

GSTR 2009/4A1 - Addendum - Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose

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Addendum

Goods and Services Tax Ruling

Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose

This Addendum amends Goods and Services Tax Ruling GSTR 2009/4 to:

- provide an explanation and to clarify how the principles set out in the ruling with respect to the application of Division 129 of the *A New Tax System (Goods and Services Tax) Act 1999* to new residential premises apply to partially completed residential property developments and residential property developments undertaken in multiple stages; and
- reflect the reasoning of the Administrative Appeals Tribunal in *GXCX v. Commissioner of Taxation* [2009] AATA 659; 2009 ATC 1-012; (2009) 73 ATR 380.

GSTR 2009/4 is amended as follows:

1. Preamble

Omit the preamble and substitute:

This document was published prior to 1 July 2010 and was a public ruling for the purposes of former section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*.

From 1 July 2010, this document is taken to be a public ruling under Division 358 of Schedule 1 to the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant 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.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

2. Paragraph 4

Omit the paragraph; substitute:

4. This Ruling explains the Commissioner's view of the law as it applies both before and after its date of issue. You can rely upon this Ruling on and from its date of issue for the purposes of section 357-60 of Schedule 1 of the *Taxation Administration Act 1953* (TAA).

Note: the Addendum to this Ruling that issued on 25 May 2011, explains our view of the law as it applied both before and after its date of issue.

3. Paragraph 26

Omit the third sentence; substitute:

She decides to build new residential premises for sale as part of her property development enterprise but makes a decision to lease the premises for 2 years in order to allow the market to improve.

4. Paragraph 37

After the second sentence; insert:

^{37A} As discussed at paragraphs 132 to 135 of this Ruling, if an entity has applied new residential premises for a creditable purpose in accordance with Division 129, the premises will also have been used other than for making supplies that are input taxed under paragraph 40-35(1)(a) and the requirements of the '5 year rule' in subsection 40-75(2) will not be satisfied.

5. Paragraph 43

After the paragraph; insert:

43A. The example at paragraphs 42 to 43 of this Ruling is consistent with the Administrative Appeals Tribunal's decision in *GXCX v. Commissioner of Taxation*^{41A} (*GXCX*), where the Tribunal considered that an intention to sell, at some indefinite time in the future, strata-titled residential units that were being leased to tenants, without more, was insufficient to establish that the units were being held for the purpose of sale and applied for the creditable purpose of sale during the relevant adjustment period.

^{41A} [2009] AATA 569; 2009 ATC 1-012; (2009) 73 ATR 380.

43B. In *GXCX* the strata-titled units in question were originally constructed for the purpose of sale as part of the taxpayer's property development enterprise. However the taxpayer subsequently decided to rent the apartments to tenants in the short term. Whilst the taxpayer had maintained an intention to sell the apartments in the medium to long term, when expected capital growth could be realised, the time when the apartments would be sold was not set.

43C. In reaching its decision, the Tribunal referred to the language in Division 129 and the method statement in section 129-40 which focuses on the application of a thing during the period from when it was acquired up until the end of the relevant adjustment period. The Tribunal found that the application of the apartments during the part of the relevant period subsequent to the taxpayer's decision to rent the 22 unsold apartments was entirely for a non-creditable purpose. The Tribunal considered that an intention to sell at some time in the future, without more, did not amount to an application of the apartments.^{41B}

6. Paragraph 45

(a) Delete the first two sentences; substitute:

Although any one factor may not be sufficient on its own, the following are some examples of objective facts and circumstances that the Commissioner would expect to be present to conclude that premises are being held for the purposes of sale. The following is not an exhaustive list and there may be other facts and circumstances in individual cases that will also be relevant to determining if the particular premises are being held for the purposes of sale. In any particular case, the Commissioner would expect there to be a preponderance of relevant factors to support a conclusion that premises are being held for the purposes of sale. Some of the factors that may be relevant include:

(b) Delete the sixth dot point and substitute with:

- past activities of the entity in carrying on the enterprise of selling new residential premises (however, it is noted that, in some cases, special purpose vehicle entities may be established for the express purpose of undertaking a single residential property development for the purpose of sale); and

^{41B} In circumstances where an entity has applied premises for both a creditable and non-creditable purpose, to some extent during a relevant period, the extent of creditable purpose of the relevant acquisitions may be determined by apportioning the creditable and non-creditable applications of the premises, using a fair and reasonable method of apportionment. Refer to paragraphs 81 to 131 of this Ruling.

