

# ***GIR/retirement-villages-issues -***



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# Retirement Villages Industry Partnership – issues register

This issues register, originally published on our main website, provides guidance on issues identified during past consultation with industry participants.

Issues in this register that are a public ruling can now be found in the *Public Rulings* section of this Legal Database.

Issues in this register that have not been labelled as public rulings, constitute written guidance. We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information on these issues and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we must still apply the law correctly. If that means you owe us money, we must ask you to pay it but we will not charge you a penalty. Also, if you acted reasonably and in good faith we will not charge you interest. If correcting the mistake means we owe you money, we will pay it to you. We will also pay you any interest you are entitled to.

If you feel that the guidance in this issues register does not fully cover your circumstances, or you are unsure how it applies to you, you can seek further assistance from us.

## October 2009

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## How this document should be used

This document is a list of major issues and subsidiary questions that have been collated as a result of consultations with the retirement village sector. The document was then refined using input from the retirement village/GST Consultative Forum. These discussions and consultations have been instrumental in the Australian Taxation Office (ATO) undertaking a technical clearance process in order to explain the intention of the policy for each major issue and outline the ATO's position for each subsidiary question.

By reading the policy intention for each major issue organisations will be able to gain an understanding of the meaning of the relevant provisions in the legislation as it currently stands. These explanations are designed to provide guidance to organisations within the retirement village sector on the basic principles that the ATO will adhere to in responding to enquiries that fall under these major categories.

The ATO's position that is outlined in each subsidiary question is specific to that question. Each response should be considered as pertaining to the particular circumstances described in the question and should not be viewed as a generic position held by the ATO. Where organisations find that the question does not fit the unique circumstances as outlined then it is important that further clarification is sought from the ATO. This would best be done by writing to the ATO at:

**Australian Taxation Office  
PO Box 3524  
ALBURY NSW 2640**

There are also a number of issues which will require the publication of separate rulings. As these rulings become available they will be published on the ATO's website which can be found at [www.ato.gov.au](http://www.ato.gov.au) There is also information which might be relevant to retirement villages as it contains rulings for income tax.

# Issue 1

## **What is the GST treatment for maintenance fees in non-freehold/strata situations where the resident is not eligible for residential care?**

Paragraphs 12 to 16 of this issue are public rulings for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*.

Paragraphs 1 to 11 of this issue are non-interpretative.

For source of ATO view for paragraphs 17 to 26 of this issue, refer to [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*.

## **ATO position**

GST guideline: Retirement villages and maintenance fees.

Retirement village proprietors need to know if maintenance fees are input taxed or taxable supplies and whether or not they can claim input tax credits. This guideline is about the GST treatment of maintenance fees under *A New Tax System (Goods and Services Tax) Act 1999*.

## **Various arrangements**

1. Various arrangements are used by owners of retirement villages to grant occupancy rights to village residents. The types of arrangements used in the industry include:

- a) strata title/freehold (These guidelines do not apply to these arrangements. See paragraph 3)
- b) lease premium (non-assignable lease)
- c) lease premium (assignable)
- d) loan/lease
- e) loan/licence
- f) prepaid rental
- g) redeemable preference share/long term lease.

## **What are these guidelines about?**

2. These guidelines set out the GST treatment of retirement village maintenance fees in non-freehold/strata situations and where the resident is not receiving services referred to in paragraph 38-25(3)(c) being daily living activities assistance or nursing services as prescribed by that subsection.

3. Where a person owns the freehold or strata title and services are provided by a body corporate these are taxable supplies if the body corporate is registered for GST.

## **What are maintenance fees?**

4. Regular maintenance or 'outgoings' charges may be payable fortnightly or at some other interval and they cover the running costs of the entire village. These may include the upkeep of the village facilities, the staff working for the common good such as attending to the call buttons, gardeners/handyman, receptionists and cleaners. All statutory charges such as Council, water and sewerage rates arising from common areas are paid from the maintenance fee. So are the management and other administration costs such as security

and accounts, insurance, workers' compensation and public liability, common area contents and in most cases building insurance for the entire village. The charge may also include a contribution towards a sinking fund for major repairs and improvements to the village or parts within the village.

### ***Government policy***

5. The extent to which resident's weekly or monthly maintenance fees are input taxed will depend on whether the components of these fees can be reasonably characterised as part of a rental charge. However, charges for supplies such as electricity use, laundry services, gardening services, security services or for meals served in a common dining areas would be subject to GST.

### ***Scheme of the Act***

6. The GST treatment of maintenance fees depends on identifying the supply as specified in contracts in light of the elements contained in section 40-35 as referred to in paragraph 7 (see below). After identifying the supply the GST consequence will follow in accordance with the Act. However, if a fee covers both a taxable and input taxed supply, then apportionment of the consideration is required between those supplies.

