contract law and also a question of fact. It is looked at from a logical standpoint rather than a legalistic standpoint, the answer being steeped	GSTR 2001/8 is cross referenced in the final Ruling. Paragraphs 17 and 55 to 63 of GSTR 2001/8 explain the ATO view on mixed and composite supplies.

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	in common sense - *Customs & Excise Commissioners v Scott.* • Is the relationship between the supply so disproportionate as to not enable the transaction to be characteristics as one supply – *Customs & Excise v Madgett & Baldwin.* • It is necessary to examine the true and substantial nature of the consideration given to determine whether there is a sufficient distinction between the allegedly different parts to make it reasonable to sever them and apportion them accordingly. The enquiry is to determine whether one element of the transaction (or consideration given) is a necessary or integral part of another or whether it is merely ancillary to or incident to the other element – *Auckland Institute of Studies Ltd v CIR*. • That a single supply made up of a number of elements, none of which are ancillary (in the sense of subservient, subordinate or ministering to) element in the transaction – *College of Estate management v C & E Commrs & Levob Verzekeringen Bv v Staatssecretaris van Financien.* • It is necessary to consider the true and substantial nature of the consideration given for the payment. This will identify the core supply (which may consist of a number of supplies that are integral each other, none of which is the dominant element in the core supply). It would then be necessary to consider whether there are supplies that are ancillary to the core supply - *C & E Commrs V FDR Ltd*. • Whether a supply is integral, ancillary or incidental to another supply is essentially the same test *Customs & Excise Commissioners v United Biscuits.* We would appreciate if it your office would consider our suggestions above and incorporate greater vigour in the legal analysis in the final Ruling.	

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5	**Leverage on the New Zealand Experience** The New Zealand Office of Inland Revenue published *Interpretation Statement IS 10/08 Retirement Villages and GST* which outlines in detail the commercial arrangements. We would suggest that any finalised ruling follows suit in examining the lease and/or licence arrangements, which will then provide a factual context for the ongoing legal analysis domestically. Relevantly, the Commissioner in New Zealand concluded that the supply of the accommodation in the sense of a place to live is 'central to the concept of retirement villages and is an essential feature of the transaction between retirement villages and their residents. The Commissioner also considers that the right to use the common areas and facilities is part of the dwelling in a retirement villages (being an appurtenance belonging to and enjoyed with the dwellings). In respect of the recreational facilities this is also part and parcel of the right to the residential accommodation and is not a separate supply. • The Commissioner (NZ) also states that the maintenance of the unit and of the village facilities is part of the supply of accommodation, being services that make possible the supply of accommodation by keeping the unit and village in good repair. Some additional key observations from IS 10/08 that the ATO may wish to consider is: • Care services supplied as part of a care package are not part of the supply of accommodation. Care service do not facilitate, enable or contribute to the supply of accommodation and are not a minor or incidental feature of the transaction. Where an emergency call response service is the only care service supplied, that service is a minor or peripheral benefit that does not alter the character of the supply. • Transport services supplied as part of a package of services is also incidental	It is considered that there are adequate Australian cases that support our legal reasoning. As New Zealand law is not binding precedential authority in Australia the Commissioner is not inclined to refer to New Zealand law unless there is a compelling analogy.

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	to the supply of accommodation. Transport services are peripheral or minor benefits that do not constitute a supply separate from the supply of accommodation. • Any additional optional care or other services supplied at the request of residents for an additional payment are separate supplies made under separate transactions. We think that there are many similarities (more so than dissimilarities) between the New Zealand arrangements and Australia and therefore in our view it would be a reasonable point in expanding the legal reasoning in the final Ruling.	
6	**Exit fees** As 'exit fees' in the draft Ruling is broadly defined to be a deferred management fee, we suggest that references (or refinements) should also be made to ATO ID 2001/634. In this ATO ID, it is said that a deferred management fee will be consideration as part of a rental charge. We are of the view that this brings completeness to the draft Ruling.	ATO ID 2001/634 has been withdrawn.
7	**Monthly charges/fees and Green Acres Example** ***1. Apportionment*** In the draft Ruling (at paragraph 12), *'incidental services/supplies' is taken to be 'regarded as part of an input taxed or composite supply, the dominant part of which comprises the residential premises provided under the lease or licence.'* It further goes on to say that whether a service is incidental is a question of fact, and it refers also to GSTR 2001/8. Additionally, paragraph 22 states that *'where an exit payment is consideration for both non-taxable (input taxed or GST-free) and taxable supplies, or consideration for a mixed supply, the exit payments should be apportioned between the taxable and non-taxable components'.* In many aspects, the list of incidental supplies per Attachment A forms part of the 'recurrent charges' payable by a resident under their lease arrangement. Therefore we also suggest that references (or refinements) be made to ATO ID 2001/636	It is considered that apportionment is out of the scope of the final Ruling. It is considered that the principles are adequately covered in *Goods and Services Tax Ruling GSTR 2008/1 Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts* The reference to 'supplies' in Attachments A and B has been removed and replaced with services. Paragraphs 15 and 18 of the final Ruling have been changed to refer to services and to include a condition regarding the legal arrangements in place.

