GSTR 2012/7 - Goods and services tax: long-term accommodation in commercial residential premises

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Goods and Services Tax Ruling

Goods and services tax: long-term accommodation in commercial residential premises

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What this Ruling is about

1. This Ruling considers how Division 87 and section 40-35 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) applies to supplies of long term accommodation in commercial residential premises.

2. The Ruling does not consider when premises are commercial residential premises.[1]

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. Any reference to a lease of premises is not 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.

[1] The Commissioner's views on when premises are commercial residential premises are set out in Goods and Services Tax Ruling GSTR 2012/6 *Goods and services tax: commercial residential premises*.

Ruling

Division 87 – long-term accommodation in commercial residential premises

5. The value of a taxable supply of commercial accommodation that is provided to an individual as long-term accommodation is modified by either section 87-5 or section 87-10 depending upon whether the accommodation is provided in commercial residential premises that are predominantly for long-term accommodation.

Commercial accommodation

6. Section 87-15 provides that commercial accommodation means the right to occupy the whole or any part of commercial residential premises, including, if it is provided as part of the right so to occupy, the supply of:

(a) cleaning and maintenance; or

(b) electricity, gas, air-conditioning or heating; or

(c) telephone, television, radio or any other similar thing.

7. For an entity to provide commercial accommodation to an individual, the individual must be provided with a right to occupy the whole or any part of the commercial residential premises for living accommodation (that is, in the sense of a right to stay). Living accommodation does not require any degree of permanence of occupation. It includes lodging, sleeping or overnight accommodation.

8. This right to occupy must be conferred at the time of the supply and must extend for the full duration of the relevant supply.

Provided to an individual as long-term accommodation

9. Paragraphs 87-5(1)(b) and 87-10(1)(b) refer to commercial accommodation that is provided to an individual as long-term accommodation. These paragraphs do not require the supply of commercial accommodation be made to an individual.

10. For commercial accommodation to be provided to an individual as long-term accommodation, it is only necessary for the supply of commercial accommodation to be made to an entity for 28 days or more, and for the accommodation, under the terms of the agreement, to be able to be taken up by an individual. It is not necessary for the commercial accommodation to be actually taken up by an individual.

Supply by way of lease of commercial residential premises

11. Subsections 87-5(1) and 87-10(1) do not apply to taxable supplies by way of lease of commercial residential premises that are subsequently operated by the acquirer to provide accommodation to individuals. While the supply by way of lease of the commercial residential premises is a supply of commercial accommodation, any provision of long-term accommodation by the acquirer to individuals is not made pursuant to that taxable supply.

Example 1 – supply by way of lease of commercial residential premises

12. *King Accommodation owns premises that have been designed and built as a student hostel and are commercial residential premises. King Accommodation leases the whole of the hostel to King Operator who predominately use the premises to provide long term accommodation of more than 27 days to students. The students come from several campuses and the hostel is not used to provide accommodation to students in connection with an education institution.*

13. *The supply of the hostel by way of lease to King Operator does not satisfy either subsection 87-5(1) or subsection 87-10(1). The value of the taxable supply is therefore not reduced.*

14. *Supplies of long-term accommodation made by King Operator that are provided to individuals will satisfy either subsection 87-5(1) or subsection 87-10(1) depending upon whether the accommodation is provided in commercial residential premises that are predominantly for long-term accommodation.*

Predominantly for long-term accommodation

15. Commercial residential premises are predominantly for long-term accommodation under subsection 87-20(3) where at least 70% of the supplies of accommodation in the commercial residential premises is for a continuous period of 28 days or more, and may, under the terms of the agreement, be taken up by an individual.

16. Any fair and reasonable method may be used to determine whether the 70% requirement is satisfied.

Option to input tax supplies of long-term accommodation

17. If a choice is made under section 87-25 to not apply Division 87 to supplies of long-term accommodation in commercial residential premises (other than a berth at a marina), paragraph 40-35(1)(b) applies, resulting in the supply of long-term accommodation being input taxed.

18. If a choice is made under section 87-25 to not apply Division 87 to supplies of long-term accommodation at a berth at a marina, subsection 40-35(1A) applies to make the supply input taxed where the berth is occupied, or is to be occupied, by a ship used as a residence. In this context, the ships must be used as a residence in the sense of being occupied on a permanent or long-term basis.

