GSTR 2012/5 - Goods and services tax: residential premises

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Goods and Services Tax Ruling

Goods and services tax: residential premises

Contents Para

LEGALLY BINDING SECTION:

What this Ruling is about **1**

Ruling **6**

Date of effect **53**

NOT LEGALLY BINDING SECTION:

Appendix 1:

Explanation **54**

Appendix 2:

Detailed contents list **104**

This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

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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.

What this Ruling is about

1. This Ruling considers how Subdivision 40-B and Subdivision 40-C of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) apply to supplies of residential premises.

2. The Ruling does not consider the issue of when a sale of real property is a sale of new residential premises. This issue is considered in Goods and Services Tax Ruling GSTR 2003/3 *Goods and services tax: when is a sale of real property a sale of new residential premises?* The Ruling does not consider when premises are commercial residential premises. This issue is considered in Goods and Services Tax Ruling GSTR 2012/6 *Goods and services tax: commercial residential premises*.

3. Unless otherwise stated in the examples in this Ruling, it is assumed that supplies and acquisitions made by entities mentioned satisfy all of the necessary requirements in section 9-5 of the GST Act for taxable supplies and section 11-5 for creditable acquisitions respectively. It is also assumed that a sale of residential premises is not a sale of new residential premises unless otherwise stated. Nor is any reference to a lease of premises a reference to a long-term lease unless otherwise stated.

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

5. A general introduction to the GST legislation affecting residential premises can be found in the Background in Part A of Appendix 1 (paragraphs 54 to 60 of this Ruling).

Ruling

Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation)

Definition of residential premises

6. Premises[1], comprising land or a building, are residential premises under paragraph (a) of the definition of residential premises in section 195-1 where the premises are occupied as a residence or for residential accommodation, regardless of the term of occupation. The actual use of the premises as a residence or for residential accommodation is relevant to satisfying this limb of the definition.

7. Premises, comprising land or a building, are also residential premises under paragraph (b) of the definition of residential premises if the premises are intended to be occupied, and are capable of being occupied, as a residence or for residential accommodation, regardless of the term of the intended occupation. This limb of the definition refers to premises that are designed, built or modified so as to be suitable to be occupied, and capable of being occupied, as a residence or for residential accommodation. This is demonstrated through the physical characteristics of the premises.

8. A supply of residential premises may consist of a single room or apartment, or a larger complex consisting of rooms or apartments.

Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation) – physical characteristics

9. The requirement in sections 40-35, 40-65 and 40-70 that premises be 'residential premises to be used predominantly for residential accommodation (regardless of the term of occupation)' is to be interpreted as a single test that looks to the physical characteristics of the property to determine the premises' suitability and capability for residential accommodation.[2]

[1] In this ruling, the 'premises' are whatever is supplied, whether this is the whole or any part of land or a building.

[2] Paragraph 40-35(2)(a) varies this wording slightly, requiring that the premises '*are to be used* predominantly for residential accommodation (regardless of the term of occupation)' (emphasis added). It is considered, however, that this wording establishes the same requirement as that set out in subsection 40-65(1) and subsection 40-70(1).

10. The requirement for residential premises to be used predominantly for residential accommodation does not require an examination of the subjective intention of, or use by, any particular person. Premises that display physical characteristics evidencing their suitability and capability to provide residential accommodation are residential premises even if they are used for a purpose other than to provide residential accommodation (for example, where the premises are used as a business office).

11. Premises that do not display physical characteristics demonstrating that they are suitable for, and capable of, being occupied as a residence or for residential accommodation are not residential premises to be used predominantly for residential accommodation, even if the premises are actually occupied as a residence or for residential accommodation. For example, someone might occupy premises that lack the physical characteristics of premises suitable for, or capable of, residential accommodation (such as a squatter residing in a disused factory). Although the premises may satisfy paragraph (a) of the definition of residential premises in section 195-1, the premises are not residential premises to be used predominantly for residential accommodation.

Example 1 – purchaser's intention not to use premises for residential accommodation

12. *John carries on an enterprise which involves leasing a house on property which he owns. Based on the physical characteristics of the house it is residential premises to be used predominantly for residential accommodation. The area in which the house is located has recently been rezoned by the local Council to permit higher density residential apartments. Following the rezoning, a developer, Knock Them Down Co, approaches John and offers to purchase his property. Knock Them Down Co intends to demolish the house, redevelop the property into a new apartment building, and sell the apartments.*

13. *The fact that Knock Them Down Co does not intend to use the house to provide residential accommodation does not mean that the house is not residential premises to be used predominantly for residential accommodation. Knock Them Down Co's intention is not a relevant factor in determining the character of the premises. Based on its physical characteristics, the house is residential premises to be used predominantly for residential accommodation. The sale of the house by John to Knock Them Down Co is an input taxed supply under section 40-65.*

Living accommodation provided by shelter and basic living facilities

14. 'Residential premises' are not limited to premises suited to extended or permanent occupation. Residential premises provide 'living accommodation', which does not require any degree of

permanence. It includes lodging, sleeping or overnight accommodation.

15. To satisfy the definition of residential premises, premises must provide shelter and basic living facilities. Premises that do not have the physical characteristics to provide these are not residential premises to be used predominantly for residential accommodation.

16. A supply of a residential apartment in a building may include a garage, car-parking space, or storage area located within the building complex. The garage, car-parking space, or storage area is ancillary or incidental to the dominant component of the supply being the residential apartment. It can be reasonably concluded that the garage, car-parking space, or storage area are to be used for the better enjoyment of the residential apartment. They do not form a dominant part of the supply. The supply is therefore a composite supply of residential premises to be used predominantly for residential accommodation.[3] This is still the outcome where the garage, car-parking space, or storage space is separately titled from the residential apartment, but is physically located within the same building complex.