7. Paragraph 47

After the paragraph; insert:

Partially completed residential property developments

47A. As part of its enterprise activities an entity may be developing and/or constructing new residential premises. In some cases the premises may be incomplete and still under construction at the end of a relevant adjustment period that applies for the purposes of Division 129. In these cases, an examination of the objective facts and circumstances will also be required in order to determine the extent to which, if any, the relevant acquisitions incorporated into the partially completed development have been applied for a creditable purpose during the adjustment period.

47B. In some instances, an objective assessment of the facts and circumstances may demonstrate that the premises are being constructed for the purpose of sale when complete. This being the case, the acquisitions that have been incorporated into the partially completed development will have been allocated or dedicated to the creditable purpose of selling new residential premises as part of the entity's enterprise,^{41C} and pursuant to section 129-50, will have been applied, to some extent, for a creditable purpose.

47C. Alternatively, an objective assessment of the facts and circumstances may demonstrate that the premises are being constructed for the purpose of leasing the premises to tenants, upon completion, for an indefinite period. In these cases, the acquisitions that have been incorporated into the partially completed development will have been exclusively allocated or dedicated to the non-creditable purpose of leasing residential premises as part of the entity's enterprise, and pursuant to section 129-50, will not have been applied for a creditable purpose.

47D. Acquisitions incorporated into partially developed/constructed new residential premises will not be applied for a creditable purpose to any extent, when the premises are being constructed exclusively for leasing purposes. However the acquisitions would not be precluded from being applied for a creditable purpose in the future if, based on an objective assessment of the facts and circumstances, the entity subsequently decides to construct the premises for the purpose of sale, or subsequent to completion of the premises, the entity commences holding the premises for the purpose of sale.

^{41C} See paragraphs 30 to 35 of this Ruling for discussion and explanation of the meaning of 'apply' in section 129-55.

47E. Paragraphs 45 and 46 of this Ruling set out some factors relevant to determining whether completed new residential premises are being held for the purpose of sale and/or being applied in relation to making input taxed supplies. In the case of incomplete residential premises under construction, actual sales or leasing of the premises will not be applicable, and there may not have been any marketing of the premises for sale. However the Commissioner considers that the remaining factors set out at paragraphs 45 and 46 of this Ruling, together with any other applicable facts and circumstances, will also be relevant in determining whether residential premises that are still under construction are being constructed for the purpose of sale or for the purpose of leasing.

47F. Any one relevant factor may not be sufficient on its own to demonstrate whether residential premises are being constructed for the purpose of sale or for the purpose of leasing. Determining whether residential premises under construction are being developed for the purpose of sale and thereby concluding that the related acquisitions are being applied, at least to some extent, for a creditable purpose, will require a weighing up of all the available evidence.

Example 2A – application for a creditable purpose of acquisitions incorporated into partially completed residential premises

47G. *Build-up is carrying on an enterprise of property development. Build-up has previously undertaken several residential property developments, and the residential premises have been sold upon completion of each development.*

47H. *Build-up commences development and construction of a residential building that will comprise several residential units. Build-up will sell the newly constructed residential units upon completion of the development, as part of its enterprise of developing residential premises for sale. Finance documentation pertaining to the development indicates that interest-only finance provided with respect to the development is conditional upon Build-up selling all of the residential units upon completion of construction.*