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	where it states that *'monthly maintenance fee consisting of components that can be reasonably characterised as part of the rental charge, does form part of the consideration for an input taxed supply under paragraph 40-35(1)(a) of the GST Act, when entity leases an independent living unit to a resident'.* We also believe that it is incumbent on the ATO to provide guidance on what is 'fair and reasonable' approach with regards to an apportionment model. We believe that greater certainty can be provided to the Industry if the 'Greenacres' apportionment model is referenced in the final Ruling. Additionally, we would further recommend further refinements to this model in that 'serviced apartments' should be included in the ATO model to reflect that the types of leasing arrangements that an operator could provide. We would be pleased to assist in this regards if required. ***2. Deal with Monthly Recurrent Charges & Incorporate Green Acres*** *Guidance in the Ruling* It is unusual that the matters listed in Attachments A and B are incorporated into the calculation of an exit fee. The supplies listed in Attachments A are more typically subject to and covered by monthly recurrent charges which may be part of the resident lease/licence agreement or a separate agreement. Supplies of a type detailed in Attachment B may be included in this monthly charge, but are more typically charged on a user pays basis. The ruling should be expanded to cover these arrangements and incorporate the existing guidance incorporated in the Green Acres example. There is no clear indication as to how the Green Acres example and the draft Ruling interact. Where taxpayers have relied on the ATO's long held view in the Green Acres example and guidance on the ATO's website to prepare budgets and financial models this omission may cause confusion. The ATO should confirm in the draft Ruling (together with some additional guidance) that the principles in the Green Acres example still apply, preferably by including	It is not currently intended to further expand on the Greenacres apportionment example nor amend ATO ID 2001/636. The issues may however be considered in the development of the program for future rulings and other guidance material.

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	some examples. ***3.*** The draft Ruling commences by identifying the supplies that are or might be made by the operator of a retirement village under a lease arrangement with a resident. Various supplies are identified as input taxed (including the supply of services which the ATO considers to be incidental services to input taxed supplies of residential rent under section 40-35 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act), or are considered to be additional consideration for the primary supply of residential rent), GST-free and taxable. Attachment A contains a non-exhaustive list of incidental services or additional consideration that relate to input taxed supplies. The draft Ruling does not distinguish between exit fees for these incidental services, and charges for the provision of these or similar incidental services that have been recovered from the residents by way of monthly service fees. In fact it is highly unusual that incidental services of a type listed in Attachment A would be accommodated in any exit fee. It is noted that the Retirement Villages Industry Partnership – Green Acres – example A deals in more detail with monthly charges in these circumstances and that many operators have relied on this example for a number of years. It is accordingly requested that the ruling cover the issue of monthly service fees and cover the same level of detail contained in the Green Acres example or include that example as it stands to appropriately provide binding status.	

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8	**Incidental Supplies – Attachment A** We believe that Attachment A could be expanded to include the following: 1. maintenance of units 2. maintenance of common areas • Attend to garbage and waste disposal of common areas 3. maintenance of fittings and fixtures • Maintain the emergency call system and all other technological systems 4. safety and security 5. Administration (including but not exhaustive) • All management, administration and marketing costs (which includes compliance and risk management programs) • Accounting, audit, legal, billing and banking costs • Contractors that the Operator may engage to satisfy items 1 to 5 listed above • Operation and maintenance of vehicles for the operation of the village • Day to day management of assets or systems in the village (includes the pool, gym, recycled water reticulation) • Obtaining the opinions or reports of experts or consultants relevant to the items 1 to 5 above.	It is agreed that the list of incidental supplies should be expanded. The list has been updated in the final Ruling with some items added and others removed. Some items in the draft Ruling referred to acquisitions solely made by the operator in supplying residential premises rather than any service provided to a resident.
9	Attachment B is a list of non-incidental supplies that might be supplied by the operator of the retirement village to the resident. The draft Ruling correctly identifies that the resident will generally provide separate consideration to retirement village operator for any such non-incidental supplies that are supplied to the resident. The possibility that some of the medical care services could be GST-free per section 38-7 of the GST Act or under other provisions should be mentioned rather than the bald statement that the list in Appendix B are taxable supplies (refer paragraphs 16-17, 42-43).	It is agreed that supplies of medical care services may be GST-free. Footnote 39 has been added to Attachment B of the final Ruling to state that some supplies may be GST-free.