17. A supply of a garage, car-parking space, or storage area that is supplied separately from the supply of a residential unit is not a supply of residential premises to be used predominantly for residential accommodation. This may occur, for example, where the garage, car-parking space, or storage area is supplied after the original supply of the residential unit, or where the garage, car-parking space, or storage area is located in a separate building. The supply is a taxable supply where the requirements of section 9-5 are satisfied.

Example 2 – supply of a car parking space

18. *Patrick is a plumber who is registered for GST. He purchases a residential unit in a CBD location with a separately titled car parking space in the same building. He resides in the unit for a period and then decides to rent the unit to overseas students who attend a nearby university. He initially leases the residential unit and car parking space together under the one lease. The supply of the residential unit and car parking space is an input taxed supply of residential premises that are to be used predominately for residential accommodation.*

19. *For a subsequent lease, he realises that students are unlikely to need the car parking space and excludes the car parking space from the lease of the residential unit. He leases the car parking space to an accountant who requires the car parking space for business purposes. The supply of the car parking space is a taxable supply. It is not a supply of residential premises to be used predominately for*

[3] The Commissioner's views on when a supply is characterised as a composite supply are set out in 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.*

residential accommodation as it is not ancillary or incidental to the supply of the residential premises.

Fit for human habitation

20. Premises must be fit for human habitation in order to be suitable for, and capable of, being occupied as a residence or for residential accommodation. An objective consideration of the relevant facts and circumstances determines whether residential premises are fit for human habitation. Residential premises are not fit for human habitation when they are in a dilapidated condition which prevents them being occupied for residential accommodation.

21. Residential premises that are either:

- in a minor state of disrepair; or
- subject to a temporary legal prohibition for occupation pending minor repairs;

are still suitable for, and capable of, being occupied as a residence or for residential accommodation.

22. A partially built building is not residential premises until it becomes fit for human habitation. Contractual or legal prohibitions against residential occupation do not prevent premises from being suitable for, and capable of, providing residential accommodation.

Example 3 – temporary disruption to occupation

23. *Ashlea is registered as a hairdresser and owns and rents residential premises that she formerly resided in at a costal town in northern Australia. The premises are not new residential premises.*

24. *A tropical cyclone crosses the coast leading to windows being shattered and damage to the roof. The damage is readily repairable but Ashlea fails to make the repairs resulting in the local Council issuing a notice stating that the premises are not fit for habitation. As a result, the tenant's occupation of the premises is temporarily disrupted. Ashlea sells the premises before making the repairs. Despite the damage to the premises and the action taken by the Council, the physical characteristics of the premises show that it is suitable for, and capable of, being occupied as a residence or for residential accommodation. The sale of the premises is therefore an input taxed supply of residential premises to be used predominately for residential accommodation.*

Other premises

25. Not all premises that possess basic living facilities are residential premises to be used predominantly for residential accommodation. If it is clear from the physical characteristics of the premises that their suitability for living accommodation is ancillary to

the premises' prevailing function, the premises are not residential premises to be used predominantly for residential accommodation.

Example 4 – office building

26. *Commercial Place is a five storey building. The ground floor has a foyer and reception area. All floors have been constructed with large open spaces for staff cubicles and desks, smaller office spaces, meeting rooms and areas for storage of documents. Each floor also contains a kitchen, amenities area and toilets. The ground floor also has showers provided with the toilet facilities.*

27. *While the office building provides shelter and basic living facilities including kitchens, toilets and shower facilities, the physical characteristics of the premises indicate that they are not residential premises to be used predominantly for residential accommodation. The physical characteristics indicate that the premises are a place for office workers to undertake tasks associated with a business. A supply of the premises would not be input taxed under Division 40.*

Example 5 – private hospital

28. *Maxwell Hospital is a privately operated hospital. The hospital contains wards to accommodate 150 patients, an entrance foyer, waiting areas, operating theatres, recovery areas, reception areas, nurses' stations, specialists' suites, storerooms, staff amenities, utility and disposal rooms, and ambulance bays. The design of the premises is based around the needs of patients and medical practitioners in providing medical and surgical treatment.*

29. *While Maxwell Hospital provides shelter and basic living facilities, its physical characteristics indicate that it is not residential premises to be used predominantly for residential accommodation. The physical characteristics indicate that these premises are a place where the sick or injured are given medical or surgical treatment. A supply of the premises would not be input taxed under Division 40.*

Example 6 – residential care facility

30. *Care-res is a developer that specialises in constructing and leasing aged care facilities. Care-res designs and builds these facilities to specifications that make these premises suitable for approval for use as a residential care facility under the relevant legislation.*

31. *Care-res constructs a facility designed to provide both personal and nursing care. The physical characteristics of this facility differ from the physical characteristics of premises for independent retirement living. This facility includes what is commonly known as a low care hostel and a nursing home. The facility meets all of the regulatory requirements of the relevant legislation in the State in*

which it operates, including the applicable provisions of the Building Code of Australia for facilities of this type.