Example 2 – caravan parks

19. *Florinda owns a caravan park where more than 70% of the occupants stay for 28 days or more. The caravan owners are permitted to leave their caravans on site and occupy them whenever they choose. She charges a GST inclusive weekly rate for the sites of $110 ($100 plus $10 GST). She also hires linen, blankets and appliances like televisions and toasters for an additional charge.*

20. *Florinda does not make a choice under subsection 87-25(1) to treat supplies as input taxed supplies. To work out the GST applicable to Florinda's long-term site-hire rate , Florinda first takes 50% of what the price of the supply would be if Division 87 did not apply, that is, 50% of $110 or $55. The GST is 10% of this or $5.50. Florinda's long-term charge is $105.50 ($100 plus $5.50 GST). The GST for linen, blanket and appliance hire is 1/11 of the price she charges for these supplies, regardless of the period the site is occupied.*

Date of effect

21. 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

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

Legislative context

22. GST is payable on taxable supplies.[2] 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.

23. A supply of residential premises by way of lease, hire or licence is an input taxed supply under section 40-35[3] unless the supply is:

- a supply of commercial residential premises or a supply of accommodation in commercial residential premises provided to an individual by the entity that controls the commercial residential premises; or
- the supply is of commercial accommodation and Division 87 would apply but for a choice made by the supplier under section 87-25.

24. Where these exceptions apply, the supply is a taxable supply under the basic rules.

25. 'Commercial residential premises' is defined in section 195-1 to mean:

(a) a hotel, motel, inn, hostel or boarding house;

(b) premises used to provide accommodation in connection with a school;

(c) a ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire;

(d) a ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport;

(da) a marina at which one or more of the berths are occupied, or are to be occupied, by ships used as residences;

(e) a caravan park or camping ground; or

(f) anything similar to residential premises described in paragraphs (a) to (e).

However, it does not include premises to the extent that they are used to provide accommodation to students in connection with an education institution that is not a school.

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[2] Subsection 7-1(1).

[3] The Commissioner's views on the application of section 40-35 are set out in Goods and Services Tax Ruling GSTR 2012/5 *Goods and services tax: residential premises*.

26. Division 87 contains concessionary treatment for entities that supply commercial accommodation that is provided to an individual as long-term accommodation by either:

- modifying the value of the taxable supply, thereby reducing the amount of GST payable;[4] or
- allowing the taxpayer to choose not to apply Division 87 in which case the supply is an input taxed supply under either section 40-35(1) or section 40-35(1A).[5]

27. Where the entity does not make the choice that Division 87 does not apply, the value of the taxable supply of commercial accommodation that is provided to an individual as long-term accommodation is modified by either section 87-5 or section 87-10 depending upon whether the accommodation is provided in commercial residential premises that are predominantly for long-term accommodation.

28. Where the accommodation is provided in commercial residential premises that are predominantly for long-term accommodation, the value of the supply under section 87-5 is 50% of what would be the price of the supply if Division 87 did not apply.[6]

29. Where the accommodation is provided in commercial residential premises that are not predominantly for long-term accommodation, the value of the supply under section 87-10 is calculated as the sum of:

- the unmodified value of the part of the supply that relates to the provision of the commercial accommodation during the first 27 days; and
- 50%, or such other percentage as is specified in the regulations, of what would be the price (if Division 87 did not apply) of that part of the supply that relates to provision of the commercial accommodation after the first 27 days.

[4] See section 87-5 and section 87-10.
[5] See section 87-25.
[6] The *A New Tax System (Goods and Services Tax) Regulations 1999* do not currently specify a different percentage to that set out in section 87-5 or section 87-10.

Part B: Long-term accommodation in commercial residential premises

Commercial accommodation

30. Section 87-15 provides that 'commercial accommodation' means the right to occupy the whole or any part of commercial residential premises, including, if it is provided as part of the right so to occupy, the supply of:

(a) cleaning and maintenance; or

(b) electricity, gas, air-conditioning or heating; or

(c) telephone, television, radio or any other similar thing.

31. In considering the meaning of 'commercial accommodation', Greenwood J stated in *Meridien Marinas Horizon Shores Pty Ltd v. FC of T* (*Meridien Marinas*):[7]

> 73. The definition of commercial accommodation is not concerned with actual use or an act of occupation of the whole or any part of the range of premises falling within the definition of commercial residential premises. Commercial accommodation is defined as the 'right' to occupy the whole or any part of the premises which confers a right to stay as contemplated by s 87-1.
>
> 74. The right to occupy, however, is necessarily given meaning by the context in which the definition operates, in conjunction with the other defined terms within Division 87 and the GST Act more generally. The right to occupy the whole or any part of the marina or any other premises falling within the definition of commercial residential premises is not a right to occupy *at large*, for the purposes of the definition of 'commercial accommodation', in a way divorced from any corresponding purpose serving the statutory objectives of Division 87. …

32. In applying section 87-15 within the context of a marina, Greenwood J found that:

> The 'right to occupy' contemplated by the definition of commercial accommodation in the context of the division is properly understood as a right to occupy the marina or a berth in the marina as a residence, in the sense of a right to stay rather than in any sense of permanent or long-term residence, which is consistent with the notion that a marina satisfying the description of commercial residential premises is a marina at which one or more of the berths are occupied, or to be occupied, by ships used as residences.[8]

[7] *Meridien Marinas* [2009] FCA 1594 at [73]-[74].
[8] *Meridien Marinas* [2009] FCA 1594 at [75].

