

GSTR 2006/D3 - Goods and services tax: when retirement village premises include communal facilities for use by the residents of the premises



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There is an Erratum notice for this document.

This document has been finalised.



Draft Goods and Services Tax Ruling

Goods and services tax: when retirement village premises include communal facilities for use by the residents of the premises

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Preamble

*This document is a draft for public comment. As such, it represents the preliminary, though considered, views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners, as it is not a ruling or advice for the purposes of section 105-60 of Schedule 1 to the **Taxation Administration Act 1953**. The final Ruling will be a public ruling for the purposes of section 105-60 of Schedule 1 to the Taxation Administration Act 1953 and may be relied upon by any entity to which it applies.*

What this Ruling is about

1. This Ruling explains when retirement village premises include communal facilities for use by the residents of the premises as required by paragraph (c) of the definition of **retirement village** in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). In this Ruling, paragraph (c) of the definition is referred to as the *communal facilities requirement*. In particular, this Ruling explains:

- what are the premises of a retirement village;
- when the premises include communal facilities, including whether services are communal facilities; and
- when communal facilities are ‘for use by the residents of the premises’.

2. This Ruling also considers the *communal facilities requirement* in regard to:

- off-site facilities; and
- facilities not yet in existence.

3. This Ruling also refers to paragraphs (a) and (b) of the definition of retirement village but does not rule on how they are satisfied.

4. All legislative references in this Ruling are to the GST Act unless otherwise stated.

Date of effect

5. This draft Ruling represents the preliminary, though considered view of the Australian Taxation Office. This draft may not be relied on by taxpayers or practitioners. When the final Ruling is officially released, it will explain the Commissioner's view of the law as it applies from 1 July 2000.

6. The final Ruling will be a public ruling for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to which it applies. Goods and Services Tax Ruling GSTR 1999/1 explains the GST rulings system and the Commissioner's view of when you can rely on our interpretation of the law in GST public and private rulings.

7. If the final public ruling conflicts with a previous private ruling that you have obtained, or a previous public ruling, the public ruling prevails. However, if you have relied on a previous ruling, you are protected in respect of what you have done up to the date of issue of the final public ruling. This means that if you have underpaid an amount of GST, you are not liable for the shortfall prior to the date of issue of the later ruling. Similarly, you are not liable to repay an amount overpaid by the Commissioner as a refund.

Background

8. The retirement village industry is diverse and villages may:
- be operated by charitable, government or commercial entities;
 - comprise premises catering to varying degrees of needs, such as independent living units and serviced apartments or a combination of these premises (and may be located with a residential care facility). Residents of these premises may also share facilities, such as a dining room;
 - offer a variety of occupancy and tenure arrangements; and/or
 - provide a wide range of facilities, amenities and services to individual residents or to all residents.

9. The extent to which facilities are provided will vary considerably across the industry. As well, there are villages, for example in rural and regional areas, which may rely on some facilities being provided within the wider community.

10. Together with a retirement village resident's right to occupy specific premises, the resident is usually provided with associated rights to use or receive services and/or facilities that may not ordinarily be provided in the wider community by a landlord to a tenant, or by a lessor to a lessee. These rights are generally provided for under residence and services contracts with the retirement village operator.¹

11. The operations of retirement villages are largely regulated by State and Territory legislation, which is mainly aimed at promoting fair trading practices in operating retirement villages and outlining the rights and obligations of retirement village residents and operators.

12. However, regulation of a retirement village under State or Territory legislation does not necessarily mean that the definition of retirement village in the GST Act is satisfied. The requirements that must be met for premises to be a retirement village for GST purposes differ from the requirements for regulation under State or Territory legislation. Further, the GST Act definition of retirement village does not rely on what is a retirement village for the purposes of the relevant State or Territory legislation.

Context

13. In December, 2004, amendments were made to the GST Act by the *Tax Laws Amendment (Retirement Villages) Act 2004* (TLA(RV) Act). The Explanatory Memorandum to the amending Bill explains that the amendments:

- ensure that supplies of care services and accommodation are GST-free when supplied to residents of serviced apartments of retirement villages that require and receive daily living activities assistance or nursing services;² and
- provide that supplies of accommodation, services related to accommodation, and meals are GST-free if provided by a charitable retirement village to a resident of such a retirement village.³

¹ A retirement village operator is commonly understood to be the entity that manages and controls the operation of a retirement village.

² Section 38-25. This section deals with GST-free residential care and was amended by the TLA(RV) Act.

³ Section 38-260, which was also inserted by the TLA(RV) Act. Here the term 'charity' includes a charitable institution and a trustee of a charitable fund. Accommodation and other supplies may also be provided GST-free by charities under section 38-250.

