


GSTR 2012/3EC2 - Compendium

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Public advice and guidance compendium – GSTR 2012/3

❶ Relying on this Compendium

This Compendium of comments provides responses to comments received on the draft update to Goods and Services Tax Ruling GSTR 2012/3 *Goods and services tax: GST treatment of care services and accommodation in retirement villages and privately funded nursing homes and hostels*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO’s general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
All legislative references in this Compendium are to the <i>A New Tax System (Goods and Services Tax) Act 1999</i> , unless otherwise indicated.		
Issue 1: Continuing need		
No legal basis		
1A	<p>The <i>A New Tax System (Goods and Services Tax) (GST-free supply – Residential Care – Non-government Funded Supplier) Determination 2015</i> (the Minister’s Determination) does not add meals as a requirement under subsection 38-25(3). The Minister’s Determination states what services under subsection 38-25(3) may be GST free by being ‘of a kind’ – a limitation. However, the Minister’s Determination does not, and cannot, extend the effect of paragraph 38-25(3)(c) which separately defines the people to whom the GST-free services must only be provided.</p> <p>Subsection 6(4) of the Minister’s Determination, referred to by the ATO, states (emphasis added):</p> <p style="padding-left: 40px;"><i>Circumstances</i></p> <p style="padding-left: 40px;">(4) For subsections (1) to (3), the circumstances are that:</p>	<p>We have revised paragraphs 54 and 54A in the Addendum to provide greater clarity. The Minister’s Determination that is referred to in paragraph 38-25(3)(b) requires that, for any of the listed services to be ‘of a kind’ to be GST-free, the recipient must have a continuing need for services mentioned in items 2.1 or 3.8 of the Quality of Care Principles (paragraph 6(4)(a) of the Minister’s Determination).</p> <p>The continuing need is set out in subparagraph 6(4)(b)(ii) of the Minister’s Determination because all services other than items 2.1 or 3.8 of the Quality of Care Principles (that are already specifically mentioned in paragraph 6(4)(a) of the Minister’s Determination) must be ‘needed’ by the resident.</p> <p>The context sets the interpretation of this ‘needed’ to take the same meaning as ‘continuing need’ specifically stated in paragraph 6(4)(a) of the Minister’s Determination.</p>

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	<p>(a) the resident has a continuing need for the services mentioned in item 2.1 or 3.8 of Schedule 1 to the Quality of Care Principles; and</p> <p>(b) the services are supplied, under a written agreement with the supplier, as a package made up of:</p> <ul style="list-style-type: none"> (i) the services mentioned in item 2.1 or 3.8 of Schedule 1 to the Quality of Care Principles; and (ii) other services mentioned in Schedule 1 to the Quality of Care Principles that are needed by the resident; and (iii) accommodation; and <p>(c) the charges for services and for accommodation are payable to the same entity.</p> <p>The Minister's Determination does not impose any additional requirements for residents to have a continuing need for meals but only restates the need for items 2.1 and 3.8 of Schedule 1 to the Quality of Care Principles (Quality of Care Principles), consistent with paragraph 38-25(3)(c).</p>	<p>The 'daily meals' requirement in paragraph 38-25(3A)(b) is a service that is also set in this same context and includes the same requirements of 'continuing need'.</p>
1B	<p>There is no support from paragraph 1.26 of the Explanatory Memorandum to the Tax Laws Amendment (Retirement Villages) Bill 2004 (the EM) for the ATO's position that residents must have a need for meals under subsection 38-25(3). Only items 2.1 (daily living activities assistance) or 3.8 (nursing services) of the Quality of Care Principles are stated in paragraph 38-25(3)(c) as the services which residents must require.</p> <p>In <i>Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue</i> [2009] HCA 41 at [47], the High Court has stated that:</p> <p>... the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general</p>	<p>No change has been made in the Addendum. Paragraph 1.26 of the EM refers to the 'people' who require care services as being:</p> <p>... aged residents with a level of frailty, disability or medical condition which requires that they receive a range of services to enable them to continue to reside within the retirement village.</p> <p>We make reference to paragraph 1.26 of the EM (at paragraph 54 in the Addendum) because, in our view, it describes the type of person to whom subsection 38-25(3) applies and supports how it is envisaged that concessional treatment is provided on the basis of need.</p>