33. The Commissioner considers that Greenwood J's reference to 'residence' in this context is consistent with the term 'living accommodation' as discussed in GSTR 2012/5 in the context of the definition of 'residential premises'.[9] Living accommodation does not require any degree of permanence of occupation. It includes lodging, sleeping or overnight accommodation. Therefore, for an entity to provide commercial accommodation to an individual, the individual must be provided with a right to occupy the whole or any part of the commercial residential premises for living accommodation (that is, in the sense of a right to stay).

34. The definition of commercial residential premises in section 195-1 includes references to things which may not necessarily include facilities that allow for occupation by an individual in the sense articulated by Greenwood J. For example, the definition refers to:

> (c) a ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire; or
>
> (d) a ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport.

35. It is therefore necessary, for section 87-15 to be satisfied, that the ships referred to in paragraphs (c) and (d) have sufficient facilities such that the supplier can provide a right to occupy the whole or any part of the ships for living accommodation to individuals.

36. In the case of caravan parks and camping grounds,[10] the 'premises' are the grounds themselves, rather than any specific accommodation in buildings. Thus, an owner who places their caravan on a site for a fee is occupying the premises. Whether they are physically occupying their caravan is, in this particular case, immaterial.[11]

37. The right to occupy the whole or any part of the commercial residential premises for living accommodation must be conferred at the time of the taxable supply.[12]

38. The Commissioner considers that this right to occupy must extend to the full duration of the relevant supply. This is supported by *Meridien Marinas* where Greenwood J referred to determining whether the lessees had obtained at the date of grant of each lease a right to occupy their berths as a residence at any time during the period of the 20-year lease.[13]

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[9] See paragraphs 14 and 75 of GSTR 2012/5.
[10] Paragraph (e) of the definition of commercial residential premises.
[11] See *Meridien Marinas* [2009] FCA 1594 at [83].
[12] See *Meridien Marinas* [2009] FCA 1594 at [83].
[13] See *Meridien Marinas* [2009] FCA 1594 at [89].

Provided to an individual as long-term accommodation

39. Paragraphs 87-5(1)(b) and 87-10(1)(b) refer to commercial accommodation that is provided to an individual as long-term accommodation. 'Individual' is defined to mean a natural person.[14] These paragraphs do not require the supply of commercial accommodation be made to an individual.

40. A taxable supply of commercial accommodation may be provided to an individual in cases where that individual is not the recipient of the supply.[15] This allows corporate entities acquiring long-term accommodation for their employees to benefit from the concessionary treatment of long-term accommodation.

41. For example, where a corporation books and pays for long-term accommodation for an employee, the employee is being provided with the accommodation, while the company is the recipient of the supply. The value of the taxable supply made to the company is reduced, assuming the supplier does not choose to treat the supplies as input taxed supplies.

42. Subsection 87-20(1) sets out the meaning of 'long-term accommodation' which is provided to an individual if commercial accommodation is provided, for a continuous period of 28 days or more, in the same premises:

(a) to that individual alone; or

(b) to that individual, together with one or more other individuals who:

(i) are also provided with that commercial accommodation; and

(ii) are not provided with it at their own expense (whether incurred directly or indirectly).

43. In *Meridien Marinas*, Greenwood J made the following observations:

> Section 87-5(a) and particularly (b) are concerned with the provision of commercial accommodation to an individual in the sense that ultimately a person, that is, a natural person consistent with the definition of 'individual' in s 195-1 of the GST Act, will occupy the whole or a part of the commercial residential premises. One example is the common case where a mining company might take a lease of all of the rooms in a motel proximate to a mining site, to be used by its employees from time to time. Some of those rooms might be used, some might not. The rooms when used will be allocated to individuals employed by the company. The supply of commercial accommodation is a supply to the corporation yet the particular rooms will be provided to individuals as the company determines. That analogue explains the operation of the section.[16]

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[14] Section 195-1.
[15] See *Meridien Marinas* [2009] FCA 1594 at [88].
[16] *Meridien Marinas* [2009] FCA 1594 at [88].

