



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

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This document has been finalised.

 There is a Compendium for this document: **GSTR 2012/4EC** .



Draft Goods and Services Tax Ruling

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

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1 This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the following way. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

What this draft Ruling is about

1. The draft Ruling explains the goods and services tax (**GST**) treatment of amounts (for convenience, **exit payments**) which a resident becomes liable to pay the operator of a retirement village when the resident's interest in the village terminates.

2. In this context, the resident's 'interest' is a right to possession of residential premises under a lease or licence.

3. All legislative references in this draft Ruling are to the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) unless otherwise specified.

4. The draft Ruling does not specifically address:

- exit payments made by residents of a retirement village where the resident holds a freehold interest;
- apportionment of input tax credits;

- the development, construction, sale or leasing of retirement villages, nursing homes, hostels or boarding homes;¹
- the activities of charitable institutions under Subdivision 38-G including supplies of retirement village accommodation under section 38-260; and
- care services provided in a retirement village.

Ruling

General principles

5. In order to determine the GST treatment of an exit payment in a lease arrangement, it is necessary to consider:

- any supply or supplies made by the operator;² and
- the extent of the connection, if any, between such a supply or supplies and the payment.³

6. Where an exit payment is made in connection with a supply, it is 'consideration' for that supply under section 9-15. In order to determine whether an exit payment has the necessary nexus with any supply, the starting point is to examine the legal arrangements between the parties.

7. For GST purposes, consideration includes any payment in connection with a supply.⁴ The connection or nexus of an exit payment to any supply requires objective evaluation of the legal arrangements between the retirement village operator and the resident in question.⁵

¹ The GST treatment of a sale of a retirement village, in particular circumstances, is addressed in Goods and Services Tax Ruling GSTR 2011/1 *Goods and services tax: development, lease and disposal of a retirement village tenanted under a 'loan-lease' arrangement*.

² See Goods and Services Tax Ruling GSTR 2006/9 *Goods and services tax: supplies*.

³ See Goods and Services Tax Rulings GSTR 2000/12 *Goods and services tax: attributing GST payable and input tax credits for supplies and acquisitions under lay-by sale agreements*; GSTR 2002/3 *Goods and services tax: prizes*; GSTR 2003/11 *Goods and services tax: payment on early termination of a lease of goods* and GSTR 2006/11 *Goods and services tax: appropriations*.

⁴ See paragraph 9-15(1)(a).

⁵ *Byrnes v. Kendle* (2011) 243 CLR 253 at 284; *Toll (FGCT) Pty Ltd v. Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179; *Pacific Carriers Ltd v. BNP Paribas* (2004) 218 CLR 451 at 461-462; *International Air Transport Association v. Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 194.

8. Legal arrangements between the parties are the natural starting point when determining which entity is making a particular supply and who are the recipients of that supply.⁶ The legal effect of these arrangements is determined by a proper reading of the arrangements as a whole, rather than simply by reference to particular labels or descriptions adopted by the parties.⁷

9. Where a nexus between consideration and a particular supply is expressed in the legal arrangements, this may not be conclusive. However, it is a factor taken into account in determining whether the consideration in question is provided for that particular supply. For example, a description of nexus which is artificial or contrived in all the circumstances will not be determinative.⁸ Whether or not this is the case however depends on the facts and circumstances of each situation.

Lease arrangements

Supplies made

10. In a lease arrangement, the operator makes input taxed or GST-free supplies to residents, and may also make taxable supplies.

Input taxed Supplies

11. Input taxed supplies to the resident in a lease arrangement may include supplies of:

- residential premises by way of lease or licence; and
- services which are integral, ancillary or incidental to the lease or licence (**incidental services**).

12. Incidental services are 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.

⁶ See paragraphs 119 to 122 of GSTR 2006/9.

⁷ *Federal Commissioner of Taxation v. Broken Hill Pty Co Ltd* [2000] FCA 1431 at [50].

⁸ cf *NM Superannuation Pty Ltd v. Young* (1993) 41 FCR 182 at 199-200; *Re Porter*; *Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184.

13. Whether a service is incidental to another supply depends on the facts of each case. A service may be regarded as incidental where it is designed to ensure, facilitate or enhance the resident's enjoyment of the lease or licence, but is not provided as an end in itself.⁹ The nature of a service is assessed according to its true character rather than simply by reference to a label or description given to it by the parties.

14. **Attachment A** contains a non-exhaustive list of incidental services.