32. *The facility includes private bedrooms and separate communal meal, living and entertainment areas, administration offices, and commercial kitchen and laundry. All functional areas for occupants, including those areas that provide living accommodation, have been designed for fittings, furniture and equipment used to provide care to persons with a condition of frailty or disability.*

33. *Overall, the physical characteristics that reflect suitability for the provision of care prevail over those which reflect suitability for the provision of residential accommodation. Although accommodation is necessary in the course of providing residential care, the premises' suitability for accommodation is ancillary to their suitability for providing care.*

34. *The facility is not residential premises to be used predominantly for residential accommodation. The physical characteristics evidence that the premises are to be used predominantly to provide care to the frail and disabled. A supply by Care-res by way of the lease of the facility is a taxable supply under section 9-5.*

35. Where it is doubtful, based on an inspection of the physical characteristics of the premises, whether the premises are residential premises to be used predominantly for residential accommodation, design or construction documents, such as architectural plans, may assist in characterising the premises. This documentation may also be relevant in determining the intended character of premises before construction of the premises is completed.

Example 7 – shop

36. *Julian leases a building from its owner. It consists of a display area, a storage area, an office, a kitchenette and a toilet. The premises were designed as a shop which is evidenced by the architectural plans held by the lessor. Julian furnishes the premises in order to use it as his residence, but makes no structural changes to it.*

37. *The building provides shelter and basic living facilities. Although the physical characteristics of the building may be considered similar to characteristics found in a house or apartment, the physical characteristics of the building together with the design plans objectively show that the premises are not residential premises to be used predominantly for residential accommodation. Rather, the characteristics and design plans show that the building is a shop designed to facilitate a retail business.*

38. *Although Julian's occupation of the shop as a residence means the shop satisfies paragraph (a) of the definition of residential premises in section 195-1, the shop is not residential premises to be used predominantly for residential accommodation. The supply is not*

an input taxed supply under Division 40 and is a taxable supply under section 9-5.

39. *The outcome of this example would differ if Julian had made modifications to the building that changed the physical character of the building from a shop to residential premises to be used predominately for residential accommodation.*

Supplies requiring apportionment

40. The value of a supply of premises that includes residential premises to be used predominantly for residential accommodation needs to be apportioned to the extent that part of the premises is not residential premises to be used predominantly for residential accommodation.

Example 8 – residential premises partly converted for business use

41. *Shannon decides to partly modify her house to use in her profession as a doctor. She modifies an area of the house to provide office and consulting room space, an operating theatre, a waiting room and storage for the business. A sealed car park is also added to the property. Significant physical modifications are made to these areas, including the removal and alteration of walls, and the addition of lighting, hygiene facilities and security to meet industry standards. The existing lounge room is used as the patients' waiting room. An existing bedroom is used for storage. No physical modifications are made to the lounge room or bedroom.*

42. *The modifications result in the part of the premises consisting of the office, consulting room, operating theatre and car park no longer being residential premises to be used predominantly for residential accommodation. Objectively, part of the premises is still designed predominantly for residential accommodation, comprising bedrooms (including the bedroom used for storage), bathroom, kitchen, living room, lounge room and gardens.*

43. *If Shannon later sells or leases the premises, she will need to apportion the value of the supply between the taxable and input taxed parts of the supply.*

Example 9 – the addition of furniture and minor fittings is not sufficient to modify physical characteristics

44. *Rebecca is a solicitor. She lives in a terrace house that is not new residential premises, and decides to convert a room at the front of the house into an office for her practice. Rebecca arranges the installation of an electricity point and telephone line for the place in the room where she intends to set-up a printer and facsimile machine. She fits the room out with book shelves, filing cabinets, desk, office chairs, a table for the printer and facsimile machine, and suitable floor coverings. She also has an advertising sign placed outside the front*

door of her house. Rebecca does not modify any of the other rooms in the house.

45. *These changes are not sufficient to modify the physical characteristics of the terrace house into premises other than residential premises to be used predominantly for residential accommodation. The furniture and fittings that Rebecca has brought into the room do not change the physical characteristics of the house itself. Also, the installation of an electricity point and telephone line, and the placement of a sign outside the house, are not sufficient modifications to alter the physical characteristics of the premises so that they are no longer residential premises to be used predominantly for residential accommodation. If Rebecca sells or leases the premises she will be making a wholly input taxed supply under section 40-65 or section 40-35 respectively.*

Land supplied with a building

46. There is no specific restriction, in the definition of residential premises, on the area of land that can be included with a building. The extent to which land forms part of residential premises to be used predominantly for residential accommodation is a question of fact and degree in each case. A relevant factor in determining this is the extent to which the physical characteristics of the land and building as a whole indicate that the land is to be enjoyed in conjunction with the residential building. The use of the land is not a determining factor in deciding if the land forms part of the residential premises.

Vacant land

47. Vacant land is not capable of being occupied as a residence or for residential accommodation as it does not provide shelter and basic living facilities. Vacant land is not residential premises.

Applying the tests in additional scenarios

Display homes

48. A house that is residential premises to be used predominantly for residential accommodation may be supplied by way of lease as a display home. Regardless of whether the lease contains a prohibition on the house being used as a residence or for residential accommodation, the supply is an input taxed supply under section 40-35.

Transportable buildings

49. A transportable building such as a demountable dwelling or moveable home[4] that is designed as a residence, or to provide residential accommodation, is residential premises when placed on land and installed ready for occupation.

50. A supply of a transportable building before it is placed on land and installed ready for occupation is not an input taxed supply under sections 40-35, 40-65 or 40-70.[5] The supply is subject to the basic rules.

51. A transportable building that is not designed as a residence or to provide residential accommodation (for example, a transportable building that lacks basic living facilities) is not residential premises to be used predominantly for residential accommodation.

Vehicles designed for road use

52. Road vehicles, including motor homes, caravans and campervans, are not residential premises as they are not land or a building. This is the case regardless of whether they are used as a residence or for residential accommodation.

