



GSTR 2011/D5 - Goods and services tax: GST treatment of care services and accommodation in retirement villages and privately funded nursing homes and hostels

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Draft Goods and Services Tax Ruling

Goods and services tax: GST treatment of care services and accommodation in retirement villages and privately funded nursing homes and hostels

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What this Ruling is about

1. This Ruling explains when care services and accommodation provided to residents in privately funded nursing homes and aged care hostels or serviced apartments in a retirement village are GST-free.
2. This Ruling explains when supplies of care services and supplies of accommodation to care recipients are GST-free under subsections 38-25(3), 38-25(4) and 38-25(4A) of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act).
3. All legislative references in this Ruling are to the GST Act unless otherwise specified.
4. This Ruling does not specifically address the GST treatment of:
 - care services and accommodation provided to residents of government funded residential care facilities covered by subsections 38-25(1) and 38-25(2);
 - services covered by an extra services fee within the meaning of Division 35 of the *Aged Care Act 1997* (Aged Care Act) and addressed by subsection 38-25(5);

- community care, or flexible care, or specialist disability services or other health services afforded GST-free treatment under Subdivision 38-B;
- the development, construction, sale or leasing of retirement villages, nursing homes, hostels or boarding homes¹; and
- the activities of charitable institutions under Subdivision 38G including supplies of retirement village accommodation under section 38-260.

Ruling

GST-free supplies of residential care under subsection 38-25(3)

5. A supply of services to a resident living in a retirement village, a privately funded nursing home, or hostel is a GST-free supply of residential care under subsection 38-25(3) if:

- the services are provided to one or more aged or disabled person in a residential setting; and
- the Aged Care Minister has determined in writing that the services are of a kind covered by Schedule 1 to the Quality of Care Principles made under section 96-1 of the *Aged Care Act 1997* (Quality of Care Principles); and
- the services include, and are only provided to people who require, the services set out in item 2.1 (daily living activities assistance) of Part 2 of Schedule 1 to the Quality of Care Principles (item 2.1 services); or item 3.8 (nursing services) of Part 3 of Schedule 1 to the Quality of Care Principles (item 3.8 services).

When are services provided in a ‘residential setting’?

6. A supply of services to an aged or disabled person can only be a GST-free supply of residential care under subsection 38-25(3) if they are provided in a ‘residential setting’.

7. Subject to the application of subsection 38-25(3A) about serviced apartments in retirement villages, the meaning of ‘residential setting’ in the context in which it appears in paragraph 38-25(3)(a) does not include a person’s private home, and excludes settings in which care may be provided but is medical in nature, such as a hospital or a psychiatric facility.

¹ The GST treatment of a sale of a retirement village, in particular circumstances, is addressed in Goods and Services Tax Ruling GSTR 2011/1 Goods and services tax: development, lease and disposal of a retirement village tenanted under a ‘loan-lease’ arrangement.

8. Privately funded nursing homes and aged-care hostels that provide care to aged or disabled people, and which have the following characteristics are considered to be a residential setting for the purposes of paragraph 38-25(3)(a):

- residents do not have a proprietary interest in the property;
- residents can be moved at the operator's discretion under certain circumstances;
- premises are marketed and held out to the public as a place for care and accommodation, rather than just accommodation; and
- residents have limited rights compared to residents who lease or own their premises.

Example 1 – Residential setting

9. *Redi-Care (RC) is a privately funded facility that provides accommodation and care for aged and disabled people. RC provides bed-sit accommodation to its 30 residents. All of the residents receive some item 2.1 services for assistance with daily living. Several of the residents also receive some item 3.8 nursing services. These services are provided by a registered nurse and care and support staff employed by RC.*

10. *Residents occupy the bed-sit accommodation provided by RC by way of licence under an accommodation agreement. The accommodation agreement does not provide the resident with exclusive possession of a particular bed-sit and stipulates that the resident may be moved to a different bed-sit or location at the operator's discretion, to allow the care needs of the resident to be met.*

11. *RC provides care services to residents. The residents have no proprietary interest in their accommodation, and no right to exclusive occupancy of a specific bed-sit. The occupancy rights of the residents are not commensurate with owners or tenants residing in their own private homes. The care services supplied to residents of RC are provided in a 'residential setting' for the purposes of paragraph 38-25(3)(a).*

Example 2 – Not a 'residential setting'