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14. As part of the amendments, the definition of retirement village was inserted into section 195-1 of the GST Act and states:

retirement village: premises are a retirement village if:

- (a) the premises are residential premises; and
- (b) accommodation in the premises is intended to be for persons who are at least 55 years old, or who are a certain age that is more than 55 years; and
- (c) the premises include communal facilities for use by the residents of the premises;

but the following are not retirement villages:

- (d) premises used, or intended to be used, for the provision of residential care (within the meaning of the *Aged Care Act 1997*) by an approved provider (within the meaning of that Act);
- (e) commercial residential premises.

15. To give effect to the intent of the amendments,⁴ the characteristics set out in the definition of retirement village distinguish retirement village premises from other residential premises in the wider community.

16. It is recognised that retirement villages may also have other characteristics that distinguish them from other residential premises, particularly the additional rights and responsibilities found in the residence and services contracts that would not ordinarily be present in agreements in the wider community (such as between a tenant and a landlord or between a lessee and a lessor).

Ruling

17. In the Commissioner's view, the residential premises of the retirement village includes the land on which the residential building is constructed along with the surrounding land that actually or substantially contributes to the enjoyment of the building or to the fulfilment of its purposes as a residence (whether or not on separate titles).

18. The Commissioner's view is that the *communal facilities requirement* is satisfied when:

- the facilities are physical;
- the facilities are within, attached to or connected to the residential buildings, or constructed on the surrounding land that actually or substantially contributes to the enjoyment of the building or to the fulfilment of its purposes as a residence (although a facility may not of itself be residential premises); and
- the facilities' primary purpose, determined objectively, is for communal use by the residents.

⁴ As explained at paragraph 13 of this Ruling.

19. The Commissioner accepts that the primary purpose of, for example, a library, dining room, recreation room, swimming pool or barbeque area is for communal use by the residents and thus is a communal facility. The premises include such a facility when it is within, attached to, or connected to the residential buildings, or constructed on the surrounding land that actually or substantially contributes to the enjoyment of the building or to the fulfilment of its purposes as a residence. The Commissioner does not accept that the primary purpose of pathways, gardens, driveways and landscaping is for communal use and thus such things are not ordinarily considered communal facilities. Although such things may be used by all residents, any incidental communal use will not be sufficient to satisfy the *communal facilities requirement*.

20. Facilities that are for the resident's own use in their individual units or apartments, such as a television antenna, are not communal facilities.

21. Services, such as those provided under either a residence or services contract, are not communal facilities for the purposes of the *communal facilities requirement* as they are not physical.

22. Retirement village premises need only include one communal facility to satisfy the *communal facilities requirement*.

23. While the facility must be for communal use by the residents of the retirement village, the residents do not need to have exclusive use of the communal facilities.

24. There is no requirement that the residents actually use the communal facilities provided the facilities are made available for their use.

25. Where only off-site facilities are provided for communal use by the residents, for example a nearby community hall, the *communal facilities requirement* is not met.

26. As residents must be able to use the communal facilities, it follows that the facilities must be in existence rather than merely planned.

Explanation (this forms part of the Ruling)

What are the premises of a retirement village

27. Paragraph (c) of the definition of retirement village requires that the premises include communal facilities for use by the residents of the premises. Paragraph (a) of that definition requires that those premises are residential premises.

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28. 'Residential premises' is a defined term⁵ and the Commissioner provides guidance as to what are residential premises in Goods and Services Tax Rulings GSTR 2000/20⁶ and GSTR 2003/3.⁷

29. Consistent with GSTR 2000/20, the Commissioner considers that the term 'residential premises' in the retirement village context encompasses, for example, independent living units and serviced apartments.⁸ Further, consistent with the view expressed in GSTR 2003/3, the residential premises of the retirement village includes the land on which the residential building is constructed along with the surrounding land that actually or substantially contributes to the enjoyment of the building or to the fulfilment of its purposes as a residence (whether or not on separate titles).⁹

When the premises include communal facilities

30. The GST Act does not define the term 'communal facilities'. The meaning of 'communal facilities' therefore should be determined according to its ordinary meaning taking into account the context in which the term is used and the recognised policy intent.¹⁰

31. A number of Australian and overseas court cases have referred to communal facilities incidentally in the context of a range of matters.¹¹ These cases show that the term 'communal facilities' may be given a very wide meaning depending upon the context in which it is used. For example:

- In *Tourapark Pty Ltd v. Federal Commissioner of Taxation*¹² in considering a taxpayer's claim for the investment allowance in respect of certain new caravans, the court found that the licence granted to the customer of the caravan park included the right to use communal facilities 'such as lavatories, laundries, a swimming pool and parking space'.
- in *Mount Isa Mines Ltd v. Federal Commissioner of Taxation*¹³ in considering objections against income tax assessments, the court accepted that communal facilities, which included a school, shopping centre, hotel, swimming pool and a sports complex, were present in a mining town built to accommodate persons serving in the mining operations at the Agnew Mine.