44. After determining that the terms of the leases made by the lessor to lessees (including non-individual entities) did not result in the lessor making a supply of commercial accommodation, his Honour observed:

> If each of the 118 lessees had obtained at the date of grant of each lease a right to occupy their berths as a residence at any time during the period of the 20-year lease, it would then be possible to use the proportion those leases bear to all leases conferring a right to occupy for residential purposes (short-term and long-term), to satisfy s 87-20(3), because Mr McCart's figures show that the 20-year leases constituted a consistently high proportion of total berth rentals, and they would therefore constitute an even higher proportion of residential berth rentals.[17]

45. In discussing the application of subsection 87-20(3), his Honour did not refer to any evidence showing that the commercial accommodation had been provided to individuals for a continuous period of 28 days or more.

46. When these passages are read together, it may be inferred that his Honour would have found that the requirements of subsection 87-20(1) would be satisfied where a supply of commercial accommodation is for 28 days or more and is able, under the terms of the agreement, to be taken up by an individual.

47. On this basis, to determine whether the commercial accommodation is provided to an individual as long-term accommodation, it is only necessary to establish that the supply of commercial accommodation made to an entity is for 28 days or more and the accommodation, under the terms of the agreement, is able to be taken up by an individual. It is not necessary for the commercial accommodation to be actually taken up by an individual.

Long-term accommodation in caravan parks and camping grounds

48. Caravan owners may choose to leave their caravans at a caravan site for an extended period. In return, the caravan owners pay site fees and have the right to use their caravans whenever they choose, sometimes paying additional fees when occupying the caravan on the site.

49. In the case of a caravan park, the right to occupy is granted when a site is hired for a caravan, even if the caravan is left unoccupied for most of the time. This means that the concessional treatment for long-term accommodation applies to supplies made to those who leave their caravans on site for an extended period at a caravan park.

[17] *Meridien Marinas* [2009] FCA 1594 at [89].

50. Where the operator moves a caravan from one site to another within the park for convenience, but maintains the booking, this is a continuous site rental. However, if the owner of a caravan and the park operator agree to 'store' the caravan in another area of the park which is not suitable for occupation, for an agreed fee, the continuity of the site rental ceases when the caravan is moved. The storage of the caravan is a separate supply, subject to the basic rules. The concession for long-term accommodation is not available in respect of the storage arrangement.

51. The concession in Division 87 applies to the base tariff the operator charges for the hire of a site. If the tariff usually includes items such as linen and electricity, then the whole of the tariff is subject to the concession in Division 87.[18] If, however, the operator makes a separate supply of these items for which the operator charges additional fees, the supply of these items is not provided as part of the right to occupy the commercial residential premises. In this case, the concession in Division 87 does not apply to them and they are subject to GST at the rate of 1/11th of the GST inclusive price.

Supply by way of lease of commercial residential premises

52. Subsections 87-5(1) and 87-10(1) do not apply to taxable supplies by way of lease of commercial residential premises that are subsequently operated by the acquirer to provide accommodation to individuals. While the supply by way of lease of the commercial residential premises is a supply of commercial accommodation, any provision of long-term accommodation by the acquirer to individuals is not made pursuant to that taxable supply. See Example 1 at paragraph 12 of this Ruling.

Predominantly for long-term accommodation

53. Based on the observation of Greenwood J in *Meridien Marinas* referred to above,[19] commercial residential premises are predominantly for long-term accommodation under subsection 87-20(3) where at least 70% of the supplies of accommodation in the commercial residential premises is for a continuous period of 28 days or more, and may, under the terms of the agreement, be taken up by an individual.

[18] Section 87-15: these things are included in the supply of 'commercial accommodation', to which the concession applies.
[19] See paragraphs 43 to 46 of this Ruling.

54. Any fair and reasonable method may be used to determine whether the 70% requirement is satisfied. The Commissioner accepts that one of the following methods or a combination of both can be used:

(a) the actual occupancy of the premises for the twelve months preceding the month for which the booking is made; or

(b) the projected occupancy for the twelve months following the month in which the booking is made.

55. If it is inappropriate to use either of these methods, a reasonable alternative may be adopted.

56. When looking at actual or projected occupancy, the number of supplies of accommodation, or the number of bookings that are for 28 days or more, rather than the number of people in each room, should be calculated. Bookings made by corporate entities for individuals can be included provided each booking is for a period of 28 or more days.

