GSTD 2012/11EC - Compendium

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Ruling Compendium – GSTD 2012/11

This is a compendium of responses to the issues raised by external parties to draft GSTR 2011/D2 and GSTR 2012/D1 – *Goods and services tax: residential premises and commercial residential premises* that are applicable to GSTD 2012/11 – *have new residential premises been used for residential accommodation before 2 December 1998 for the purposes of paragraph 40-65(2)(b) of the A New Tax System (Goods and Services Tax) Act 1999 where the premises were only operated as commercial residential premises before that date?*

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling. Paragraph or example references under 'issue raised' are to GSTR 2011/D2 or GSTR 2012/D1 as applicable. Paragraph or example references under 'ATO Response/Action taken' are to GSTD 2012/11 unless otherwise indicated.

Summary of issues raised and responses

GSTR 2011/D2

Issue No.	Issue raised	ATO Response/Action taken
1	In regard to paragraph 37, there is no justification in the legislation for asserting that 'the prior use for residential accommodation does not encompass prior use for making supplies of accommodation in commercial residential premises'. The submission referred to *South Steyne Hotel Pty Ltd v. Commissioner of Taxation* [2009] FCA 13 and *South Steyne Hotel Pty Ltd v. Commissioner of Taxation* [2009] FCAFC 155. It was submitted that the ATO unjustifiably relies upon extraneous material in an Explanatory Memorandum to reach the same conclusion, but the words in the Act say that a sale of real property used predominantly for residential accommodation is a taxable supply if it is new residential premises other than those (new	We consider that the views expressed in paragraphs 1 and 12 – 14 are consistent with the *South Steyne* decisions. Paragraphs 13 to 14 refer to the reasoning of the Court in those decisions.

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	residential premises) used for residential accommodation before 2 December 1998. The term or duration of the occupation is to be disregarded, and this facet of occupation only arises in relation to commercial residential premises. (See below for a discussion of *Sebastien* and the extraneous material supposedly found in the Explanatory Memorandum). It was further submitted that bearing in mind that 'residential premises which have only previously been sold as commercial residential premises or as part of commercial residential premises are still regarded as new residential premises ' (Explanatory Memorandum 15.6), there is overwhelming evidence that residential accommodation can be provided in commercial residential premises. When clause 40-65(2)(b) provides that the sale of new residential premises other than those used for residential accommodation before 2 December 1998 is a taxable supply, there is no room for a distorted interpretation – slight or otherwise. To consider commercial residential premises and commercial residential accommodation as a species distinct from residential premises and residential accommodation is to repeat the Federal Court misinterpretation which led to the *Marana* amendments. It is the way in which they are used that leads to their definition as commercial, and to their differential taxing.	

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Summary of issues raised and responses

GSTR 2012/D1

Issue No.	Issue raised	ATO Response/Action taken
1	The submission considered the text of sections 40-35, 40-65 and 40-75. The submission provided that the wording of the Act is clear enough. There is no need to go outside the Act looking for extraneous material to support an external agenda, and *Marana*, *Gloxinia* and other cases have illustrated that if the straightforward words of the Act lead to an outcome that is considered by some to be inconsistent with the intention of Parliament, it is up to Parliament to change the Act – not for us to apply what we think they meant to say or should have said. On the basis of the above analysis, I believe that the material in GSTR 2012/D1 surrounding paragraphs 43 to 46 is not correct. Commercial residential premises are residential premises, and if an enterprise in commercial residential premises is discontinued the physical facilities revert to residential premises, and their sales as residential premises is a sale of new residential premises; and if these residential premises have been used to provide residential accommodation even in commercial residential premises before 2 December 1998 then the sale is not a taxable supply.	We consider that the views expressed in paragraphs 1 and 12 – 14 are consistent with the *South Steyne* decisions. Paragraphs 13 to 14 refer to the reasoning of the Court in those decisions.