GST-free supplies

15. Supplies of care services and serviced apartments by an operator of a retirement village are GST-free when subsections 38-25(3) and 38-25(4A)¹⁰ apply. Consequently, exit payments made in this situation are made in connection with GST-free supplies, which include those services which are integral, ancillary or incidental to the supply of residential premises and care services.

Taxable supplies

16. An operator may also make taxable supplies to the resident. Taxable supplies consist of services which are not incidental services (**non-incidental services**) and are not GST-free under subsection 38-25(3). These include optional services which have no necessary connection to the resident's ability to enjoy residential premises under the lease or licence.

17. **Attachment B** contains a non-exhaustive list of non-incidental services.

⁹ See paragraphs 17 and 55 to 63 of Goods and Services Tax Ruling GSTR 2001/8 *Goods and services tax: apportioning the consideration for a supply that includes taxable and non-taxable parts*; *Customs and Excise Commissioners v. Madgett & Baldwin* [1998] BVC 458 at 464; *Customs and Excise Commissioners v. British Telecommunications plc* [1999] BVC 306 at 312; *Beynon & Partners v. Commissioners of Customs and Excise* [2005] 1 WLR 86 at 91; *cf Saga Holidays Ltd v. Federal Commissioner of Taxation* (2005) 149 FCR 41 at 82-83.

¹⁰ See Draft Goods and Services Tax Ruling GSTR 2011/D5 *Goods and services tax: GST treatment of care services and accommodation in retirement villages and privately funded nursing homes and hostels*.

Payment as consideration for supplies made***Payment wholly or partly consideration for input taxed supplies***

18. Exit payments are treated as consideration for a supply of residential premises, except to the extent that an objective assessment in all the circumstances indicates that they are consideration for some other supply or supplies. Supplies of residential premises in a retirement village by way of lease or licence are input taxed unless the supply of the premises is a supply of serviced apartments that are GST-free under subsection 38-25(4A).

19. Neither the method by which an exit payment is to be determined nor the variables used to calculate an exit payment are necessarily decisive in identifying the supply or supplies for which the exit payment is consideration.¹¹ There may be situations, however, where the method of calculation prescribed for an exit payment, in all the circumstances is sufficient to establish nexus with a supply other than a supply of residential premises.

20. Subject to contrary indications within the legal arrangements, an exit payment is consideration wholly for supplies that would be input taxed where:

- the operator does not provide services other than incidental services; or
- the operator provides non-incidental services but:
 - the resident is liable to provide separate consideration for them; and
 - the value of that consideration is not significantly less than the market value of the services.

Payment wholly or partly consideration for taxable supplies

21. By way of contrast, an exit payment is treated as consideration wholly or partly for supplies that would be taxable where:

- the resident is not liable to provide any separate consideration for those services; or
- the value of the separate consideration they provide is significantly less than the market value of the services.

¹¹ cf *Re Vidler and Federal Commissioner of Taxation* (2009) 72 ATR 832 at 845.

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Apportionment between taxable and non-taxable components

22. 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 payment should be apportioned between the taxable and non-taxable components.¹² The apportionment method adopted must be reasonable in all the circumstances.

Date of effect

23. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

29 February 2012

¹² See paragraphs 25 to 26 and 92 of GSTR 2001/8.

Appendix 1 – Explanation

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

General principles

24. An exit payment is generally made by a resident of a retirement village to the village operator on exit from the village. The fee is commonly known as a deferred management fee (DMF), but may also be referred to as an exit or termination fee. Other exit payments may include selling fees, capital improvement fees, renovation fees and cleaning fees.

25. An exit payment consisting of a DMF is commonly calculated in the following ways:

- lease arrangement – a percentage of the entry contribution made by the exiting resident or
- a percentage of the entry contribution made by the new incoming resident

In some situations the calculation may be adjusted with reference to the increase or decrease in the value of the residential unit.

26. In order to determine the GST treatment of an exit payment, it is necessary to consider:

- any supply or supplies made by the operator; and
- the extent of the connection, if any, between such a supply or supplies and the payment

27. Where an exit payment has a sufficient connection with a supply it is 'consideration' for that supply under section 9-15. In order to determine whether an exit payment has the necessary nexus with any supply, the starting point is to examine the legal arrangements between the parties.

28. For GST purposes consideration includes any payment in connection with a supply.¹³ The connection or nexus of an exit payment to any supply is to be determined by an objective evaluation of the legal arrangements between the retirement village operator and the resident in question.¹⁴

¹³ See paragraph 9-15(1)(a).