⁵ Section 195-1.

⁶ Goods and Services Tax Ruling GSTR 2000/20 Goods and services tax: commercial residential premises.

⁷ 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?

⁸ This is consistent with paragraphs 24 to 27 of GSTR 2000/20.

⁹ See paragraph 95 of GSTR 2003/3.

¹⁰ As explained at paragraph 15 of this Ruling.

¹¹ The meaning of the term 'communal facilities' was not an issue in these cases.

¹² (1982) 12 ATR 842 at page 843; 82 ATC 4105 at page 4105 to 4106.

¹³ (1990) 21 ATR 159 at page 187; 90 ATC 4267 at page 4292.

- In *Zig Inge Retirement Villages*¹⁴ a case which concerned a permit to build a retirement village, the Tribunal found that Zig Inge Retirement Villages provided a range of communal facilities ‘including lounges, courtyard, dining room and recreational areas’.
- In *Colchester Sixth Form College*¹⁵ a case which concerned whether the construction of a new building at the college was the construction of an annexe to an existing building or whether the construction works produced an enlargement of, or an extension to, an existing building, the court referred to ‘communal facilities such as the refectory and offices that all add to the facilities of the College’.

32. Further, there is no single retirement village industry definition of the term ‘communal facilities’. The Retirement Village Association (Australia) provides the following description, which is consistent with other relevant industry sources:

‘**Communal Facilities**’ is the generic term for a wide range of amenities and services offered to residents. Villages are vibrant communities of senior Australians with shared interest and a desire to live life to the full. To serve this community, villages will provide a number of recreational, service and social facilities available to all residents. Each village is different, and a full list of communal facilities will be provided in individual sales kits.¹⁶

33. The Commissioner acknowledges from the cases and the industry view that the term ‘communal facilities’ is capable of broad meaning. However, adopting a view that would allow almost anything to be described as a ‘communal facility’ in the context of retirement villages would not take account of the words and intent of the definition, which serve to distinguish retirement village premises from other residential premises.¹⁷

34. The definition of retirement village requires that the retirement village premises include communal facilities for use by its residents. The Commissioner’s view is that the premises include a facility when the facility is physical and is within, attached to, or connected to the residential buildings, or constructed on the surrounding land that actually or substantially contributes to the enjoyment of the building or to the fulfilment of its purposes as a residence.¹⁸ Such a facility may not of itself be residential premises.

¹⁴ [2000] VCAT 2330 (30 November 2000) at paragraph 21.

¹⁵ [2000] BVC 2095 at page 2101.

¹⁶ www.retirementvillagesaust.com.au.

¹⁷ As explained at paragraph 15 of this Ruling.

¹⁸ See discussion at paragraphs 27 to 29 of this Ruling.

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35. Services may be provided under a residence contract and/or an associated services agreement and include, for example maintenance and upkeep of common areas, managerial and administrative services, and the organisation and provision of recreational and social activities for residents. In the Commissioner's view, services are not communal facilities for the purposes of the *communal facilities requirement* as they are not physical.

36. In determining whether premises include a communal facility it is also necessary to consider the communal aspect of the *communal facilities requirement*. It is the Commissioner's view that the primary purpose of the facility, determined objectively, must be for communal use by the residents of the premises.

37. While it is not possible to exhaustively list facilities for communal use by the village residents, it is accepted that the following types of facilities are for communal use by the residents – a library, dining room or recreation room and other recreational and leisure facilities such as swimming pools and barbeque areas. The premises includes such communal facilities where the facilities are within, attached to, or connected to the residential buildings, or constructed on the surrounding land that actually or substantially contributes to the enjoyment of the building or to the fulfilment of its purposes as a residence.¹⁹

38. Where the premises include a facility, the primary purpose of which is not communal use, any incidental use of that facility for a communal activity would not qualify it as a communal facility. For example, a pathway in a retirement village provides convenient and safe access to various parts of the village but it may also be used for a group walking activity. As the pathway's primary purpose is not for communal use, that incidental use would not qualify it as a communal facility. Likewise, a garden that is used for a group meditation activity is not a communal facility as its primary purpose for being included in the village would not ordinarily be for communal use. Hence, it is the Commissioner's view that in the context of the retirement village definition, pathways, gardens, driveways and landscaping are not included for the primary purpose of communal use by the village residents and, therefore, are not communal facilities.

39. Similarly, facilities that are primarily for the resident's own use in their individual units or apartments, such as a television antenna, are not communal facilities.

40. To satisfy the *communal facilities requirement*, retirement village premises need only include one communal facility.²⁰

¹⁹ If a village is unsure whether its premises include communal facilities, it can seek guidance from the Tax Office – see paragraph 48 of the Ruling.