12. *Plane View (PV) is a privately funded aged care hostel that provides accommodation and services for aged or disabled people in one room, studio style apartments. All of the 25 residents of PV receive some item 2.1 services for assistance with daily living. These services are provided by care and support staff employed by PV.*

13. *PV residents occupy their accommodation by way of lease of an apartment within the facility. Under the lease, residents have exclusive occupancy of a specific studio apartment. The resident cannot be unilaterally moved to another apartment by the operator of PV. The resident can have overnight guests, and does not have to seek approval for temporary absences, for example, to attend external appointments or to visit friends and relatives.*

14. *The services supplied to residents by PV are not provided in a 'residential setting' and are not GST-free under subsection 38-25(3).² The occupancy rights of residents of PV are such that they are tenants living in their private homes.*

Serviced apartments in a retirement village

15. For the purposes of subsection 38-25(3)(a), an independent living unit or serviced apartment in a retirement village is not ordinarily considered to be a residential setting. However, subsection 38-25(3A) expands the application of paragraph 38-25(3)(a). This expansion of paragraph 38-25(3)(a), however, is limited to 'serviced apartments' in 'retirement villages', as defined in the GST Act.³

Subsection 38-25(3A) allows for services provided to a resident of a 'retirement village' to be taken, for the purposes of paragraph 38-25(3)(a), to be provided in a residential setting if, and only if (emphasis added):

- he or she is a resident of a 'serviced apartment' in the retirement village; and
- there is in force a written agreement under which the operator of the retirement village provides daily meals and heavy laundry services to all of the residents of the apartment.

16. A supply of services to a resident of a serviced apartment (as defined in section 195-1) in a retirement village that satisfies the definition of retirement village in section 195-1 can, subject to the requirements specified in paragraph 38-25(3A)(b) and the requirements in paragraphs 38-25(3)(b) and 38-25(3)(c), be GST-free under subsection 38-25(3).

17. Services supplied to residents of independent living units (or other accommodation that is not a serviced apartment) in a retirement village, which satisfies the definition of retirement village in section 195-1, are not taken to be provided in a 'residential setting'. In these circumstances, the supplies of services cannot be GST-free under subsection 38-25(3).

² Depending upon the relevant circumstances, the item 2.1 services supplied to residents of PV may qualify as GST-free supplies of community care under section 38-30.

³ The terms 'serviced apartment' and 'retirement village' are defined in section 195-1, and are discussed at paragraphs 18 to 65 and paragraphs 126 to 158 of this draft Ruling.

Retirement village

18. The definition of retirement village in section 195-1 contains the following requirements:

- (a) the premises are residential premises; and
- (b) accommodation in the premises is intended to be for persons who are at least 55 years old, or who are a certain age that is more than 55 years; and
- (c) the premises include communal facilities for use by the residents of the premises;

but the following are not retirement villages:

- (d) premises used, or intended to be used, for the provision of residential care (within the meaning of the Aged Care Act) by an approved provider (within the meaning of that Act); and
- (e) commercial residential premises.

19. Retirement villages governed by the retirement village legislation applicable in the state or territory⁴ where they are located are residential premises,⁵ and satisfy paragraph (a) of the definition of retirement village in section 195-1.

20. It is a question of fact, determined by the entry requirements of a particular complex or facility, whether premises are intended for persons of at least 55 years of age as required by paragraph (b) of the definition of retirement village in section 195-1.

21. Communal facilities referred to in paragraph (c) of the definition of retirement village in section 195-1 include the following types of facilities located within a retirement village complex: a library, a dining room, a recreation room, a chapel, a gymnasium, and outdoor recreational and leisure facilities such as a tennis court, a swimming pool or a barbeque area.⁶ Communal facilities do not include reception areas, pathways, gardens, driveways and landscaping.⁷

⁴ *Retirement Villages Act 1986* (Vic); *Retirement Villages Act 1999* (NSW); *Retirement Villages Act 1999* (Qld); *Retirement Villages Act 2004* (NT); *Retirement Villages Act 1992* (WA); *Retirement Villages Act 1987* (SA); *Retirement Villages Act 2004* (Tas).

⁵ See paragraph 258 of Draft Goods and Services Tax Ruling 2011/D2, Goods and services tax: residential premises and commercial residential premises.

⁶ See paragraph 23 of Goods and Services Tax Ruling GSTR 2007/1 Goods and services tax: when retirement village premises include communal facilities for use by the residents of the premises.

⁷ See paragraphs 25 and 26 of GSTR 2007/1.