¹⁴ *Byrnes v. Kendle* (2011) 243 CLR 253 at 284; *Toll (FGCT) Pty Ltd v. Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179; *Pacific Carriers Ltd v. BNP Paribas* (2004) 218 CLR 451 at 461-462; *International Air Transport Association v. Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 194.

Express statements

29. Legal arrangements between the parties are the natural starting point when determining the entity making a particular supply and who are the recipient of that supply.¹⁵ The legal effect of these arrangements is determined by a proper reading of the arrangements as a whole, rather than simply by reference to particular labels or descriptions adopted by the parties.¹⁶

30. The parties cannot, by the mere device of labelling, either confer a particular legal character on a relationship that it does not truly possess or deny it a character that it does possess.¹⁷ As Gray J stated in *Transport Workers Union of Australia*:

A court will always look at all of the terms of the contract, to determine its true essence, and will not be bound by the express choice of the parties as to the label to be attached to it. ...the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck.¹⁸

31. Labels or descriptions given to exit payments must be attributed their proper weight in the context of the legal arrangements.¹⁹ This may lead to the label or description being disregarded entirely; or to its being given full force and effect. In all cases, however, a label will be given a weight appropriate to the circumstances. Labels are not a substitute for legal analysis.

32. An expressed nexus between consideration and a particular supply may not be conclusive, but is a factor taken into account in determining whether the consideration in question is provided for that particular supply. For example, a description of nexus which is artificial or contrived in all the circumstances is not determinative.²⁰

33. In *Federal Commissioner of Taxation v. Luxottica Retail Australia Pty Ltd*, the Full Federal Court looked at the allocation of the price of a pair of spectacles between GST-free prescription lenses and taxable frames, in circumstances where a discount was only applied to the frames. 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.²¹

¹⁵ See paragraphs 119 to 122 of GSTR 2006/9.

¹⁶ *Federal Commissioner of Taxation v. Broken Hill Pty Co Ltd* [2000] FCA 1431 at [50].

¹⁷ *South Sydney District Rugby League Football Club Ltd v. News Ltd* [2000] FCA 1541 at [135].

¹⁸ *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184, cf *Natalie Newton (trading as Combine Care for the Elderly) v. Commissioner of Taxation* [2011] AATA 897.

¹⁹ *South Sydney District Rugby League Football Club Ltd v. News Ltd* [2000] FCA 1541 at [135], *Homecare Direct Shopping Pty Ltd v. CGU Workers Compensation (Vic) Ltd* [2008] VSCA 111 at 48-50.

²⁰ *NM Superannuation Pty Ltd v. Young* (1993) 41 FCR 182 (at 199-200).

²¹ *Federal Commissioner of Taxation v. Luxottica Retail Australia Pty Ltd* (2011) 191 FCR 561 at 571.

Lease arrangements

34. In order to determine the GST treatment of an exit payment in a lease arrangement, it is necessary to consider:

- any supply or supplies made by the operator; and
- the extent, if any, to which the exit payment in question represents consideration for any one of those supplies.

35. In a lease arrangement, the operator makes input taxed or GST-free supplies to the resident and may also make taxable supplies.

Input taxed supplies

36. Input taxed supplies to the resident include:

- residential premises by way of lease or licence
- services which are integral, ancillary or incidental to the lease (**incidental services**);

that are in each case not GST-free under section 38-25.

Residential premises

37. Where the supply by way of lease arrangement, that is not the supply of a serviced apartment covered by subsection 38-25(4A), the operator makes an input taxed supply of residential premises by way of lease or licence over a unit.²² The operator also makes a supply of a licence over common areas in the village. This also involves an input taxed supply,²³ since the common areas are part of the 'residential premises' made available to the resident under the residence agreement.²⁴

²² Paragraph 40-35(1)(a).

²³ The view taken here is that the lease and licence together provide 'residential premises' including both the unit and common areas.

²⁴ Paragraph 40-35(1)(a).

Incidental services

38. In a lease arrangement, the operator may also provide incidental services. These services are integral, ancillary or incidental to the supply of residential premises. They are part of an input taxed, composite supply,²⁵ the dominant part of which comprises the residential premises provided under the lease or licence. In this context, services are considered to be 'incidental services' where they are 'ancillary' to the lease or licence in the sense described in *Customs and Excise Commissioners v. Madgett & Baldwin*.²⁶

... a service is ancillary if, first, it contributes to the proper performance of the principal service and second, it takes up a marginal proportion of the package price compared to the principal service. It does not constitute an object for customers or a service sought for its own sake, but a means of better enjoying the principal service.