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10	Suggest the formation of a working group which would consist of retirement village industry specialist and representatives from your office, with the sole objective of outlining a list of current products and services provided by each operator and clarifying the GST position for each product line.	Not specific feedback on the ruling.
11	**Include all Components of Final Amount Payable** The draft Ruling does not address all the components of the final amount, only the exit fee (sometimes referred to as the 'deferred management fee'). When a resident exits a retirement village, a final amount is calculated. This final amount may (depending on the resident contract) include a number of different components, collectively referred to as the exit fee. Other components may, for example, include an increase in the capital value of the Independent Living Unit (that is, a proportion of the capital gain). If the ruling is specific to exit fees, it will (without further commentary) create uncertainty in respect to the GST treatment of any other component of the final amount payable. To increase certainty, the ATO should: (a) ensure that the following types of payments are included in the ruling as input-taxed supplies: • adjustments to exit fees (that are not a separate supply or could be regarded as consideration for such a supply); and • obligations related to exit fees; and (b) insert the following words after paragraph 19: *'The exit fee retains its character as an input taxed supply where:* • *the resident contract provides for an adjustment to the exit fee;* • *that exit fee* otherwise *represents the supply of the residential premises and incidental services that would be input taxed; and* • *the adjustment does not relate to something that is a separate supply*	New paragraph 22 has been inserted to deal with adjustments to the exit fee. This paragraph is based on the suggested wording. New paragraphs 24 and 57 to 60 have also been inserted to deal with the treatment of capital appreciation/depreciation amounts. Paragraphs 27 to 29 discuss when payments will be consideration for a supply other than residential premises.

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	(such as recognition of capital appreciation); or • *the adjustment is not by mere reference to a separate supply that is otherwise dealt with.'*	
12	**Include Freehold Interests** To streamline the operation of the GST provisions, the draft Ruling should treat reversions involving **leasehold** interests the same as reversions involving **freehold** interests.	Freehold interests in a retirement village are outside the scope of the Ruling.
13	**Address Third Party Service Providers** The ruling should address in which circumstances the charges should be taxable or input taxed in the context of the Green Acres example or at the very least Attachments A AND B. This guidance should extend to the ability to claim GST input tax credits by that third party based on the supplies that it makes. The items listed in Attachments A AND B to the draft Ruling may in a number of circumstances be supplied by the owner/operator of the village, or by a third party entity engaged by and often related to the owner/operator. This principal reason for this is to isolate resident expenses and the review of same which are heavily regulated under the State based Retirement Village Acts. Costs normally considered incidental to the supply of residential premises are typically covered in monthly recurrent charges may be under contract with that entity or under an agency agreement where the supplies are made on behalf of the operator. However in either case the State legislation provides that no surplus may be made on these charges and any deficit is to be met by the retirement village operator.	This is outside the scope of the Ruling. This issue may be considered in the development of the program for future rulings and other guidance material.