Date of effect

53. This Ruling applies both before and after its date of issue. However, this Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10). If, prior to the issue of this Ruling, you relied on Goods and Services Tax Ruling GSTR 2000/20, you are protected in respect of what you have done up to the date of issue of this Ruling and the withdrawal of GSTR 2000/20.

Commissioner of Taxation
19 December 2012

[4] In this Ruling, the term 'moveable home' means a structure designed to be used as a residence that can be relocated from site to site.
[5] However, subsection 9-30(4) may apply.

Appendix 1 – Explanation

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

Part A: Background and legislative context

54. GST is payable on taxable supplies.[6] Section 9-5 sets out the criteria that must be satisfied for a supply to be a taxable supply. A supply is not a taxable supply to the extent that it is GST-free or input taxed.

55. The term 'residential premises' is defined in section 195-1 to mean land or a building that:

(a) is occupied as a residence or for residential accommodation; or

(b) is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation;

(regardless of the term of occupation or intended occupation) and includes a floating home.

56. The main provisions in the GST Act dealing with supplies of residential premises are:

(a) Subdivision 40-B, section 40-35 – Residential rent; and;

(b) Subdivision 40-C, section 40-65 – Sale of residential premises; section 40-70 – Supplies of residential premises by way of long-term lease; and section 40-75 – Meaning of *new residential premises*.

57. If a supply of premises is not input taxed under Subdivisions 40-B or 40-C and no other special rules apply, the basic rules determine whether the supply is taxable.[7]

58. In summary, a supply of residential premises may be:

(a) an input taxed supply by way of lease, hire or licence of residential premises (other than 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) to the extent that the premises are to be used predominantly for residential accommodation (regardless of the term of occupation);

[6] Subsection 7-1(1).
[7] Other special rules may also be relevant, such as rules pertaining to 'associates' in Division 72.

(b) a taxable supply by way of sale, or long-term lease,[8] of new residential premises other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998; or

(c) an input taxed supply by way of sale, or long-term lease, of real property to the extent that the property is residential premises (other than new residential premises or commercial residential premises) to be used predominantly for residential accommodation (regardless of the term of occupation).

Legislative amendments

59. The meanings of the terms 'residential premises' and 'commercial residential premises' were considered by the Full Federal Court in *Marana Holdings Pty Ltd v. Commissioner of Taxation*[9] (*Marana*). The Court also considered the expressions 'residential accommodation' and 'new residential premises'.

60. In *Marana* the Full Federal Court examined the ordinary meanings of the terms 'reside' and 'residence', and considered that these terms connote a permanent or at least long-term commitment to dwelling in a particular place. However, this interpretation represented a significant departure from the intended GST treatment of certain supplies of real property.[10] To maintain the intended GST treatment of affected premises and give certainty, the GST Act was amended in 2006 with effect from 1 July 2000 (the *Marana* amendments). The amendment to the definition of 'residential premises' was to confirm that the period of occupation or intended occupation of land or a building is not relevant in determining whether premises are residential premises. Further, the change was to ensure that premises that are occupied or are intended to be occupied for residential accommodation are residential premises and therefore generally subject to input taxed treatment upon sale or rental.[11]

[8] 'Long-term lease' is defined in section 195-1.
[9] (2004) 141 FCR 299; 2004 ATC 5068; (2004); 57 ATR 521.
[10] Paragraph 15.4 of the Revised Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006.
[11] Paragraph 15.7 of the Revised Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006.

Part B: Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation)

Definition of residential premises

61. Premises, comprising land or a building, are residential premises under paragraph (a) of the definition of residential premises in section 195-1 where the premises are occupied as a residence or for residential accommodation regardless of the term of occupation or intended occupation. The use of the premises as a residence or for residential accommodation is relevant to satisfying this limb to the definition.

62. Premises, comprising land or a building, are also residential premises under paragraph (b) of the definition of residential premises if the premises are intended to be occupied, and are capable of being occupied, as a residence or for residential accommodation regardless of the term of the occupation or intended occupation.

63. In *Marana* the Full Federal Court considered the phrase 'intended to be occupied' in the definition of residential premises in section 195-1. The Court held that the intention to occupy is not the subjective intention of any particular entity but the objective intention with which the particular premises are designed, built or modified.[12] This intention is reflected, to a greater or lesser extent, in their suitability for occupation as a residence or for residential accommodation. The Court noted that this may also overlap with the further requirement that the premises be capable of such use.[13] Accordingly, it is necessary to consider the premises' physical characteristics to determine whether they are suitable for, and capable of, being occupied as a residence or for residential accommodation (regardless of the term of the occupation or intended occupation).

64. Paragraph (b) of the definition of residential premises refers to premises that are designed, built or modified so as to be suitable for, and capable of, being occupied as a residence or for residential accommodation. This is demonstrated through the physical characteristics of the premises.

Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation) – physical characteristics

65. A supply is input taxed under sections 40-35, 40-65 or 40-70 only to the extent that it is a supply of real property or premises that are residential premises to be used predominantly for residential accommodation.

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[12] *Marana* (2004) 141 FCR 299 at 313; 2004 ATC 5068 at 5079; (2004) 57 ATR 521.
[13] See also comments of Perram J discussing the *Marana* decision in *Sunchen Pty Ltd v. FC of T* [2010] FCA 21 at [17].