39. The question whether a service is integral, ancillary or incidental to the supply of residential premises by way of lease depends on the circumstances of each case. No single factor provides the test for determining whether a part of a supply is integral, ancillary or incidental to another part of the supply. In the present context, an incidental service is designed to ensure, facilitate or enhance the resident's enjoyment of the lease or licence but is not provided as an end in itself.

40. The connection between a service and the supply of residential premises is assessed by reference to the true character of the service, rather than the labels or forms of words used by the parties. Accordingly, the parties cannot make a service integral, ancillary or incidental to the supply of accommodation merely by stating that it has that character in the agreement.

GST-free supplies

41. Supplies of serviced apartments and care services in a retirement village are GST-free when subsections 38-25(3) and 38-25(4A)²⁷ apply. Consequently, exit payments made in this situation are made in connection with GST-free supplies, including services which are integral, ancillary or incidental to the supply of residential premises and care services.

²⁵ See paragraphs 17 and 55 to 63 of GSTR 2001/8.

²⁶ *Customs and Excise Commissioners v. Madgett & Baldwin* [1998] BVC 458 at 464.

²⁷ See GSTR 2011/D5.

Taxable supplies

42. The operator may also make taxable supplies to the resident. Taxable supplies in this context include services (**non-incidental services**) which are not incidental to supply of residential premises by way of lease or licence. Non-incidental services may include optional services which have no necessary connection to the resident's ability to enjoy residential premises under the lease or licence.

43. **Attachment B** contains a non-exhaustive list of non-incidental services.

Payment as consideration for supplies made***Payment wholly or partly consideration for input taxed supplies***

44. Exit payments are treated as consideration for a supply of residential premises, except to the extent that an objective assessment of all the circumstances indicates that they are consideration for some other supply or supplies. Supplies of residential premises in a lease or licence arrangement are input taxed unless the premises are GST-free serviced apartments under subsection 38-25(4A).

45. Neither the method by which an exit payment is to be determined nor the variables used to calculate an exit payment are necessarily decisive in identifying the supply or supplies for which the exit payment is consideration. There may be situations, however, where the method of calculation prescribed for an exit payment, after considering the objective circumstances, may be sufficient to establish nexus with a supply other than a supply of residential premises.

46. Exit payments are commonly calculated by reference to the duration of the lease or licence rather than the level of services actually provided. Unless particular terms of the legal arrangement indicate otherwise, it may be taken that such exit payments are, to some extent, consideration for the supply of residential premises, or the composite supply of residential premises and incidental services.

47. Unless particular terms of the legal agreement indicate otherwise, an exit payment is wholly consideration for supplies that are input taxed (or GST-free where the supplies covered by section 38-25) where:

- the operator does not provide services other than incidental services; or
- the operator provides non-incidental services but:
 - the resident is liable to provide separate consideration in respect of them; and

- the value of that consideration is not significantly less than the market value of the services.

48. In such cases, the connection between the exit payment and the making of supplies of residential premises and/or incidental services may be inferred from the lack of any such connection between the payment and non-incidental services.

Payment wholly or partly consideration for taxable supplies

49. By way of contrast, it may be that an exit payment is consideration for the taxable supply of non-incidental services where the operator provides non-incidental services and:

- residents do not provide any separate consideration for those services; or
- the value of the separate consideration they provide is significantly less than the market value of the services.

50. In the absence of any contrary indications, a part of an exit payment that is calculated by express reference to the extent of (non incidental) services performed by the operator would be consideration for those services rather than for the supply of the premises.

Apportionment between taxable and non-taxable components

51. 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 payment in question should be apportioned between the taxable and non-taxable components.²⁸ The apportionment method adopted must be reasonable in all circumstances.²⁹

²⁸ See paragraphs 25 to 26 and 92 of GSTR 2001/8.

²⁹ See paragraphs 25 to 26 and 92 of GSTR 2001/8.

Appendix 2 – Your comments

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

53. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the ATO office website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

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Appendix 3 – Detailed contents list

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

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10; GSTR 2000/12;
GSTR 2001/8; GSTR 2002/3;
GSTR 2003/11; GSTR 2006/9;
GSTR 2006/11; GSTR 2011/1;
GSTR 2011/D5; GSTR 2012/D1

Subject references:

- creditable purpose
- Goods and services tax
- GST consideration
- GST input tax credits & creditable acquisitions
- GST new residential premises
- GST retirement villages
- GST supplies & acquisitions

Legislative references:

- ANTS(GST)A 1999
- ANTS(GST)A 1999 9-15
- ANTS(GST)A 1999 9-15(1)(a)
- ANTS(GST)A 1999 Subdiv 38-G
- ANTS(GST)A 1999 38-25
- ANTS(GST)A 1999 38-25(3)
- ANTS(GST)A 1999 38-25(4A)
- ANTS(GST)A 1999 38-260
- ANTS(GST)A 1999 40-35(1)(a)

Case references:

- Archibald Howie Pty Ltd v. Commissioner of Stamp Duties (NSW) (1948) 77 CLR 143; [1948] HCA 28
- Beynon & Partners v. Commissioners of Customs and Excise [2005] 1 WLR 86
- Byrnes v. Kendle (2011) 243 CLR 253; [2011] HCA 26
- Chief Commissioner of State Revenue v. Dick Smith Electronics Holdings Pty Ltd (2005) 221 CLR 496; [2005] HCA 3; 2005 ATC 4052 (2005) 58 ATR 241
- Customs and Excise Commissioners v. Madgett & Baldwin [1998] BVC 458

- Customs and Excise Commissioners v. British Telecommunications plc [1999] BVC 306
- Federal Commissioner of Taxation v. Broken Hill Pty Co Ltd [2000] FCA 1431; 2000 ATC 4659; (2000) 45 ATR 507
- Federal Commissioner of Taxation v. Luxottica Retail Australia Pty Ltd (2011) 191 FCR 561; [2011] FCAFC 20; 2011 ATC 20-243; (2011) 79 ATR 768
- Homecare Direct Shopping Pty Ltd v. CGU Workers Compensation (Vic) Ltd [2008] VSCA 111
- International Air Transport Association v. Ansett Australia Holdings Ltd (2008) 234 CLR 151; [2008] HCA 3
- Natalie Newton (trading as Combine Care for the Elderly) v. Commissioner of Taxation [2011] AATA 897; 2011 ATC 10-226
- NM Superannuation Pty Ltd v. Young (1993) 41 FCR 182
- Pacific Carriers Ltd v. BNP Paribas (2004) 218 CLR 451; [2004] HCA 35
- Re Porter; Re Transport Workers Union of Australia [1989] FCA 226; (1989) 34 IR 179
- Re Vidler and Federal Commissioner of Taxation [2009] AATA 395; 2009 ATC 10-093; (2009) 72 ATR 832
- Saga Holidays Ltd v. Federal Commissioner of Taxation (2005) 149 FCR 41; [2005] FCA 1892; 2006 ATC 4001; (2005) 61 ATR 384
- South Sydney District Rugby League Football Club Ltd v. News Ltd [2000] FCA 1541
- Toll (FGCT) Pty Ltd v. Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52

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ATO references

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Goods and Services Tax ~~ Property and construction ~~
retirement villages

Attachment A – Incidental supplies

Item	Action/service
1.	Maintenance of units Ensuring that units are fit for habitation and in good repair.
2.	Maintenance of common areas Maintenance of common areas, including: ³⁰ <ul style="list-style-type: none"> • Car parks; • Driveways; • Barbeque areas; • Gardens
3.	Maintenance of fittings and fixtures Maintaining, repairing and replacing fittings and fixtures relating to residential premises on village land.
4.	Safety and security Maintenance of safety equipment, administration of safety procedures, arranging security over common areas or the village as a whole
5.	Insurance of common areas Arranging insurance for public liability, building, fire, theft and other matters relating to common areas
6.	Administration General administrative services, to the extent that they relate to items 1 to 5 of Attachment A of this draft Ruling.

³⁰ See paragraph 278 of Draft Goods and Services Tax Ruling GSTR 2012/D1 *Goods and services tax: residential premises and commercial residential premises.*

Attachment B – Non-incidenta

Item	Action/service
1.	Meals Preparation and/or delivery of meals to residents, provision a village dining room
2.	Internal cleaning Cleaning of the interior of the resident's unit
3.	Laundry and ironing Provision of laundry and/or ironing services to residents
4.	Linen Supply of linen to residents
5.	Social events The provision for consideration of entertainment events for residents, such as a bus trip to a theatre
6.	Hair and beauty Hairdressing, makeup etc
7.	Medical care Provision of specialist medical care including transport to medical appointments
8.	Personal care Assistance with showering, hygiene, dressing, mobility, communication, shopping
9.	Commercial residential premises Services incidental to the supply of premises used to provide services of the kind referred to in items 1 to 8 of Attachment B of this draft Ruling.
10.	Administration General administrative services, to the extent that they relate to items 1 to 9 of Attachment B of this draft Ruling.