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	purpose and policy of a provision, in particular the mischief it is seeking to remedy.	
1C	<p>There is no basis for reading extra requirements (that is, meals in addition to items 2.1 and 3.8 of the Quality of Care Principles) into paragraph 38-25(3)(c).</p> <p>If the need for meals could be read into paragraph 38-25(3)(c) as the ATO argues, there are no exceptions allowed for on the words of that paragraph. The ATO seeks to allow for those exceptions on a reasoning that occasional refusal of meals for stated purposes does not alter that a resident has a continuing need for meals. But that reasoning is not to be found in the words of the paragraph.</p>	<p>No change has been made in the Addendum. In our view there is no 'extra requirement' of meals read into paragraph 38-25(3)(c). This paragraph states that the services that are 'of a kind' listed at paragraph 38-25(3)(b) can only be provided GST-free to people who <i>must</i> receive item 2.1 or 3.8 services.</p> <p>The requirement for the need for daily meals arises from the kind of services specified under the Minister's Determination made for paragraph 38-25(3)(b), which requires that the services are needed by the recipient. We explain at Issue 1A of this Compendium that we consider, in the wider context of subsection 6(4) of the Minister's Determination, the word 'needed' in subparagraph 6(4)(b)(ii) has the same meaning as 'continuing need'. The requirement for need also arises under paragraph 38-25(3)(a), by way of the special provision for retirement villages in subsection 38-25(3A) to be treated as a 'residential setting' and eligible to receive care services GST-free.</p>
1D	<p>The ATO approach also immediately runs into the practical difficulty that many residents (who definitely still need items 2.1 and/or 3.8 of the Quality of Care Principles) may not (or may not wish to, and this may become more frequent as they age) actually eat 3 meals a day, much less morning and afternoon tea and supper. It would seem absurd and unintended that residents' (entirely predictable) individual personal choices in this regard should run counter to the intended operation of the law and should independently (and uncontrollably) alter the GST treatment for operators.</p>	<p>No change has been made in the Addendum. It is an application of all 3 principles that determines whether the 'daily meals' requirement in paragraph 38-25(3A)(b) is met. Principle Three, at paragraphs 62A and 62B in the Addendum, discusses when a resident does not take and eat every meal. It is our view that a resident may decline to take or eat a meal in limited or irregular circumstances, such as for cultural, religious, family, dietary, personal taste, health, recreational or medical reasons. However, a persistent or regular pattern of not taking or eating meals unrelated to these situations is, in our view, an indicator that the paragraph 38-25(3A)(b) obligation is not met.</p>
1E	<p>With regard to the structure of the Quality of Care Principles, the reference to item 2.1 (daily living activities assistance) or 3.8 (nursing services) does not mean that all the possible services listed under those items must be provided. This is entirely inconsistent with the context of the Quality of Care Principles as lists of what may be provided, not of lists of all the things that must always be provided. So, assistance with meals</p>	<p>There has been a change to paragraphs 54 and 54A in the Addendum to provide clarity about the continuing need principle. Our interpretation of 'continuing need' is further discussed at Issue 1A of this Compendium. We agree that not all services included in item 2.1 or 3.8 services may be required by a resident.</p>

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	cannot be used as an indirect basis to include a requirement that residents must always (mostly) take meals. The meals requirement comes solely from subsection 38-25(3A).	
1F	The meals requirement cannot be properly interpreted as a 'resident-needs driven' requirement, as the ATO seeks to continue to do in these proposed revisions to GSTR 2012/3. Under the wording of section 38-25, it is a 'operator-driven' requirement. Where an operator provides the meals within the terms of subsection 38-25(3A), what the resident does in terms of refusing meals (and the resident's subjective reasons) is irrelevant.	No change has been made in the Addendum. It is our view that subsection 38-25(3) is interpreted in accordance with the 3 principles stated. Our view of the obligations on the operator under this provision are explained further in our response to Issue 2 of this Compendium.
Issue 2: Make available		
Legal obligation on operator, not resident		
2A	A resident's continuing need for assistance to be provided with daily meals given their continuing need for item 2.1 or 3.8 services of the Quality of Care Principles involves a 'leap' of wording and reasoning unsupported by the words of the sections and the Quality of Care Principles. Refer to the comments about the EM reference and the High Court's statements in Issue 1B of this Compendium.	We have made a change to paragraphs 54 and 54A in the Addendum to provide greater clarity. Our interpretation of 'continuing need' is further discussed in our response to Issue 1A of this Compendium.
2B	What is needed is for the ATO to instead more fully explain in the final Addendum how the 'operator driven' requirement under subsection 38-25(3A) should practically work. Paragraph 38-25(3A)(b) imposes that '... there is in force a written agreement under which the operator of the retirement village provides daily meals and heavy laundry services ...'. It would be more helpful if the proposed changes to the Ruling instead addressed the issues around the meaning of the written agreement in subsection 38-25(3A), including: <ul style="list-style-type: none"> • If 'provides' can include 'making available', which the ATO seems to accept in principle (for example, 	No change has been made in the Addendum. The operator's requirement is discussed in Principle Two at paragraphs 56 to 61B in the Addendum. The written agreement is discussed in these paragraphs to explain that: <ul style="list-style-type: none"> • the operator must be under a legal obligation • the operator's obligation arises on election • there can be a separate written agreement to the resident's contract, and • the operator's obligation can be satisfied by an external operator as agent for the operator. The operator's requirements under subsection 38-25(3), including subsection 38-25(3A), are explained in the 3 principles and in our view