### ***Relevant section – Section 40-35 – Residential rent***

7. The relevant section is section 40-35 which provides as follows:

- A supply of premises that is by way of lease, hire or licence (including a renewal or extension of a lease, hire or licence) is input taxed if either of the following apply:
  - a. the supply is of residential premises (other than a supply of commercial residential premises or a supply of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises)
  - b. the supply is of commercial accommodation and Division 87 (which is about long-term accommodation in commercial premises) would apply to the supply but for a choice made by the supplier under section 87-25.
- However:
  - a. the supply is input taxed only to the extent that the premises are to be used predominantly for residential accommodation (regardless of the term of occupation)
  - b. the supply is not input taxed under this section if the lease, hire or licence, or the renewal or extension of a lease, hire or licence, is a long-term lease.

(Please note that while a supply of residential premises by way of long-term lease is not input taxed under section 40-35, such a supply (other than a supply of new residential premises) is input taxed under section 40-70.)

8. From perusal of the above the following criteria must be satisfied before the lease/hire fees will be treated as input taxed:

- a. there must be a supply (this term is defined in section 9-10)
- b. the supply must be of premises (the term premises is not defined for the purposes of the Act)

- c. the supply must be by way of lease, hire or licence (which excludes the supply of freehold or strata title). Even though the section is entitled 'Residential Rent' the section focuses upon the method by which the supply is made.
- d. the supply must be of residential premises (as defined in section 195-1) of either of the following:
  - i. other than a supply of 'commercial residential premises' (as defined in section 195-1) or a supply of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises
  - ii. is of commercial accommodation (as defined in section 87-15) and Division 87 in relation to long-term accommodation would apply but for a choice made under section 87-25.

However the supply is input taxed only to the extent that:

- iii. the premises are to be used predominantly for residential accommodation (regardless of the term of occupation).
- e. if the supply is in the form of a long-term lease (as defined in section 195-1), the premises must not be new residential premises. (However, in the context of retirement villages, it is unlikely that the lease/licence arrangement will satisfy the GST definition of a long-term lease.)

9. Retirement villages are not commercial residential premises for the purposes of the Act. Retirement villages do not hold themselves out as accommodation for tourist guests or lodgers. Further, the status of residents in a leasehold situation is that of a tenant or lessee rather than guests, lodgers or boarders.

10. Central to the above is the concept of residential premises which is defined in section 195-1 to mean 'land or a building that either:

- a. is occupied as a residence or for residential accommodation
- b. is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation

(regardless of the term of the occupation or intended occupation) and includes a floating home (as defined in section 195-1)'.

11. The Macquarie dictionary defines 'residence' as 'the place, especially the house in which one resides; dwelling place; dwelling'. Therefore, in its ordinary meaning the word could be interpreted as the bare supply of somewhere to live (being a roof over someone's head) or as including the things that normally go with the supply of somewhere to live.

### ***GST treatment for maintenance fees***

The content for this issue is a public ruling for the purposes of the *Taxation Administration Act 1953* and can be found [here](#).

### ***Apportionment***

17. A lessor may make mixed supplies of both **input taxed** and **taxable supplies**. The amount of GST payable will depend on separating these supplies and the consideration for each type of supply in order to determine the extent 'creditable purpose' for claiming input tax credits. Goods and Services Tax Ruling [GSTR 2006/4](#) explains the Commissioner's view on the meaning of 'creditable purpose'. That ruling also explains several possible methodologies for determining the extent of 'creditable purpose'.

### ***Determining the extent of creditable purpose***

18. For an acquisition to be for a creditable purpose it must be made in carrying on your enterprise. An acquisition is made in carrying on your enterprise if it is made in the course of your enterprise including during, commencing or termination of that enterprise.

19. Enterprise is broadly defined in section 9-20 of the GST Act. The same definition appears in section 38 of the ABN Act, and has been considered in Miscellaneous Taxation Ruling [MT 2006/1](#). This ruling states the Commissioner's view on the meaning of the term 'enterprise' in the ABN Act. The parts of it that explain the definition of 'enterprise' under section 38 of the ABN Act reflect the Commissioner's view of the definition of 'enterprise' under section 9-20 of the GST Act.

20. Charitable and religious organisations, government bodies and trusts are also considered to be carrying on an enterprise.

21. The input tax credits must be reduced for any element that relates to making input taxed supplies or which are of a 'private or domestic nature'.

22. When you first claim an input tax credit for an acquisition, the amount of your credit entitlement depends on the planned use in your enterprise compared to the total use. Entities must be able to make a 'reasonable estimate' of the planned use of a thing at the time of acquisition. This should be based on records already available or on previous experience. Where practicable, the entity should use a direct apportionment method. If this is not practicable you should use an indirect method that is fair and reasonable. For example, where the cost of measuring the use of the acquisition is disproportionate to the cost of the acquisition itself.