²⁰ Paragraph 23(b) of the *Acts Interpretation Act 1901*: unless the contrary intention appears, words in the singular number include the plural and words in the plural number include the singular.

When communal facilities are ‘for use by the residents of the premises’

41. The definition of retirement village requires that the communal facilities be for use by the residents. In the Commissioner’s view, the test of ‘for use by the residents of the premises’ is an objective test. The Commissioner considers relevant factors include whether the communal facility is in a practical sense, accessible to, and able to be used by, the residents. If the facility is not able to be readily accessed and used by residents, this might call into question whether the facility is, in a practical sense, available for use by the residents.

42. The communal facilities need not necessarily be for the exclusive use of the residents. For example, the use of a recreation room for commercial purposes for a few hours a week, say for a visiting hairdresser, will not prevent the room being a ‘communal facility’.

43. In addition, there is no requirement that the residents actually use the communal facilities provided the facilities are made available for their use.

44. Where the communal facility is temporarily unavailable, for example due to maintenance or improvement, the *communal facilities requirement* can still be met.

Specific circumstances***Off-site facilities***

45. The degree to which communal facilities are provided varies considerably across the industry. Some village premises, for example in rural or regional areas, do not include communal facilities but may rely on some facilities located elsewhere. For example, an operator may enter into an arrangement for the village residents to use the communal facilities at a neighbouring or nearby retirement village, or lease or licence a nearby community hall for use by the residents of the village. Such arrangements do not satisfy the *communal facilities requirement* as the premises of the village do not include communal facilities.²¹

46. However, given the broad nature of communal facilities and that only one facility is required (for example, a communal barbeque area), it is ordinarily expected that most villages would satisfy the *communal facilities requirement* in some other way.

²¹ See paragraph 34 of this Ruling.

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Facilities not yet in existence

47. In the Commissioner's view, the *communal facilities requirement* is met when the communal facilities are actually in existence in a temporary or permanent state for use by the residents of the village. However, if the communal facilities are planned but are not yet in existence, for example in a staged development, the *communal facilities requirement* is not met.²²

Guidance from the Tax Office

48. The Commissioner recognises that in some circumstances a village may have doubts as to whether they comply with the *communal facilities requirement*. If a village is experiencing difficulties in reaching a decision, it should seek guidance from the Tax Office.

Your comments

49. We invite you to comment on this draft Goods and Services Tax Ruling. Please forward your comments to the contact officer(s) by the due date. (Note: The Tax office prepares a compendium of comments for the consideration of the relevant Rulings Panel. The Tax Office may use a sanitised version (names and identifying information removed) of the compendium in providing its responses to persons providing comments. Please advise if you do not want your comments included in a sanitised compendium.)

Due date:	6 October 2006
Contact officer:	Geoff Jensen
E-mail address:	geoff.jensen@ato.gov.au
Telephone:	(07) 3213 5673
Facsimile:	(07) 3213 5055
Address:	Level 17, 140 Creek St Brisbane QLD 4001
Contact officer:	Adam Johnson
E-mail address:	adam.johnson@ato.gov.au
Telephone:	(07) 3213 5693
Facsimile:	(07) 3213 5055
Address:	Level 17, 140 Creek St Brisbane QLD 4001

²² Notwithstanding that communal facilities may not yet be in existence, the basic GST rules still apply to claiming input tax credits if acquisitions are made for a creditable purpose, for example for making supplies that will be GST-free. However, if acquisitions intended for a creditable purpose are later used to make input taxed supplies, for example if residential premises are leased for a period prior to communal facilities existing, adjustments are required under the GST law.

Detailed contents list

50. Below is a detailed contents list for this draft Goods and Services Tax Ruling:

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Previous drafts:

Not previously issued as a draft

Related Rulings/Determinations:

GSTR 1999/1; GSTR 2000/20;
GSTR 2003/3

Subject references:

- communal facilities
- goods and services tax
- premises
- residential care service
- residential premises
- retirement village

Legislative references:

- ANTS(GST)A 1999 38-25
- ANTS(GST)A 1999 38-250
- ANTS(GST)A 1999 38-260
- ANTS(GST)A 1999 195-1
- TAA 1953 Sch 1 105-60
- Acts Interpretation Act 1901 23(b)

- Aged Care Act 1997

- Tax Laws Amendment
(Retirement Villages) Act 2004

Case references:

- Colchester Sixth Form College
[2000] BVC 2095
- Mount Isa Mines Ltd v. Federal
Commissioner of Taxation (1990)
21 ATR 159; 90 ATC 4267
- Tourapark Pty Ltd v. Federal
Commissioner of Taxation (1982)
12 ATR 842; 82 ATC 4105
- Zig Inge Retirement Villages
[2000] VCAT 2330 (30 November
2000)

Other references:

- Tax Laws Amendment
(Retirement Villages) Bill 2004

ATO references

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