47I. *At the end of the first relevant adjustment period, for Division 129 purposes, the residential building remains incomplete, and construction is continuing. Although Build-up has not commenced marketing the residential units for sale, the relevant facts and circumstances are sufficient to demonstrate that Build-up is constructing the residential units for the purpose of sale. Therefore, the acquisitions incorporated into the partially completed development have been applied for the creditable purpose of sale during the first adjustment period.*

Partially completed multi-stage residential property developments

47J. In some cases residential property developments may be undertaken in stages, with completed, individual residential units constructed in the earlier stages of the development being leased to tenants prior to the completion and sale of the entire property. Depending upon the magnitude of the development being undertaken, the staged development process may mean that the development may take a number of years to complete. A common example of residential property developments that are undertaken in multi-stages is that of retirement village complexes, where individual independent living units completed in the earlier stages of the development are made available to tenants under loan-lease arrangements^{41D} while the construction of the later stages of the development is being completed.

47K. In the context of multi-stage developments, the leasing of individual residential units to tenants prior to the completion of the entire development will mean that up to the end of the relevant adjustment period the development has been applied, to some extent, for the non-creditable purpose of leasing residential premises. However, the Commissioner considers that the development will also be being concurrently applied for a creditable purpose, to some extent, if, based on an assessment of the relevant facts and circumstances, the entire development is being constructed for the purpose of sale rather than for the purpose of leasing or as a capital asset of a business to be carried on by the entity, for example the operation of a retirement village. In these circumstances, the acquisitions pertaining to the development will have also been allocated or dedicated, to some extent, to the creditable purpose of sale as part of the entity's enterprise of constructing the development for sale.^{41E}

^{41D} Similar to the type of arrangement set out in paragraph 6 of GSTR 2011/1.

^{41E} As discussed at paragraphs 132 to 135 of this Ruling, if an entity has applied new residential premises for a creditable purpose in accordance with Division 129, the premises will also have been used other than for making supplies that are input

47L. As is the case with partially completed residential premises more generally, although there may be no actual sale or active marketing of the premises during an adjustment period, the remaining factors set out at paragraphs 45 and 46 of this Ruling, together with any other relevant facts and circumstances, will be applicable to determining whether a multi-stage development is being undertaken for the purpose of sale.^{41F}

47M. There may be some factors, more specifically relevant to multi-stage residential developments, which will assist in determining the application of the acquisitions used in the construction of the development. For example, although not conclusive on its own, an absence of strata-titling of individual units within a multi-stage development, and the inability to sell units independently as each stage is completed, would be consistent with a conclusion that the development is being undertaken for the purpose of selling the entire development.

8. Paragraph 57

After the paragraph; insert:

Example 3A – dual concurrent application – partially completed multi-stage development comprising residential units being concurrently applied for creditable and non-creditable purposes

57A. *XYZ Pty Ltd is carrying on a property development enterprise and has a history of constructing and developing new residential premises for sale. It commences a multi-stage development of a retirement village, which when complete will comprise 100 independent living units. The entire development, comprising 4 separate stages, is expected to take six years to complete.*

57B. *XYZ Pty Ltd's business plan is to not strata-title the independent living units. XYZ Pty Ltd will market and sell the entire, completed development as a whole. To fund the development and to enhance the prospects of sale, XYZ Pty Ltd will lease the independent living units completed in the earlier stages to tenants under loan-lease arrangements.*

57C. *XYZ Pty Ltd's business plan is supported by other evidence consistent with a conclusion that the development is being undertaken for the purpose of selling the completed retirement village as a whole. This other evidence includes minutes of directors' meetings and relevant accounting information. The development has been classified as trading stock in XYZ's accounting and taxation reports.*

taxed under paragraph 40-35(1)(a) and the requirements of the '5 year rule' in subsection 40-75(2) will not be satisfied.

^{41F} See example 3A at paragraphs 57A to 57D of this Ruling.