23. Some examples of 'direct methods' of measuring use are: (i) distance (for example kilometres travelled); (ii) time (for example computer time or personnel spent on various activities); (iii) transactions (for example number of transactions of particular types); and (iv) area (for example floor area). Entities may measure the use over a certain period to determine actual use. The period chosen should be representative of the total usage of the thing acquired.

24. However, it may be necessary to use 'indirect methods', that is, variables that are not directly identifiable with the use of a particular acquisition. These may be appropriate in circumstances where there are overhead expenses or a large number of small acquisitions and it is not effective to try and measure the use to which each separate acquisition is put. There are two types of indirect methods, input based and output based. Examples of input based methods include: (i) the cost of acquisitions used to make taxable or GST-free supplies relative to the total costs of all acquisitions; or (ii) the input tax attributable to acquisitions used to make taxable or GST-free supplies relative to total input tax. Output based methods utilise measures of output to estimate use of acquisitions, such as: (a) total value of taxable and GST-free supplies as a percentage of total supplies; and (b) net profit (or gross profit) from taxable and GST-free supplies as a percentage of total net profit (or gross profit).

25. If you make a creditable acquisition you must keep records that show and explain all transactions that are relevant to that acquisition. The records must be such as to enable your liability under the GST Act to be readily ascertained (section 382-5 of Schedule 1 to the *Taxation Administration Act 1953*).

26. Examples of the principles outlined in this guideline and the methods of apportionment are attached (see [example A](#) and [example B](#)). These examples may help you to determine the extent of creditable purpose for the purpose of claiming input tax credits. You will have to review your methodology if the application of creditable purpose differs from the extent of your intended or planned use.

## Issue 2

### **What is the GST treatment of accommodation bonds and accommodation charges?**

(Issue 2 issue is now obsolete. The explanations provided at Issue 2 should not be relied on as written guidance or as a public ruling for the purposes of section 357-60 of the *Taxation Administration Act 1953*.)

This issue is now superseded by Goods and Services Tax Determination [GSTD 2011/4](#) *Goods and services tax: Are accommodation bonds retention amounts or accommodation charges paid by residents of an aged care facility covered by the Aged Care Act 1997, that is supplying GST-free services under subsection 38-25(1) of the A New Tax System (Goods and Services Tax) Act 1997, consideration for a GST-free supply?* [GSTR 2012/4](#) *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 issue previously stated:

### **ATO position**

#### ***What is the GST treatment of accommodation bonds and accommodation charges in nursing homes and hostels?***

Accommodation bonds and accommodation charges for Commonwealth Government funded nursing homes and hostels will be GST-free.

These bonds and charges are payments made by residents of Commonwealth funded residential care facilities and are for the cost of their care and accommodation. For such care conducted by approved providers funded pursuant to the *Commonwealth Aged Care Act 1997*, the amount paid for an accommodation bond is usually a lump sum amount which is refundable less a retention amount of \$220 a month for up to five years.

Accommodation bonds for nursing homes and hostel care will also be GST-free, where the supplier receives Commonwealth funding (other than as an approved provider under the *Aged Care Act 1997*) or receives state or territory government funding, and the services provided to aged or disabled people are determined by the Aged Care Minister to be services of a kind covered by Schedule 1 to the Quality of Care Principles under the *Aged Care Act*. The Aged Care Minister's Determination was issued on 28 June 2000.

The effect of the accommodation bonds being GST-free is that aged care residents will not pay GST on their bonds and the providers of the residential aged care can claim GST input tax credits.

#### ***What is the GST treatment of entry contributions in leasehold retirement villages and other rented private residential accommodation services?***

Retention amounts retained from entry contributions paid for accommodation for aged or disabled people in retirement villages and other rented private residential accommodation services will be GST-free, where the person is required to receive and is receiving daily living activities assistance or nursing services as defined in Items 2.1 or 3.8 of Schedule 1 to the Quality of Care Principles and the services provided are determined by the Aged Care Minister to be services of a kind covered by Schedule 1 to the Quality of Care Principles under the *Aged Care Act* and the accommodation is provided in the course of supplying that care. As referred to above the Aged Care Minister's Determination was issued on 28 June 2000.

For other residents of leasehold retirement villages and other rented private residential accommodation, any amounts retained and applied from entry contributions for accommodation will be input taxed on the basis that they are for the supply of residential



accommodation and should get the same treatment as private residential rent generally. Those supplies covered by entry contribution retention amounts that cannot reasonably be characterised as residential accommodation are not entitled to input tax treatment and should be treated as separate supplies.