Option to input tax supplies of long-term accommodation

57. Greenwood J summarised the interaction between Division 87 and section 40-35 as follows:

> …Rather than simply input tax the supply of commercial accommodation (in the same way as residential premises) which would require the supplier to attribute GST payments on inputs in an enterprise comprising the supply of commercial accommodation and other activities constituting taxable supplies, so as to isolate input tax credits referable to the other activities apart from the supply of accommodation, Division 87 seeks to avoid difficulty by a 'concessionary treatment of long-term accommodation'. Section 40-35(1)(b) treats that part of such a supply as input taxed, although the supplier may elect to avoid the difficulties of segmentation, attribution and calculation by applying Division 87 to reduce the value of the supply by 50%.[20]

58. Section 87-25 allows an entity to choose not to apply the special rules for reducing the value on which GST is calculated on supplies of commercial accommodation. If the supplier chooses not to apply the special rules, a supply of commercial accommodation (other than a berth at a marina) is input taxed under paragraph 40-35(1)(b) if it is also a supply of premises by way of lease, hire or licence. This includes the first 27 days of the supply, even if the supplies of commercial accommodation are provided in commercial residential premises that are not predominantly for long-term accommodation. Any supplies of accommodation of 27 days or less are not subject to the Division 87 concession and are not input taxed – they are taxable supplies under the basic rules.

[20] See *Meridien Marinas* [2009] FCA 1594 at [61]. Note that subsections 87-5(1) and 87-10(1) refer to 50% of what the price would be if the Division did not apply.

59. The choice not to apply Division 87 to supplies of commercial accommodation in marinas (being the supply of a berth at a marina that falls within the definition of commercial residential premises) results in the supply being input taxed only where the additional requirement in paragraph 40-35(1A)(a) is satisfied. This additional requirement is that the berth is occupied, or is to be occupied, by a ship used as a residence. Paragraph 40-35(1A)(a) differs from the requirements in section 87-5 in that the former is concerned with a berth occupied or to be occupied by a ship used as a residence in the sense of occupation of a permanent or long-term nature whereas the latter is concerned with the conferral of a right to occupy the berth for living accommodation.[21] Where the additional requirement contained in paragraph 40-35(1A)(a) is not satisfied, the supply of the commercial accommodation is a taxable supply. The GST on the taxable supply is calculated in accordance with section 9-70.

60. If the choice is made to input tax supplies of long-term accommodation, all supplies of commercial accommodation for 28 or more days must be input taxed where the requirements in section 40-35 are satisfied. The choice remains in force for at least 12 months after the day on which the choice was first made. However, the choice may be revoked after 12 months or more. All supplies of long-term accommodation must then be taxed under the special rules for at least the next 12 months after the day the choice was revoked. That is, a further choice cannot be made within 12 months of the revocation of the previous choice.

61. There is no requirement to advise the Australian Taxation Office about these choices.

[21] See *Meridien Marinas* [2009] FCA 1594 at [77].

Appendix 2 – Detailed contents list

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

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References

Previous draft:

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

Related Rulings/Determinations:

TR 2006/10; GSTR 2012/5; GSTR 2012/6

Previous Rulings/Determinations:

GSTR 2000/20

Subject references:

- Goods and services tax
- GST boarding/rooming houses
- GST caravan parks
- GST commercial residential premises
- GST lease and real property
- GST long-term accommodation
- GST long-term lease
- GST marina berths
- GST real property
- GST residential premises
- GST residential rents
- GST sale of real property

Legislative references:

- ANTS(GST)A 1999
- ANTS(GST)A 1999 7-1(1)
- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-70
- ANTS(GST)A 1999 11-5
- ANTS(GST)A 1999 40-35
- ANTS(GST)A 1999 40-35(1)
- ANTS(GST)A 1999 40-35(1)(b)
- ANTS(GST)A 1999 40-35(1A)
- ANTS(GST)A 1999 40-35(1A)(a)
- ANTS(GST)A 1999 Div 87
- ANTS(GST)A 1999 87-1
- ANTS(GST)A 1999 87-5
- ANTS(GST)A 1999 87-5(a)
- ANTS(GST)A 1999 87-5(1)
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- ANTS(GST)A 1999 87-10(1)
- ANTS(GST)A 1999 87-10(1)(b)
- ANTS(GST)A 1999 87-15
- ANTS(GST)A 1999 87-20(1)
- ANTS(GST)A 1999 87-20(3)
- ANTS(GST)A 1999 87-25
- ANTS(GST)A 1999 87-25(1)
- ANTS(GST)A 1999 195-1
- TAA 1953

Case references:

- Meridien Marinas Horizon Shores Pty Limited v. FC of T [2009] FCA 1594; 2009 ATC 20-158; (2009) 74 ATR 787

ATO references

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