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	<p>paragraphs 62 and 62A of the draft update) but then limits that meaning by the incorrect reasoning based on a 'resident-needs driven' requirement for meals.</p> <ul style="list-style-type: none"> • The effect of a resident declining a meal (regardless of reason). Query why a resident refusing meals should have any different effect in terms of the operator's satisfaction of subsection 38-25(3A) to a resident accepting a meal and (quietly) throwing it out, or why a resident's reasons for refusal of a meal should make any difference to the operator's GST position under subsection 38-25(3A). • The practicalities of how far an agreement to 'make available' meals (if it can be an accepted meaning of 'provides') may be applied. Whether the permanent availability of an option to take meals is enough, and why/why not. Plus, if and why payment arrangements under such option arrangements (that is, no payment for meals not taken) should make any difference to the operator satisfying subsection 38-25(3A). <p>Such an approach will require revision of the examples in the draft update currently based on a 'resident-needs driven' meals requirement, largely as outlined in our prior comments.</p>	<p>further explanation is duplication and unnecessary. The circumstances and examples provided in the Addendum of where a resident does not take a meal illustrate our view of whether the resident has a continuing need for daily meals under the provision and what 'generally' means in the context of an operator serving daily meals as explained in paragraph 54A in the Addendum.</p>
Issue 3: Only one resident per apartment		
3A	<p>In relation to Example 7 in the draft update, we would appreciate it if the ATO clarifies whether Elizabeth would be viewed as having a continuing need for the provision of daily meals and heavy laundry services if she and Jack signed up for daily meals and heavy laundry services (even though Elizabeth cares for herself without assistance).</p> <p>More broadly, we would like to seek clarification to whether the supply of accommodation, daily meals and laundry to all of the residents of the apartment would continue to qualify for</p>	<p>No change has been made in the Addendum. This example is written to illustrate the requirement in paragraph 38-25(3A)(b) that the written agreement must be for the operator to provide daily meals and heavy laundry services to all residents of the apartment. If not, both residents will fail to meet the 'residential setting' requirement in paragraph 38-25(3)(a). Then, as discussed at Issue 1A of this Compendium, for the resident to satisfy paragraphs 38-25(3)(b) and (c), the resident must have a continuing need for, among other things, daily meals and item 2.1 or 3.8 services of the Quality of Care Principles, and must be in receipt of item 2.1 or 3.8 services and daily meals.</p>