In determining the GST treatment of entry contributions only the retention amounts are the consideration for the supply in question.

The effect of being input taxed is that the resident does not pay GST on the retained amounts and the provider of the residence cannot claim an input tax credit on the cost of providing that accommodation.

This GST treatment of retained amounts being input taxed, is the same treatment that people in the general community will receive when paying their private residential rents. Accordingly, this treatment ensures that older people are treated equitably, whether they choose to live in leasehold retirement villages or in other rental homes in the community.

## Issue 3

### **Do agreements entered into prior to 8 July 1999 have any different GST applicability to them?**

Non-interpretative - straight application of the law.

#### **ATO position**

The recipient of a supply of residential premises or residential rent is not entitled to an input tax credit. This is because the supply is input taxed, and also because the recipient would not be acquiring it for creditable purpose.

Therefore the 'relevant date' in relation to a supply of residential premises or residential rent to a resident is 2 December 1998. In order for section 13 of the *A New Tax System (Goods and Services Tax Transition) Act 1999* (GST Transition Act) to make a supply of residential premises or residential rent GST-free the following requirements must be met:

- A written agreement must be made before 2 December 1998.
- The agreement must specifically identify the supply of residential premises or residential rent.
- The agreement must identify the consideration in money, or a way of working out the consideration in money, for the supply.

If a review opportunity arises under the agreement the supply will only be GST-free to the extent it is made before the review opportunity arises. The supply will not be GST-free to the extent it is made on or after 1 July 2005 unless all of the consideration was paid before 2 December 1998. If no review opportunity arises under the agreement the supply will only be GST-free to the extent it is made before 1 July 2005, unless all of the consideration was paid before 2 December 1998.

## Issue 4

**If there have been any contracts issued after 8 July 1999 that do not contain a clause entitling the company to apply a GST charge to any resident, is there any transitional or savings provision available that would entitle the company to charge to the resident any GST payable notwithstanding the lack of a clause entitling it to do so?**

Non-interpretative - straight application of the law

### **ATO position**

For the purposes of section 13 of the GST Transition Act the relevant date is 2 December 1998 and not 8 July 1999 where the recipient is not entitled to a full input tax credit for the supply. A resident would not be entitled to an input tax credit in relation to the acquisition of a supply of residential premises or residential rent, or an acquisition of a private or domestic nature. A contract made on or after 2 December 1998 in this case cannot not meet the requirements of section 13. If section 13 does not apply to a contract a supply made under the contract cannot be GST-free under section 13. If the company makes a taxable supply under the contract, GST is payable on the supply. Whether or not a supply is a taxable supply is determined by the GST Act and the GST Transition Act.

As there is no provision in the GST legislation that allows a supplier to alter an agreed price for a supply, or to recover from the recipient an amount of GST payable, the company cannot charge a resident an extra amount to recover GST payable on a supply to the resident, unless the contract enables the supplier to do this.

## **Issue 5**

**Do contracts without a review opportunity attract any GST until 2005? If so is it July 2005 or some other date?**

Non-interpretative - straight application of the law

### **ATO position**

If a supply by the company meets the requirements of section 13 of the GST Transition Act and no review opportunity arises under the agreement the supply will be GST-free until 30 June 2005. From 1 July 2005 it will no longer be GST-free under section 13 (unless all of the consideration for the supply was paid before 2 December 1998 and no review opportunity arises). The provisions of the GST Act will determine whether or not the supply is a taxable supply.

## Issue 6

**Will contracts entered into prior to 8 July 1999, and still in force in 2005, be varied by operation of law to enable the company to apply a GST charge to any maintenance levies paid by a resident?**

Non-interpretative - straight application of the law

### **ATO position**

If the maintenance levies were the consideration for a supply which was GST-free under section 13 of the GST Transition Act and which ceases to be GST-free from 1 July 2005, the GST Act will determine whether the supply is a taxable supply (or input taxed supply) from 1 July 2005. Whether a contract can be varied to enable the supplier to change the consideration or price of a supply will depend on the terms of the contract. Whether or not the consideration can be changed does not affect whether or not the supply is a taxable supply (or an input taxed supply) under the GST legislation. Division 2 of the GST Transitional Act (enacted in 2005) provides a mechanism for the parties to negotiate a change to the consideration for the supply to take into consideration the impact of GST.

## Issue 7

### **Can the provision of retirement village accommodation be GST-free under the provisions concerning the non-commercial activities of charitable institutions?**

#### ***GST policy/law***

The GST law promotes that the commercial activities of charities will be taxable but the non-commercial supplies provided by charities will be GST-free. Thus, supplies for nominal consideration made by a charity are GST-free

Subdivision 38G, section 38-250 renders certain non-commercial supplies made by a charitable institution, a trustee of a charitable fund or a gift deductible entity GST-free.