66. In *Sunchen Pty Ltd v. Federal Commissioner of Taxation*[14] (*Sunchen*) Edmonds and Gilmour JJ in a joint judgement considered the 'architecture' of subsection 40-65(1).[15] Their Honours referred to a view that there are two discrete elements of subsection 40-65(1): firstly, whether the property is residential premises, and secondly, whether the property is to be used predominantly for residential accommodation. Their Honours considered that the phrase 'intended to be occupied' in the definition of residential premises and the phrase 'to be used predominantly for residential accommodation' are both concerned with the characteristics of the property rather than the intended use of any person. Therefore, their Honours concluded that subsection 40-65(1) contains the single test of 'residential premises to be used predominantly for residential accommodation' which looks to the characteristics of the property. The Commissioner considers that this reasoning applies equally to sections 40-35 and 40-70 which contain similar wording.

67. In *Sunchen* Edmonds and Gilmour JJ noted at [26] that the critical features of the provision considered by the Full Federal Court in *Marana* also appear in section 40-65, that is:

- to the extent that section 40-65 incorporates a concept of intention, the person having the relevant intention is not identified; and
- the expression 'to be used' has as its grammatical subject the residential premises the subject of the sale.

68. Their Honours held that the phrase 'to be used predominantly for residential accommodation' does not refer to use by any particular person, but to the attributes of the property to which its use is suited.[16] That is, the phrase is concerned with the characteristics of the property in terms of its suitability for residential accommodation.[17] However, their Honours made the following observation:[18]

> …That is not to say that actual use of the property will necessarily be irrelevant; as the Full Court (Bowen CJ, Deane and Fisher JJ) said in the Hamilton Island Enterprises case: '[T]he use to which an item is actually put will ordinarily be illustrative of at least some aspects of its character.'

[14] [2010] FCAFC 138.
[15] *Sunchen* [2010] FCAFC 138 at [42].
[16] *Sunchen* [2010] FCAFC 138 at [41].
[17] *Sunchen* [2010] FCAFC 138 at [44]. This position may be contrasted to the decision of White J in *Toyama Pty Ltd v. Landmark Building Developments Pty Ltd* 2006 ATC 4160; (2006) 62 ATR 73; [2006] NSWSC 83, which erected a test in which the intentions of the purchaser are relevant and important. See also *Sunchen* [2010] FCAFC 138 at [24].
[18] *Sunchen* [2010] FCAFC 138 at [41].

69. In *Hamilton Island Enterprises v. FC of T*[19] (*Hamilton Island Enterprises*), the Full Federal Court considered whether helicopters were 'plant or articles for use in, or primarily and principally in connection with, amusement or recreation' for the purposes of subparagraph 82AF(2)(f)(i) of the *Income Tax Assessment Act 1936*. The Court found that subparagraph 82AF(2)(f)(i) was constructed so as to describe the attributes of the property which the drafter was seeking to identify and did not, in its terms, introduce any notion of use by a particular person.[20] The character of the helicopters was that of machines of utility constructed and designed for use in supporting and transporting people and things in and through the air. Their character did not change according to how they were used.[21] The Court made the following observation:[22]

> The above comments of the Full Court should not be read as indicating that the use to which the relevant item of personal property is put will necessarily be irrelevant for the purposes of determining whether, for the purposes of s 82AF(2)(f)(i), the item answers the description 'plant or articles for use in, or primarily and principally in connection with, amusement or recreation'. It may, in a particular case, be common ground that the use to which the relevant item is put corresponds with the use which it is of its character to serve. In such a case, the examination of the actual use of the item could well be decisive of the question whether it was or was not of the designated character. Quite apart from such cases, the use to which an item is actually put will ordinarily be illustrative of at least some aspects of its character.

70. The Commissioner considers that the observation made by Edmonds and Gilmour JJ in *Sunchen* mentioned in paragraph 68 of this Ruling recognises that in the majority of instances, premises that possess characteristics suitable for residential accommodation will be used for that purpose. However, the actual use of such premises for a purpose other than residential accommodation does not prevent the premises from being residential premises to be used predominantly for residential accommodation. This is consistent with the approach taken by the Full Federal Court in *Hamilton Island Enterprises*. The joint decision of the Full Federal Court in *Sunchen*, while making the observation set out above, did not place any weighting on how the premises were used in deciding that the premises were residential premises to be used predominantly for residential accommodation.

[19] *Hamilton Island Enterprises* 82 ATC 4302; (1982) 13 ATR 220.
[20] *Hamilton Island Enterprises* 82 ATC 4302 at 4305; (1982) 13 ATR 220 at 224.
[21] *Hamilton Island Enterprises* 82 ATC 4302 at 4306; (1982) 13 ATR 220 at 225.
[22] *Hamilton Island Enterprises* 82 ATC 4302 at 4305; (1982) 13 ATR 220 at 224.

71. In the context of the definition of residential premises and sections 40-35, 40-65 and 40-70, suitability refers to the suitability of the premises by reference to their physical characteristics.[23] Premises are suitable for, and capable of, occupation as a residence or for residential accommodation if they possess the necessary features to provide residential accommodation and are able to be occupied as residential premises. Premises that display these physical characteristics are residential premises even if they are used for a purpose other than to provide residential accommodation (for example, where the premises are used as a business office).

72. The reference in *Marana* to premises being 'modified' recognises that the physical characteristics of premises may be altered after the premises are first designed and built. In each case, it is necessary to determine the suitability of the premises by reference to their physical characteristics at the time when the relevant supply is made.

73. Premises that do not display physical characteristics demonstrating that they are suitable for, and capable of, being occupied as a residence or for residential accommodation are not residential premises to be used predominantly for residential accommodation, even if the premises are actually occupied as a residence or for residential accommodation. For example, someone might occupy premises that lack the physical characteristics of premises suitable for, or capable of, residential accommodation (such as a squatter residing in a disused factory). Although the premises may satisfy paragraph (a) of the definition of residential premises in section 195-1, the premises are not residential premises to be used predominantly for residential accommodation.