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	<p>GST-free treatment if only one of the residents has a continuing need for daily living assistance or nursing services.</p>	<p>If Elizabeth signs up for the provision of daily meals, this does not mean in the circumstances outlined that Elizabeth has a continuing need for those daily meals. If Elizabeth has no continuing need for daily meals and does not receive daily meals, then paragraph 38-25(3)(b) and subsection 38-25(3A) will not be met to enable Elizabeth to receive GST-free care services.</p> <p>More generally, in circumstances where services are provided to all residents of an apartment but only some of the residents need those services, then the services would not be GST-free.</p>
Issue 4: Compliance and documentation for operators		
4A	<p>It is noted in Paragraph 62A of the draft update that the definition of 'must make available' extends to ensuring the resident takes and eats the meals. With respect, we are of the view that the act of making available daily meals only means the operator needs to ensure the daily meals are available to the residents for their consumption. We do not believe that the definition should extend to ensuring the resident takes and eats their meals.</p> <p>Even if the definition was to extend to ensuring the resident takes and eats the meals with regularity, we note that to comply within the scenarios provided requires active monitoring and documentation of each resident's meal consumption for record-keeping purposes. This will not be practical and extremely onerous on the operations to manage.</p> <p>In addition, there will be complexity and uncertainty for both the operator and the resident in the event it is noted that our resident has not taken meals regularly. Under such a circumstance, we would presume that the supply of the daily meals and heavy laundry (previously provided) would not qualify for GST-free treatment and be subject to GST. There will be additional analysis required to determine how far back we would be required to go in adjusting the GST treatment of the daily meals and laundry.</p>	<p>No change has been made in the Addendum. It is our view that in reading the requirement in context (see our responses to other issues raised in this Compendium), the type of person who has a continuing need for eating support and has a written agreement with an operator to provide 'daily meals' required for their 'daily living' or 'nursing' support needs to take and eat a meal. We disagree that an operator should only be required under their obligation to provide daily meals to make a meal available to a resident when this means no responsibility to ensure that the resident takes and eats a meal, active monitoring, or documentation. Further, the resident must take a meal because this shows a need for a meal. If the resident is not taking a meal, this can be an indicator of no need for a meal.</p>

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	The same issue would arise if the resident then subsequently changes their meal pattern and complies within the scenarios provided. Similarly, the resident would expect that we treat the supply of daily meals and heavy laundry as GST-free supplies and refund the GST back.	
Issue 5: Meal credits: resident absences		
5A	<p>In the draft update, it is accepted that although the 3 conditions may be met, there will be occasions where a resident may be absent from a retirement village (that is, planned holiday or time in hospital). Per the draft update, those occasional absences will not cause an operator to fail in meeting the requirements of subsection 38-25(3A).</p> <p>It is our understanding that the market segment for serviced apartments is currently considering offering residents the issuance of a meal credit or meal voucher for any missed meals. We submit that it should equally be acceptable that operators can issue a meal credit or a meal voucher for those meals that an absent resident were unable to take, and that it will not prevent subsection 38-25(3A) from being met.</p> <p>In addition, we request the Commissioner's feedback on whether those meal credits could be taken and used by an absent resident or another person whom they may wish to share a meal with. We submit that the use of meal credits in this way will also not prevent the operator from meeting subsection 38-25(3A).</p>	<p>No change has been made in the Addendum. We would need to consider the full facts and circumstances of these new offerings once they have been developed to understand what meals are being provided and not taken and for what reasons. The same 3 principles would apply and would need to be satisfied under any new offerings.</p>
Issue 6: Standard meal option		
6A	There is another option available to consider the meaning of 'daily meals'. Specifically, we believe that due to the nature of the individuals who inhabit retirement village serviced apartments, operators should be given a flexibility to offer a set menu of 14 meals per week. The retirement village serviced apartments are to be inhabited by those over-55 year olds who need some care but are likely to be still ambulatory and	No change has been made in the Addendum. Our view in paragraph 54B in the Addendum is that item 1.10 of the Quality of Care Principles requires generally 3 meals a day plus morning tea, afternoon tea and supper. Our interpretation of 'generally' is explained in Principle Three in paragraphs 62 to 71 in the Addendum. The circumstances provided are limited or irregular situations that do not lead to a persistent or regular pattern of not taking or eating meals. We consider that the Principles must support that the

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	<p>maintain an active lifestyle. It is not likely to be inhabited by individuals who have a high care need and are not ambulatory. In that context, the inhabitants are likely to need flexibility when taking their meals, as they may wish to eat out regularly – for instance, once or twice a week.</p>	<p>resident must have a continuing need for eating support services and the provision of daily meals.</p>
Issue 7: Basic care package – minimum 3 hours per week		
7A	<p>While not covered by the proposed changes to the Ruling, we would also like to take the opportunity to request the ATO to consider another scenario.</p> <p>In order for the supply of accommodation, daily meals and laundry and the daily living assistance or nursing services to qualify for GST-free treatment under subsections 38-25(3) and (4A), we understand that evidence is required that the residents have a need for care services (that is, daily living assistance activities or nursing services) and that there needs to be a supply of such services.</p> <p>In the scenario that a resident has been assessed as having a continuing need for care services, we submit that a basic package of a minimum 3 hours per week can be offered to residents of a serviced apartment. In that scenario, providing that residents have a continuing need for care, the GST-free requirements will be met.</p>	<p>No change has been made in the Addendum. The same 3 principles would apply and would need to be satisfied under these circumstances.</p>