For the supply of accommodation, the supply is GST-free where the supplier is a charitable institution, a trustee of a charitable fund or a gift deductible entity, and

- the supply is for consideration that is less than 75% of the GST inclusive market value of the supply, or
- the supply is for consideration that is less than 75% of the cost to the supplier of providing the accommodation.

#### **ATO position**

a. *What is the meaning of a 'non-commercial supply' of residential accommodation by a charity?*

Where the supplier is a charity a 'non commercial' supply of accommodation would be where it is provided for consideration (rent) that is less than 75% of the market value or less than 75% of the cost to the supplier.

b. *What is the method for determining the market value of residential accommodation?*

The ATO has issued guidelines for determining the market value of accommodation. They are based on the Department of Employment and Workplace Relations and Small Business temporary accommodation rent ceilings. A copy of the guidelines is available from the Charities and Non-Profit Organisations Industry Partnership.

c. *What amounts are included in the consideration for accommodation provided by a retirement village?*

All those payments that are considered to be in the nature of a rental payment for the accommodation provided would be included in the determination of the rent amount. For example, the rent amount would include the rent components of maintenance fees, deferred charges and lease payments for the period over which they apply. See [example C](#).

## Issue 8

**Does the right of occupation acquired by a resident who purchases a redeemable preference share need to be less than 50 years to retain any GST exemption?**

The content for this issue is a public ruling for the purposes of the *Taxation Administration Act 1953* and can be found [here](#).

## Issue 9

### **9.1 Is the purchase of a redeemable preference share in a company that owns and runs a retirement village input taxed?**

The answers to issue 9.1 are non-interpretative - straight application of the law

### **9.2 Is a company, that issues redeemable preference shares which carry rights to occupancy that are akin to a leasehold arrangement, entitled to claim input tax credits in carrying on the retirement village enterprise?**

#### ***GST law***

9.1 See section references in [Issue 8](#) above.

9.2 Section 11-20, who is entitled to input tax credits for creditable acquisitions.

Section 11-5, what is a creditable acquisition.

Section 11-15, meaning of creditable acquisition.

#### **ATO position**

9.1 See discussion in [Issue 8](#) above. A supply of a share is a financial supply and is input taxed.

9.2 Section 11-20 provides that a supplier is entitled to an input tax credit for any creditable acquisition that the supplier makes. However, subsection 11-15(2) provides a supplier does not make a creditable acquisition if the acquisition relates to making supplies that are input taxed. Therefore, the company in this instance would not be entitled to claim input tax credits to the extent that the supplies it makes are input taxed.



# Issue 10

## ***A New Tax System (Goods and Services Tax) Act 1999***

(Issue 10 is now obsolete. The explanations provided at issue 10 should not be relied on as written guidance or as a public ruling for the purposes of section 357-60 of the Taxation Administration Act 1953.

This Issue is now superseded by Goods and Services Tax Ruling [GSTR 2012/3](#) - *Goods and services tax: GST treatment of care services and accommodation in retirement villages and privately funded nursing homes and hostels*.

This issue previously stated:

For supplies made to residents of serviced apartments in retirement villages, refer also to *GST and serviced apartments in retirement villages* (NAT 12761). All legislative references are to the GST Act, unless otherwise stated.

1. The following sets out the circumstances in which residential care services<sup>1</sup> will be GST-free under subsection 38-25(3). It also sets out the GST treatment of accommodation supplied under subsection 38-25(4) where the resident is receiving residential care services<sup>2</sup> referred to in subsection 38-25(3).

### ***Residential Care***

2. Residential care is personal and/or nursing care provided to a person in a residential facility (see definition of 'residential care' in section 41-3 of the *Aged Care Act 1997*). Residential care generally does not include care provided to an individual in their own private home. However, care provided to an individual in their own home may be covered by the community care provisions under section 38-30.

3. Subsection 38-25(3) of the GST Act provides as follows:

A supply of services is **GST-free** if:

- (a) the services are provided to one or more aged or disabled people in a residential setting; and
- (b) the Aged Care Minister<sup>3</sup> has determined in writing that the services are of a kind covered by Schedule 1 of the Quality of Care Principles;<sup>4</sup> and
- (c) the services include, and are only provided to people who require, the services (care services) set out in:
  - (i) item 2.1 (daily living activities assistance) of Part 2 of that Schedule; or
  - (ii) item 3.8 (nursing services) of Part 3 of that Schedule.

4. Essential requirements of the Aged Care Minister's Determination<sup>4</sup> (see section 5 of the *GST-Free Supply (Residential Care - Non-Government-Funded Supplier) Determination 2000*) are that:

- a. the care recipient has a continuing need for the services mentioned in items 2.1 or 3.8 of Schedule 1; and
- b. the services are supplied, under a written agreement with the supplier, as a package made up of:

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<sup>1</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*.