57D. *On an objective assessment of the facts and circumstances in this case, XYZ Pty Ltd is constructing the entire retirement village for the purpose of leasing and for sale on completion. This is a concurrent application for the creditable purpose of sale and the non-creditable purpose of leasing residential premises. XYZ Pty Ltd is required to determine its extent of creditable purpose, under Division 129, by apportioning between its creditable and non-creditable purposes on a fair and reasonable basis.*^{44A}

9. Paragraph 60

After the paragraph; insert:

Example 4A – consecutive different applications – multi-stage development comprising new residential premises that are applied for a creditable purpose and then for a non-creditable purpose

60A. *Entity Pty Ltd commences a multi-staged development of a retirement village in June 2009. As demonstrated by the objective facts and circumstances, Entity Pty Ltd is undertaking the development for the purpose of selling the fully-tenanted retirement village in its entirety, when complete. The independent living units completed in the earlier stages of the development will be made available to tenants under a loan-lease arrangement whilst the later stages of the development are continuing to be developed.*

60B. *During October 2010, Entity Pty Ltd receives detailed financial projections which show that better long-term investment rates of return can be achieved by holding the premises indefinitely. The financial projections are tabled and discussed at the next directors' meeting, with the directors resolving to alter their business strategy to one of solely supplying the independent living units (as and when completed) for lease rather than holding the entire retirement village development for the purpose of sale.*

60C. *Up until October 2010, Entity Pty Ltd has applied the development for the dual purpose of sale and lease. However, after that time, the development will no longer be being applied for the purpose of selling the fully-tenanted retirement village in its entirety. At the end of the relevant adjustment period, Entity Pty Ltd is required to determine its extent of creditable purpose by apportioning between its creditable and non-creditable purposes on a fair and reasonable basis.*

^{44A} Refer to paragraph 81A of this Ruling regarding apportionment methodologies that may be appropriate to determine the extent of creditable purpose in the context of a retirement village comprising new residential premises.

10. Paragraph 81

After the paragraph; insert:

81A. 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, considers how to determine the extent to which input tax credits are available for acquisitions or importations made by a developer to construct or develop a village that has the features set out in the class of arrangement described in that Ruling. GSTR 2011/1 must be considered when determining a fair and reasonable method of apportionment in relation to the arrangements covered by that Ruling. The views and examples that follow do not specifically consider partially completed developments as discussed in paragraphs 47A to 47I of this Ruling or the facts of multi-stage developments as discussed in paragraphs 47J to 47M of this Ruling.

11. Paragraph 129

After the paragraph; insert footnote 51A:

^{51A} In the Administrative Appeals Tribunal case of *A Taxpayer v. Commissioner of Taxation* [2011] AATA 160; 2011 ATC 1-029; the Tribunal, at paragraph 27 of its decision, accepted the reasoning as set out in paragraph 128 of this Ruling as to why an apportionment method based on the effective life of residential premises is not considered to be fair and reasonable.

12. Detailed contents list

Insert:

<i>Partially completed residential property developments</i>	47A
<i> Example 2A – application for a creditable purpose of acquisitions incorporated into partially completed residential premises</i>	47G
<i>Partially completed multi-stage residential property developments</i>	47H
<i> Example 3A – dual concurrent application – partially completed multi-stage development comprising residential units being concurrently applied for creditable and non-creditable purposes</i>	57A
<i> Example 4A – consecutive different applications – multi-stage development comprising new residential premises that are applied for a creditable purpose and then for a non-creditable purpose</i>	60A

13. Related Rulings/Determinations

Insert:

GSTR 2011/1

14. Case references

Insert:

- A Taxpayer v. Commissioner of Taxation [2011] AATA 160; 2011 ATC 1-029
- GXCX v. Commissioner of Taxation [2009] AATA 569; 2009 ATC 1-012; (2009) 73 ATR 380

This Addendum applies both before and after its date of issue.

Commissioner of Taxation

25 May 2011

ATO references

NO: 1-2EU7Y44

ISSN: 1443-5160

ATOlaw topic: Goods and Services Tax ~~ Property and construction ~~
new residential premises
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adjustments for change in creditable purpose
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