Living accommodation provided by shelter and basic living facilities

74. The ordinary meaning of the word 'residence' connotes a degree of permanent or long-term commitment to the occupation of premises.[24] However, the *Marana* amendments broaden the definition of residential premises, ensuring that it is not limited to premises suited to extended or permanent occupation. The amendments included the words 'residential accommodation' and 'regardless of the term of occupation or intended occupation'. This gives 'residential premises' a broader meaning in the GST Act than they ordinarily have.[25]

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[23] See Example 1 at paragraphs 12 to 13 of this Ruling.
[24] *Marana* (2004) 141 FCR 299 at 312; 2004 ATC 5068 at 5078; (2004) 57 ATR 521 at 533.
[25] Per Stone J in *South Steyne Hotel Pty Ltd v. FC of T* [2009] FCA 13 at [34] and per Edmonds J in the Full Federal Court decision of *South Steyne Hotel Pty Ltd v. Federal Commissioner of Taxation* [2009] FCAFC 155 at [85].

75. Residential premises, as defined in the GST Act, provide living accommodation.[26] Living accommodation does not require any degree of permanence of occupation. It includes lodging, sleeping or overnight accommodation. In *South Steyne Hotel Pty Ltd v. FC of T*[27] (*South Steyne*), Stone J referred to a number of overseas decisions on this point including *Urdd Gobaith Cymru*[28] and *Owen*.[29] Her Honour noted:

> 37. … [In *Urdd Gobaith Cymru*] The Tribunal chairman agreed that 'a residence' clearly implied a building with a significant degree of permanence of occupation but added:
>
> However, the word loses that clear meaning when used as an adjective. In ordinary English 'residential accommodation' merely signifies lodging, sleeping or overnight accommodation. It does not suggest the need for such accommodation to be for any fixed or minimum period.
>
> 38. … In *Owen* the Court of Appeal expressed a similar view as to the meaning of 'residential accommodation' used in the context of the *Capital Gains Tax Act 1979*. The position was put succinctly by Leggat LJ who said:
>
> In my judgment the expression 'residential accommodation' does not directly or by association mean premises likely to be occupied as a home. It means living accommodation, by contrast, for example with office accommodation.

76. In *South Steyne* it was held that only the elements of shelter and basic living facilities are necessary for premises to satisfy the definition of residential premises.[30] This includes, for example, shelter and basic living facilities provided by a bedroom and bathroom.[31] However, premises may provide shelter and basic living facilities without necessarily having a conventional bedroom or bathroom.[32]

77. The premises may be in any of a number of forms, including detached buildings, semi-detached buildings, strata title apartments, single rooms or suites of rooms within larger premises. Premises that lack the features of shelter and basic living facilities are not residential premises.

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[26] 'Living accommodation' is not a defined term in the GST Act.
[27] *South Steyne* [2009] FCA 13.
[28] *Urdd Gobaith Cymru v. Commissioner of Customs and Excise* [1997] V & DR 273.
[29] *Owen v. Elliott (Inspector of Taxes)* [1990] 1 CH 786.
[30] Per Stone J in *South Steyne* [2009] FCA 13, at [31]; accepted by the Full Federal Court per Emmett J (with whom Finn J agreed), [2009] FCAFC 155 at [85]; and Edmonds J at [85]; refer also to the Full Federal Court in *Vidler v. Federal Commissioner of Taxation* [2010] FCAFC 59 at [22].
[31] *South Steyne* per Stone J at [2009] FCA 13 at [31].
[32] Per Stone J in *Vidler v. FC of T* [2009] FCA 1426 at [12].

78. A supply of a residential apartment in a building may include a garage, car-parking space, or storage area physically separate from the apartment, but within the building complex. The garage, car-parking space, or storage area is ancillary or incidental to the dominant component of the supply being the residential apartment. It can be therefore reasonably concluded that the garage, car-parking space, or storage area are to be used for the better enjoyment of the residential apartment. They do not form a dominant part of the supply. The supply is therefore a composite supply of residential premises to be used predominantly for residential accommodation.[33] This is still the outcome where the garage, car-parking space, or storage space is separately titled to the residential apartment, if it is physically located within the building complex.

79. A supply of a garage, car-parking space, or storage area that is supplied separately to the supply of a residential unit is not an input taxed supply of residential premises to be used predominantly for residential accommodation. The supply is a taxable supply where the requirements of section 9-5 are satisfied. This may occur, for example, where a person initially buys a residential apartment from a registered developer entity without a car parking space and subsequently purchases a car parking space as a separate supply from the registered developer entity. See Example 2 at paragraph 18 of this Ruling.

Fit for human habitation

80. The condition of the premises supplied is relevant in deciding whether they are suitable for, and capable of, being occupied as a residence or for residential accommodation. To be residential premises as defined, premises must be fit for human habitation. An objective consideration of the relevant facts and circumstances determines whether residential premises are fit for human habitation. Premises are not suitable for, or capable of, human habitation if they are dilapidated to the extent that their condition prevents occupation for residential accommodation (as may be evidenced by a demolition order issued by a relevant authority because of the premises' condition). In these circumstances, the condition of the premises indicates that the premises are no longer suitable for, or capable of, providing shelter and the basic living facilities. However, residential premises that are either:

- in a minor state of disrepair; or
- subject to a temporary legal prohibition for occupation pending minor repairs;

are still suitable for, and capable of, being occupied as a residence or for residential accommodation. See Example 3 at paragraph 23 of this Ruling.

[33] The Commissioner's views on when a supply is a composite supply are set out in GSTR 2001/8.