<sup>2</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*.

<sup>3</sup> **Aged Care Minister** - means the Minister administering the *Aged Care Act 1997*.

<sup>4</sup> **Quality of Care Principles** - means the principles made under section 96-1 of the *Aged Care Act 1997*.

- (i) the services mentioned in items 2.1 or 3.8 of Schedule 1; and
  - (ii) other services mentioned in Schedule 1 that are needed by the care recipient; and
  - (iii) accommodation; and
- c. the charges for services and for accommodation are payable to the same entity.

5. The following criteria must be satisfied for the supply of residential care services to be GST-free:

- the services must be provided to one or more aged or disabled people;
- the services must be provided in a residential setting;
- the Aged Care Minister<sup>5</sup> has made a determination that the services are of a kind covered by Schedule 1 to the Quality of Care Principles;<sup>6</sup> and
- the services include and are only provided to people who require and are receiving on an ongoing basis the services set out in item 2.1 or 3.8 of that Schedule.

6. However, in relation to a supply that is made to a resident of a serviced apartment in a retirement village and of a kind referred to in subparagraphs 38-25(4A)(b)(i), (ii) or (iii), the following two criteria listed in paragraph 5 above do not apply (see section 2 and Schedule 1 item 18 of the *Tax Laws Amendment (Retirement Villages) Act 2004*):

- that accommodation be included in a package of services, and
- that charges for accommodation and services be payable to the one entity.

7. Subsection 38-25(3A) provides as follows:

Services provided to a resident of a retirement village are taken, for the purposes of paragraph 38-25(3)(a), to be provided in a residential setting if, and only if:

- a. he or she is a resident of a serviced apartment in the retirement village; and
- b. there is in force a written agreement under which the operator of the retirement village provides daily meals and heavy laundry services to all of the residents of the apartment.

Refer to the fact sheet, GST and serviced apartments in retirement villages (NAT 12761) for further information on the operation of section 38-25(4A) and 38-25(3A) mentioned in the paragraphs immediately above.

### ***GST-free accommodation***

8. Subsection 38-25(4) provides as follows:

A supply of accommodation is **GST-free** if it is made to a person *in the course of* making a supply to that person that is GST-free under subsection 38-25(1), (2) or (3).

9. Subsection 38-25(4A) provides as follows:

A supply is GST-free if:

- (a) it is made to a person who is a person of a kind referred to in paragraph 38-25(3)(c); and
- (b) it is:

<sup>5</sup> **Aged Care Minister** - means the Minister administering the *Aged Care Act 1997*.

<sup>6</sup> **Quality of Care Principles** - means the principles made under section 96-1 of the *Aged Care Act 1997*.

- (i) a supply, by way of lease, hire or licence, of residential premises consisting of a serviced apartment in a retirement village; or
  - (ii) a sale of real property that is residential premises consisting of a serviced apartment in a retirement village; or
  - (iii) a supply of an excluded security (within the meaning of the *Corporations Act 2001*) in respect of which the right to participate in a retirement village scheme (within the meaning of that Act) entitles the person to use or occupy a serviced apartment in a retirement village; and
- (c) in a case where:
- (i) a determination made for the purposes of paragraph 38-25(3B)(a) is in force; and
  - (ii) the determination is not restricted under subsection 38-25(3C) in such a way that the determination excludes the person; the Aged Care Secretary has, in accordance with the determination, assessed the person as requiring the levels of care services determined in the determination; and
- (d) it is made in connection with one or more supplies, or proposed supplies, to the person that are or will be GST-free under subsection 38-25(3).

### ***ATO interpretation on the application of these sections***

10. The emphasis of the above sections of the Act and the Aged Care Minister's determination is on the residential care services<sup>7</sup> that are provided to the recipient of the supply. Accommodation is only an ancillary aspect to that care. Consequently, the supply of accommodation by the proprietor of a residential care facility is GST-free only where the requirements for the supply of residential care services<sup>8</sup> are fully satisfied. It is not the entity or facility that is GST-free.

### **Written agreement requirements**

11. The Aged Care Minister's determination stipulates that the services, required by a person under items 2.1 or 3.8 of Schedule 1 and other services mentioned in Schedule 1, are GST-free if:

- they are needed by that person on a continuous basis
- they are provided under a written agreement with the supplier, and
- both the care and accommodation charges are paid to the same entity (where the supply is not to a resident of a serviced apartment in a retirement village, see paragraph 7 above).

12. The ATO requires such written agreements:

- (a) for existing residential care recipients residing in a facility before 1 July 2000, to be entered into on or before 31 August 2000
- (b) for residents entering a facility on or after 1 July 2000, to be entered into by 25 August 2000 or otherwise within 7 days of the resident moving into the accommodation.