22. Residential care facilities that are managed by an entity that is an ‘approved provider’ for the purposes of the Aged Care Act and supplies residential care to the residents, either as an owner-operator or as a lessee of the premises under a lease granted by the owner of the premises, are excluded from the definition of retirement village in section 195-1 by paragraph (d).

23. A retirement village that is covered by the retirement village legislation applicable in the state or territory where it is located is not commercial residential premises⁸ and is not excluded from being a retirement village by paragraph (e) of the definition of retirement village in section 195-1.

Example 3 – Retirement village

24. *Birdseye Views is a residential complex comprising a number of assisted living units and independent living units. There is a communal dining room and recreation room for use by the residents.*

25. *Entry as a resident of Birdseye Views is limited to retirees who are at least 55 years old. However, residents are able to reside at Birdseye Views with a spouse or partner who may not yet have attained 55 years of age.*

26. *Residents reside at Birdseye in accordance with the terms of a residence contract entered into with the owner/operator of the complex. The rights and obligations of residents and the owner/operator of Birdseye Views are governed by the state retirement village legislation applicable in the state where Birdseye Views is located.*

27. *Birdseye Views is residential premises containing communal facilities for use by residents and the accommodation in the premises is intended to be for persons who are at least 55 years old. Birdseye Views is a ‘retirement village’ as defined in section 195-1.*

28. *Services supplied to residents of Birdseye that occupy serviced apartments which satisfy the definition of ‘serviced apartment’ in section 195-1 may be GST-free supplies of residential care under subsection 38-25(3). However, supplies of services to residents that occupy accommodation at Birdseye, other than in a serviced apartment, are not GST-free under subsection 38-25(3).*

Example 4 – Not a ‘retirement village’

29. *Maxwell Co owns a residential complex, known as the Lucky Retirement Home, comprising 45 self-contained units that are designed to facilitate the provision of care to residents, a communal dining room and recreation room. Maxwell Co leases the Lucky Retirement Home to Sunshine Care Co.*

⁸ See paragraph 260 of GSTR 2011/D2.

30. *Sunshine Care Co is an 'approved provider' as defined in the Aged Care Act. The Lucky Retirement Home is operated by Sunshine Care Co as an aged-care hostel for the provision of residential care, as defined in the Aged Care Act.*

31. *The Lucky Retirement Home is not a 'retirement village'. The facility is used by an approved provider to provide residential care, and is therefore excluded from being a retirement village by paragraph (d) of the definition of retirement village in section 195-1.*

32. *Because the Lucky Retirement Home is not a retirement village as defined in section 195-1, subsection 38-25(3A) does not apply. The services supplied to residents of the Lucky Retirement Home are not taken to be provided in a 'residential setting'.*

Serviced apartment

33. The definition of serviced apartment in section 195-1 contains the following requirements:

- (a) the apartment is designed to be occupied by aged residents who require either or both of the following:
 - (i) item 2.1 services;
 - (ii) item 3.8 services; and
- (b) at least one responsible person is continuously:
 - (i) on call to render emergency assistance to the residents of the apartment; and
 - (ii) in reasonable proximity to the apartment; and
- (c) the apartment is part of a single complex of apartments to which paragraphs (a) and (b) apply, and is accessible from a common corridor linking the apartment to the other apartments in the complex; and
- (d) there is in the retirement village a communal dining facility that is available for use by the residents of apartments in the retirement village to which paragraphs (a), (b) and (c) apply.

However, a detached house, row house, terrace house, town house or villa unit is not a serviced apartment.

34. Serviced apartments in retirement villages share many features and characteristics that are also common to other types of accommodation provided in retirement villages, including independent living units and self-care units. Independent living units and self-care units are designed for people who are capable of living independently and do not require daily living activities assistance or nursing services, as set out in items 2.1 and 3.8 of Schedule 1 to the Quality of Care Principles. Independent living units and self-care units are not serviced apartments as defined in section 195-1.

35. Any one factor on its own is not conclusive. However, the following characteristics indicate that an apartment is designed for a person who requires item 2.1 services, item 3.8 services, or a combination of both services, as required by paragraph (a) of the definition of serviced apartment in section 195-1:

- fixtures and fittings consistent with a person who requires daily living activities assistance or nursing services, for example, bathroom hand rails, grab rails, wheelchair ramps, and wide doorways that allow for wheelchair access;
- a smaller physical layout than other styles of accommodation in a retirement village, for example, a one room studio style apartment or an apartment with no or only limited cooking facilities, comprising only one or two bedrooms and a separate living area;
- any self-catering facilities are limited, for example, a small kitchenette with a microwave and bar fridge;
- no laundry, or only limited self-laundry facilities.