81. Conversely, a partially built building is not residential premises until the premises are fit for human habitation. It is a question of fact whether the physical characteristics of the building demonstrate that the premises supplied are suitable for, and capable of, being occupied as a residence or for residential accommodation. An occupancy permit/certificate, a certificate of final inspection, or similar document issued by the relevant authorised person or authority may provide evidence that the premises are fit for human habitation. Where a certificate of final inspection, or similar document, has not been issued for the premises and the premises are supplied, it is still necessary to consider whether the physical characteristics of the premises demonstrate that the premises are suitable for, and capable of, being occupied as residential premises.

82. Contractual or legal prohibitions against long-term or short-term occupation as a residence do not prevent premises from being suitable for, and capable of, providing residential accommodation.

Applying the test of 'residential premises to be used predominantly for residential accommodation'

Identifying the premises

83. Before considering whether a supply of premises consists of residential premises, commercial residential premises, or another type of premises, it is necessary to identify the premises subject to the supply.[34] In this context it is possible for premises to be part of larger land or a building. For example, if the subject of the supply is limited to a strata-titled room or apartment within a larger building, it is necessary to consider the character of that room or apartment, not the character of the larger building.

Other premises

84. A variety of buildings may include basic living facilities, such as office buildings and hospitals. However, it does not follow that all premises that have these facilities are necessarily residential premises to be used predominantly for residential accommodation.

85. Although these premises have, in part, physical characteristics common to premises that provide living accommodation, they also have physical characteristics which reflect their suitability for another purpose. Where premises' suitability for the provision of living accommodation is ancillary to the premises' prevailing function, they are not residential premises to be used predominantly for residential accommodation.[35]

[34] *South Steyne* [2009] FCA 13 at [41].
[35] See Examples 4, 5 and 6 at paragraphs 26 to 34 of this Ruling.

86. Even if an office worker eats and sleeps overnight in an office building for a period, it does not follow that the premises are residential premises to be used predominantly for residential accommodation. Rather, the physical characteristics of the premises reveal that the building is an office. Similarly, a squatter might eat and sleep in an otherwise vacant factory or warehouse but this does not make it residential premises to be used predominantly for residential accommodation.

87. These outcomes are consistent with the legislative policy. The legislative intention is that Subdivisions 40-B and 40-C operate so that those renting a house, flat or home unit are on the same footing as persons who own their own homes: neither is to bear the cost of GST in connection with such occupation.[36] There is nothing to suggest that the legislative intention is that a supply of non-residential structures (such as a factory, warehouse or office) should be input taxed simply because someone occupies the premises when they are supplied, even if that person could be said to be living there.

88. Design or construction documents, such as architectural plans, may assist in identifying the physical characteristics of premises as residential premises to be used predominantly for residential accommodation where inspection of the physical characteristics of the premises does not give a clear indication. See Example 7 at paragraph 36 of this Ruling. This documentation may also be relevant in determining the intended character of premises before construction of the premises is completed.

Supplies requiring apportionment

89. In some circumstances, premises consist of two or more parts: one part residential premises to be used predominantly for residential accommodation, and the other part premises of another kind. As paragraph 40-35(2)(a), subsection 40-65(1), and paragraph 40-70(1)(a) refer to the extent that the premises or property are to be used predominantly for residential accommodation, it is necessary that the value of the supply of such premises be apportioned.

[36] See *Marana* (2004) 141 FCR 299 at 306-307; 2004 ATC 5068 at 5074-5075; (2004) 57 ATR 521 at 528-529 and paragraphs 5.164 to 5.168 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.

90. This means that, if there is a single supply of the premises but only part of premises is residential premises to be used predominantly for residential accommodation, the supply is input taxed to the extent of that part. For example, if residential premises are designed, built or modified so that part of the premises is a house and part is for commercial purposes, such as a shop (based on its physical characteristics), a supply of the premises is a taxable supply to the extent that it relates to the shop. The supply of the premises is input taxed to the extent that it consists of the house.[37] See Examples 8 and 9 at paragraphs 41 to 45 of this Ruling.

Land supplied with a building

91. The GST Act does not restrict the area of land that can be included in residential premises. The extent to which land forms part of residential premises to be used predominantly for residential accommodation is a question of fact and degree in each case. A relevant factor in determining this is the extent to which the physical characteristics of the land and building as a whole indicate that the land is enjoyed in conjunction with the residential building. Just because land is used privately does not mean that the land necessarily has the physical characteristics to indicate that the land is to be enjoyed in conjunction with the residential building.

Vacant land

92. Vacant land cannot be residential premises. In *Vidler v. Federal Commissioner of Taxation*,[38] Sundberg, Bennett and Nicholas JJ stated that 'vacant land is not land that is capable of being occupied as a residence or for residential accommodation'. This is because vacant land, of itself, does not provide shelter and basic living facilities, and cannot, therefore, be occupied as a residence or for residential accommodation.

Display homes

93. A purchaser of new residential premises may lease their premises back to the builder for use as a display home. The display home has physical characteristics that enable it to be occupied as a residence. The lease of the display home is input taxed under section 40-35 being a supply of residential premises to be used predominantly for residential accommodation. The subsequent use by the builder is not a relevant consideration.

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[37] This position is consistent with paragraph 5.164 of the Explanatory Memorandum to the A New Tax System (Goods and Services Tax) Bill 1998.
[38] *Vidler v. Federal Commissioner of Taxation* [2010] FCAFC 59 at [34].

94. A contract for the sale and lease back of the display home may contain a contractual prohibition relating to its use as a residence or for residential accommodation during the period of its leaseback. This prohibition does not change the character of the premises as a house designed for residential accommodation and fit for human habitation. The supply of the house by lease back to the builder is an input taxed supply, despite the contractual prohibition.