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<sup>7</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*

<sup>8</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*

13. The written agreements must:

- (a) specify the type of care services agreed to be provided to the resident which must include at least **one** of the services listed in 2.1 or 3.8 and the charges applicable to those services; and
- (b) if the resident needs any of the other services listed in Schedule 1, set out the type of other services agreed to be provided and the charges applicable to those services.

14. The written agreements must also contain a schedule, updated on a six monthly basis, prepared by the proprietor of the facility and signed by an identified person of authority that demonstrates the care is being provided on a continuous basis.

15. The written agreements must also contain a second schedule, updated on a six monthly basis, prepared and signed by a medical practitioner<sup>9</sup> who is:

- independent of the supplier and chosen by the resident or the resident's representative, and
- competent to assess the aged and/or disability needs of the resident

that certifies which services listed in 2.1 or 3.8, are needed by the resident on a continuous basis as part of their treatment.

### ***Meaning of the term 'Residential setting'***

16. To ensure parity with the publicly funded sector, the ATO considers the term 'residential setting', in paragraph 38-25(3)(a), to mean:

- (a) a residential care facility complying with state or territory legislation regulating the supply of residential care services<sup>10</sup>, and
- (b) in those states or territories that do not regulate residential care facilities, a congregate care facility<sup>11</sup> (such as a nursing home or aged care hostel) conducted by the supplier of residential care services. The facility must primarily provide residential care services<sup>12</sup>. The accommodation is to be suitable for the aged, frail and/or disabled residents having regard to their long term needs as assessed in accordance with the written agreement with the supplier of the residential care services.

17. Consequently, the facility must provide:

- sufficient appropriately trained staff to meet the nursing and personal care needs of residents, and
- sufficient support staff, and
- meals and cleaning services, and
- furnishings, furniture and equipment for the provision of that care, and
- any other requirements specified in the Quality of Care Principles.<sup>13</sup>

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<sup>9</sup> **Medical practitioner** - means a person who is a medical practitioner for the purposes of the *Health Insurance Act 1973*.

<sup>10</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*

<sup>11</sup> **Congregate care facility**- means a facility that combines non independent individual living quarters with communal facilities for food, care, and recreation.

<sup>12</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*.

<sup>13</sup> **Quality of Care Principles** - means the principles made under section 96-1 of the *Aged Care Act 1997*.

The ATO considers that the provision of an on-call nurse only is not sufficient to satisfy these requirements.

18. Accommodation to aged or disabled people in retirement villages and other private residential accommodation services are not provided in a residential setting because a person's private home is not a 'residential setting' for the purposes of paragraph 38-25(3)(a). However, there is a statutory exception to this rule under subsection 38-25(3A). Under this subsection, a person's private home is a residential setting where that home is a serviced apartment (as defined in section 195-1) in a retirement village and there is in force a written agreement under which the village operator provides daily meals and heavy laundry services to all residents of the serviced apartment.

### ***Meaning of 'Accommodation'***

19. A supply of accommodation is GST-free if it is made to an individual *in the course of* making a supply to that individual that is GST-free under subsection 38-25(3).

20. Accordingly, in circumstances where a resident enters a privately funded facility including a retirement village only for the accommodation without any residential care services<sup>14</sup> described under subsection 38-25(3), then the supply of accommodation will not be GST-free under subsection 38-25(4).

21. The word 'accommodation' in subsection 38-25(4) means a bed or space for occupancy by an individual who needs and is receiving GST-free residential care services<sup>15</sup> in that accommodation under the terms of the agreement between the individual and the supplier of the residential care services<sup>16</sup>. The ATO also considers that the word 'accommodation' extends to those accommodation services set out in Part 1 of Schedule 1 to the Quality of Care Principles that are needed by and provided to a resident receiving GST-free residential care services<sup>17</sup>.

22. The supply of a freehold or strata title interest will not qualify for GST-free treatment under subsection 38-25(4) as it is not a supply of accommodation that is provided continuously through the period of the supply of residential care services.<sup>18</sup> However, that supply of residential premises constituting a serviced apartment in a retirement village or the right to use or occupy a serviced apartment in a retirement village may be GST-free under subsection 38-25(4) (see also paragraph 7 above).

23. Subsection 38-25(4) requires a supply of accommodation to be made *in the course of* making GST-free supplies. *In the course* means it is contemporaneous with the making of GST-free supplies. This means there must be a continuous supply of accommodation that accompanies the provision of GST-free supplies. The GST-free supply of accommodation ceases to apply when the provision of GST-free residential care services to the individual ends.