36. Paragraph (b) of the definition of serviced apartment in section 195-1 requires someone who is capable of assisting a person who requires item 2.1 or item 3.8 services to be available to provide immediate assistance to residents when necessary. The provision of a personal medical emergency call device that alerts an off-site external service provider of a potential medical emergency when activated by the resident is not sufficient to satisfy the requirement in paragraph (b) of the definition of serviced apartment in section 195-1, which requires a responsible person be on call continuously to render emergency assistance to residents.

37. However, an emergency call device which alerts at least one responsible person who is on-site within the precincts of the retirement village, and who may be an external service provider, is sufficient to satisfy paragraph (b) of the definition of serviced apartment in section 195-1. The requirement is also met where at least one responsible person is shared between two adjacent retirement villages and that person is on-site at one of those retirement villages at any time.

38. The reference to 'responsible person', in the context that it appears in paragraph (b) of the definition of serviced apartment in section 195-1, means someone who is capable of rendering emergency assistance, and who is also suitably qualified to render emergency assistance to persons that require item 2.1 or item 3.8 services. For example, a 'responsible person' would not ordinarily include general employees such as receptionists, gardeners, cleaners and security guards.

39. A common corridor required by paragraph (c) of the definition of serviced apartment in section 195-1 includes internal passageways that connect all of the apartments in a single complex of apartments. A common corridor does not include covered or uncovered passageways that connect an apartment to another apartment that is outside of the building. It also does not include pathways and roads, including pathways and roads connecting groups of apartments with other groups of apartments, within the retirement village. One retirement village may comprise more than one complex of apartments. Paragraph (c) of the definition of serviced apartment in section 195-1 only requires the apartments in a particular complex to be accessible from a common corridor and does not require each individual complex of apartments to also be connected by a common corridor.

40. Paragraph (d) of the definition means that an apartment satisfies the definition of serviced apartment in section 195-1 if residents have access to a communal dining facility that is available for use by them. The communal dining facility must be located within the retirement village in which the apartment is situated but it does not have to be connected to the complex of serviced apartments.

Example 5 – Serviced apartment

41. *Happy Days Retirement Haven (Happy Days) is a retirement village as defined in section 195-1. Happy Days offers two different styles of accommodation to residents which are referred to as self contained units and assisted living units.*

42. *The assisted living units are located within a single building in the retirement village complex. They each contain one or two bedrooms, a separate living area, bathroom and kitchenette. The bathrooms in each unit are fitted with grab rails and hand rails. All of the assisted living units are linked and accessible from a passageway within the building. Call buttons are fitted in all of the rooms of each unit which, when activated, alert on-site nursing and care staff that a resident requires assistance.*

43. *There is a communal dining hall, within the complex, for the use of all of the residents of Happy Days.*

44. *The assisted living units at Happy Days exhibit physical characteristics which indicate that they are designed for people who require daily living activities assistance and nursing services. They are part of a single complex and all of the apartments are accessible from an internal passageway. The assisted living units also satisfy all of the other requirements specified in the definition of serviced apartment in section 195-1 and are 'serviced apartments' for the purposes of subsection 38-25(3A).*

45. *Services supplied to residents of the assisted living units at Happy Days may, subject to the requirements of paragraph 38-25(3A)(b), be taken to be provided in a residential setting and may be GST-free supplies of residential care under subsection 38-25(3).*

Example 6 – Not a ‘serviced apartment’

46. *The self-contained units at Happy Days Retirement Haven (referred to in Example 5) consist of 60 two bedroom units, configured in groups of four units under the one roof. Each self-contained unit is accessible from an external door only, and has pathways and/or roads around it.*

47. *Each self-contained unit comprises one or two bedrooms, a full kitchen and laundry facilities, a separate living area, separate bathroom and a small courtyard garden. Some of the units also have a carport for the resident’s motor vehicle.*

48. *Similar to the assisted living units at Happy Days, the bathrooms of the independent living units are fitted with grab rails and hand rails and there is one call button within each unit which, when activated, alerts on-site nursing and care staff that a resident requires assistance.*