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14	**General comment** We remain concerned that the ATO's policy for GST on retirement villages remains commercially unsustainable (and we understand it is subject to litigation). The inability to obtain input tax credits on the massive construction spending required for a typical village renders village financing and viability problematic. More than any other premises or establishment type; we believe that retirement villages do not fall neatly within the residential premises versus commercial residential premises divide. We suggest the ATO bear in mind the continuing difficulties in this area when next requested by Treasury to suggest legislative amendments to remedy deficiencies in the GST system.	This is a comment on policy.
15	In our view, the draft Ruling makes the appropriate assumption that an exit fee in the nature of a deferred management fee will generally be consideration for the supply of the residential lease to the resident. As a result, the draft Ruling takes the view that the fee will be part of the consideration for an input taxed supply, except to the extent that the supply is GST-free as accommodation provided to the resident in a serviced apartment in the retirement village in conjunction with care services, or is taxable by being for a separate supply that is separately charged for. While the ATO asserts that some part of the exit fee might relate to taxable supplies made by the retirement village operator to the resident, (for example, refurbishment fees to reinstate the unit to a state to be leased/licenced again), the better view is that the resident has provided adequate consideration for those taxable supplies at the time that they were made. Applying the reasoning of the Tribunal in *Luxottica*,[1] as endorsed by the Full Federal Court, the value of a supply is generally a matter of fact, not of law. Where a supplier and recipient agree to the proportionate value of the components of a 'mixed' supply (a single supply with taxable and non-taxable components), there is generally no cause for supplanting that agreed pricing with a 'notional price' in circumstances	The reasoning in *Luxottica* is accepted and it is agreed that the value of a supply is a question of fact. Footnote 30 has been inserted into the final Ruling which indicates when consideration would be less than market value.

[1] *Federal Commissioner of Taxation v. Luxottica Retail Australia Pty Ltd* (2011) 191 FCR 561; 2011 ATC 20-243; (2011) 79 ATR 768

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	where the pricing is based on sound commercial reasons, provided there is nothing contrived or artificial about the pricing methodology adopted. In such cases, we consider that it would be inappropriate for the Commissioner to seek to attribute additional consideration to those taxable supplies. In this respect, we request that the Commissioner provide an explanation in the draft Ruling as to why the ATO's view, at paragraphs 21 and 47, is consistent with the Full Federal Court's decision in *Luxottica,* or as to how the present circumstances should otherwise be distinguished. The relevant ATO view is that 'an exit payment is treated as consideration wholly or partly for supplies that would be taxable where: … • the value of the separate consideration [the resident provides] is significantly less than the market value of the services.' The Commissioner appears to have taken the view that the amount of the (otherwise input taxed) lease charge recovers the difference between the market value of the non-ancillary services and the below market price allocated to them. The draft does not specifically assert that nor support it but we cannot see another explanation for the Commissioner's views in the draft. The Commissioner then seems to conclude that the exit charge needs to be apportioned so that a component is attributed to the non-ancillary services provided during the period of occupation. It is crucial to remember that the village and its residents are not associated hence Division 72 does not apply. We cannot find legislative or judicial support for the Commissioner's proposed allocation. At paragraph 33 of the draft Ruling, the ATO does refer to the *Luxottica* decision, however it is only to note that 'the fact that the pricing methodology was not 'contrived or artificial' was one of the circumstances taken into account in concluding that it was correct to allocate the discount to the frames only'. Are we therefore to infer from this reference that the ATO considers that retirement villages would be regarded as engaging in contrived or artificial pricing simply because they charge separate consideration for non-ancillary services which is significantly less than the market value of the services?	

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	We also note that if the ATO takes the view at paragraph 21 and 47 in relation to exit fees, does this view also apply to ongoing fees while residents are residing at the retirement village? In other words, does the otherwise input taxed lease charge need to be apportioned so that a component is attributed to the non-ancillary services and taxed? Without prejudice to the above, our comments below apply where legislative or judicial support can be found for the Commissioner's views in the draft. From a compliance perspective, applying the ATO's view would involve a complex calculation to determine the portion of exit fees that would be taxable. This is especially so if a resident has paid 'significantly' less than market value for the services over many years. Such a calculation would require reviewing detailed records of services provided to residents for 'significantly' less than market value over many years. In our view, this calculation would be extremely difficult for many village owners to undertake and the extra revenue that would be derived from such a calculation is likely to be minimal. We would therefore recommend that, if the ATO maintains its view, the draft Ruling include a definition of 'significantly less than market value' to provide greater clarity over and guidance in relation to this issue and the circumstances that will require the complex calculations to be undertaken.	
16	It should be noted that the draft Ruling does not cover the very common scenario where some or many of the supplies are made to, and charged to, the resident by a legal entity that is separate to the owner of the village. They are often called the 'Manager'. In such cases, even though the fees charged to the residents are always collected by the Manager, the GST consequences will be different depending on whether those supplies are provided by the Manager in its own right to the resident, or contractually to the Owner and then 'provided' to the resident on behalf of the Owner. As these are very common, we consider the finalised ruling should be expanded to deal with that scenario.	'Supplies made by a third party manager' are considered outside the scope of the ruling – refer to paragraph 4 of the final Ruling. This issue may be considered in the development of the program of future rulings and guidance material.