### ***Temporary absences***

24. GST-free services and associated accommodation are considered to continue to be supplied as a package during temporary absences consistent with the provisions of

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<sup>14</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*

<sup>15</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*

<sup>16</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*

<sup>17</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*

<sup>18</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*.

section 42-2 of the *Aged Care Act 1997*. The recipient must still be required to receive these services during a period of temporary absence.

***What charges will be GST-free?***

25. For the period a resident needs to receive and is receiving residential care services<sup>19</sup> the following charges are GST-free to the extent they are for services provided only to that individual *in the course of* their care:

- charges for those services defined in items 2.1 or 3.8 of Schedule 1 that the resident needs to receive and is receiving on an ongoing basis
- charges for other services mentioned in Schedule 1 that are needed by the resident
- rent
- retention amounts retained from ingoing contributions paid for accommodation, to the extent that they can reasonably be characterised as rent
- maintenance fees, to the extent that they can reasonably be characterised as rent or covering other accommodation charges mentioned in Schedule 1.

GST-free treatment does not extend to any services, including accommodation or meals, supplied to relatives, companions or visitors of the care recipient.

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<sup>19</sup> **Residential Care Services** - has the meaning given by the dictionary in Schedule 1 to the *Aged Care Act 1997*.

## **Issue 11**

### **What is the GST treatment of deferred management fees in freehold situations?**

The ATO views deferred management fees as part of the consideration for the purchase of real property. Therefore, the ATO position in relation to deferred management fees in freehold situations is that the first sale would be a taxable supply and all subsequent sales would be input taxed. This treatment is the same as applies to sales of residential property generally.

A deferred management fee will be treated in this manner unless the provisions of a relevant contract specify that the deferred management fee is consideration for a supply other than real property.

## Issue 12

### **Gross up on the sale of retirement villages and apportionment of construction credits: frequently asked questions.**

(Issue 12 is now obsolete. The explanations provided at issue 12 should not be relied on as written guidance or as a public ruling for the purposes of section 357-60 of the *Taxation Administration Act 1953*.)

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

This issue previously stated:

#### **Background**

The ATO has been considering the application of the GST law to the transaction involving the first sale of a tenanted retirement village where that first sale constitutes a taxable supply of new residential premises. Typically, the tenanting of a village involves a loan-licence model, where a resident lends an amount of money to a retirement village operator in return for a licence to occupy the premises.

The sale of the retirement village consists of:

- the transfer of freehold title, and
- the acceptance by the purchaser of the obligations of the vendor to the residents, in particular the obligation either to repay the loan made by the resident, or to pay residents' exit entitlements.

This obligation on the purchaser is additionally imposed by statute. Some states impose the actual loan liability on the purchaser, others impose an obligation to pay the exit entitlement. We note that the Australian Capital Territory (ACT) has no specific provisions imposing liabilities on a purchaser of a tenanted retirement village.

The following questions have been developed to provide interim guidance on this issue.

#### **Does a vendor of a retirement village (RV), when calculating the consideration payable by a prospective purchaser, need to include the value of incoming contributions that a purchaser will undertake to repay and/or exist as statutory charges over the land, where that sale is a taxable supply of new residential premises?**

The ATO view on assumption of liabilities is contained in [GSTR 2004/9 - Goods and services tax: GST consequences of the assumption of vendor liabilities by the purchaser of an enterprise](#). This ruling states that where a purchaser agrees to assume a vendor's liability, the value of the obligation forms part of the consideration for the supply. The ruling does however contain an exception for liabilities imposed by statute.

Although the application of GSTR 2004/9 to the retirement village industry is not entirely clear, we acknowledge that a taxpayer may interpret certain paragraphs of GSTR 2004/9 to mean that the liabilities imposed on a purchaser by statute should not be included in the consideration for the supply of a tenanted retirement village using a loan-licence model.

#### **If I have relied on GSTR 2004/9 and not included as part of the consideration for the sale of a tenanted retirement village the liability assumed by the purchaser by statute, am I protected against a GST liability if the ATO view is changed?**

Retirement village owners who have acted on the interpretation that the statutory liability assumed by the purchaser to repay ingoing contributions does not form part of the



consideration for the sale will be protected under section 105-60 of the *Taxation Assessment Act 1953* from any potential increase in their net amount if the ATO view is changed.

**Note:** The ATO considers that if you exclude the liability assumed by the purchaser on sale from the consideration for sale for the purposes of determining GST on sale, you should not include that liability as part of the consideration for sale for the purposes of applying an output based apportionment methodology to calculate input tax credit entitlements. The ATO may consider challenging your reliance on the ruling if you act inconsistently by:

- excluding the liability when calculating consideration for the sale of the tenanted retirement village for GST, and
- including the liability when calculating the consideration for the sale of the tenanted retirement village when applying an output based methodology to calculate input tax credit entitlements on development of the retirement village.

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