Transportable buildings

95. A transportable building such as a demountable dwelling or a moveable home[39] that is designed as a residence, or to provide residential accommodation, is residential premises when placed on land and installed ready for occupation.

96. A supply of a transportable building before it is placed on land and installed ready for occupation is not an input taxed supply under sections 40-35, 40-65 or 40-70.[40] The supply is subject to the basic rules.

97. A transportable building that is not designed as a residence or to provide residential accommodation (for example, transportable buildings that lack basic living facilities) is not residential premises to be used predominantly for residential accommodation. Supplies of demountable buildings that are not residential premises to be used predominantly for residential accommodation are subject to GST under the basic rules.

Vehicles designed for road use

98. Road vehicles, including motor homes, caravans and campervans, are not residential premises as they are not land or a building. This is the case regardless of whether they are used as a residence or for residential accommodation.[41]

Floating homes and ships

99. Floating homes are included in the definition of residential premises. 'Floating home' is defined in section 195-1 to mean a structure composed of a floating platform and a building designed to be occupied (regardless of the term of occupation) as a residence that is permanently affixed to the platform but does not include any structure that has means of, or is capable of being readily adapted for, self-propulsion.

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[39] In this Ruling, the term 'moveable home' means a structure designed to be used as a residence that can be relocated from site to site.
[40] However, subsection 9-30(4) may apply.
[41] A supply of accommodation in a caravan may be a supply of accommodation in commercial residential premises. See Goods and Services Tax Ruling GSTR 2012/6: Goods and services tax: commercial residential premises.

100. The words 'regardless of the term of occupation' in the definition mean that floating homes are not limited to structures that are suited to extended or permanent occupation. To be a floating home, the structure must be designed to provide living accommodation. That is, it must provide basic living facilities, such as the facilities for sleeping and bathing.

101. In *Case 54/95,*[42] the Administrative Appeals Tribunal considered whether accommodation provided on an offshore mobile drilling unit (being a drilling rig capable of drilling holes at sea) was 'residential accommodation' for the purposes of paragraph 30(2)(c) of the *Fringe Benefits Tax Assessment Act 1986*. The Tribunal found that the accommodation was residential accommodation as the sleeping, mess and recreational quarters, together with food provided on board, provided the drill crew with a place to reside (or lodge) and meals.[43] In such circumstances there is a segregated area that can be identified as residential premises.

102. 'Floating home' does not include any structure that has means of, or is capable of being readily adapted for, self-propulsion. A vessel may be adapted for self-propulsion by the fitting of an outboard motor. Most houseboats are not residential premises because they are either self-propelled or readily adaptable for self-propulsion in this way.

103. A supply of a floating home by way of lease, hire or licence is an input taxed supply under section 40-35. However, as floating homes are not real property, they are subject to the basic rules for taxable supplies upon sale.[44] A sale of a floating home is not an input taxed supply unless subsection 9-30(4) applies. This subsection applies where the floating home was solely used by the supplier to make input taxed supplies.

[42] 95 ATC 447; (1995) 31 ATR 1264.
[43] At [37] – [38]. While the case was appealed to the Federal Court in *Maretech CMDL Pty v. FC of T* 97 ATC 4033; (1996) 34 ATR 459, this issue was not raised on appeal.
[44] Section 40-65 only applies to a sale of real property.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	**1**
Ruling	**6**
Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation)	6
Definition of residential premises	6
Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation) – physical characteristics	9
Example 1 – purchaser's intention not to use premises for residential accommodation	12
Living accommodation provided by shelter and basic living facilities	14
Example 2 – supply of a car parking space	18
Fit for human habitation	20
Example 3 – temporary disruption to occupation	23
Other premises	25
Example 4 – office building	26
Example 5 – private hospital	28
Example 6 – residential care facility	30
Example 7 – shop	36
Supplies requiring apportionment	40
Example 8 – residential premises partly converted for business use	41
Example 9 – the addition of furniture and minor fittings is not sufficient to modify the physical characteristics	44
Land supplied with a building	46
Vacant land	47
Applying the tests in additional scenarios	48
Display homes	48
Transportable buildings	49
Vehicles designed for road use	52
Date of effect	**53**
Appendix 1 – Explanation	**54**

Part A: Background and legislative context 54

Legislative amendments 59

Part B: Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation) 61

Definition of residential premises 61

Residential premises to be used predominantly for residential accommodation (regardless of the term of occupation) – physical characteristics 65

Living accommodation provided by shelter and basic living facilities 74

Fit for human habitation 80

Applying the test of 'residential premises to be used predominantly for residential accommodation' 83

Identifying the premises 83

Other Premises 84

Supplies requiring apportionment 89

Land supplied with a building 91

Vacant land 92

Display homes 93

Transportable buildings 95

Vehicles designed for road use 98

Floating homes and ships 99

Appendix 2 – Detailed contents list 104

References

Previous draft:

Previously issued in GSTR 2011/D2 and GSTR 2012/D1

Related Rulings/Determinations:

TR 2006/10; GSTR 2001/8; GSTR 2003/3; GSTR 2012/6

Previous Rulings/Determinations:

GSTR 2000/20

Subject references:

- Goods and services tax
- GST display homes
- GST lease and real property
- GST long-term lease
- GST real property
- GST residential premises
- GST residential rents
- GST retirement villages
- GST sale of real property
- GST sale of residential premises

Legislative references:

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- Case 54/95 95 ATC 447; (1995) 31 ATR 1264
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