49. *The self-contained apartments are not serviced apartments as defined in section 195-1 for the purposes of subsection 38-25(3A).*

50. *The self-contained apartments do not satisfy paragraph (c) of the definition of ‘serviced apartment’ in section 195-1 which requires the apartments to be linked by a common corridor. The apartments have some characteristics in common with the assisted living units. However, although not determinative, the presence of features such as a full kitchen, laundry and carport are also indicative of the units being designed for occupants who are capable of living independently without the need for care services or other regular services, rather than for someone that requires item 2.1 or item 3.8 services. Services supplied to residents of the self-contained apartments at Happy Days are not taken to be provided in a residential setting and are not GST-free supplies of residential care under subsection 38-25(3).⁹*

⁹ Depending upon the particular circumstances, the services supplied may be GST-free supplies of community care under section 38-30.

Provision of daily meals and heavy laundry to all residents of a serviced apartment

51. A supply of services to a resident of a serviced apartment in a retirement village is only taken to be provided in a residential setting for the purposes of paragraph 38-25(3)(a) if the operator of the retirement village, under a written agreement, provides daily meals and heavy laundry services to all of the residents of the serviced apartment.¹⁰

52. To satisfy the requirement for the provision of daily meals, there must be an arrangement in place whereby the retirement village operator provides all of a resident's daily meal requirements. Ordinarily, this includes the provision of breakfast (or ingredients for the residents to prepare their own breakfast), lunch and dinner to all of the residents of a serviced apartment. This requirement is not satisfied if the residents are supplied with breakfast each day but cook their own lunch and dinner.

53. The requirement that daily meals be provided may be satisfied even though a resident is temporarily absent from the retirement village on a particular day and receives their meals elsewhere. For example, at a relative's house.

54. The requirement for the provision of daily meals and heavy laundry services is satisfied if, under a written agreement between the operator and the resident, an external provider provides the daily meals and heavy laundry services to all of the residents of a serviced apartment as an agent for the operator or as a subcontractor engaged by the operator.

55. A separate written agreement or a specific provision in an accommodation agreement or residence contract that obligates the operator to provide daily meals and heavy laundry services to all the residents of a serviced apartment satisfies the requirement in paragraph 38-25(3A)(b) for there to be a written agreement.

56. An accommodation agreement or a residence contract merely stating that meals and heavy laundry services are available should the resident/s require them, or request them, does not satisfy the written agreement requirement in paragraph 38-25(3A)(b). This is the case even if there are agreed prices that apply if residents request meals. In these circumstances, services supplied to a resident of a serviced apartment in a retirement village are not taken to be provided in a residential setting and cannot be GST-free under subsection 38-25(3).

Example 7 – Daily meals requirement not satisfied

¹⁰ Paragraph 38-25(3A)(b).

57. *Jack and Elizabeth reside together in a serviced apartment in a retirement village. Jack requires daily living activities assistance and nursing services. Elizabeth does not require any of these services and is able to care for herself without assistance.*

58. *Residents of the serviced apartments can choose to have daily meals, including breakfast, lunch and dinner, provided by the operator of the retirement village for an extra fee. However, Elizabeth enjoys cooking and cooks lunch and dinner for herself and Jack each day, except for once a week when they have dinner in the communal dining room with friends who reside at the retirement village.*

59. *The daily meals requirement in paragraph 38-25(3A)(b) is not satisfied in this example. Although all daily meals are available if Jack and Elizabeth choose to have them provided by the operator, there is no arrangement under which the operator actually provides daily meals to Jack and Elizabeth.*

Example 8 – Daily meals – external provider as agent for operator

60. *Ernie resides at the Sparkling Shores Retirement Village (Sparkling Shores). The terms of the residence contract that Ernie has with the operator obligates the operator to provide daily meals and a heavy laundry service to Ernie for a daily fee payable to the operator.*

61. *The operator of Sparkling Shores has a contract with an external catering company that delivers all of Ernie's daily meals to him on behalf of, and as agent for, the operator.*

62. *The daily meals requirement in paragraph 38-25(3A)(b) is met in these circumstances. The operator is supplying daily meals to Ernie, through its agent.*

Example 9 – Daily meals and heavy laundry – written agreement

63. *Margaret resides in a serviced apartment in a retirement village. The operator of the retirement village provides all of Margaret's meals and does all of Margaret's general and heavy laundry.*

64. *The residence contract that Margaret has with the operator of the retirement village includes a general provision which states that meals and laundry services can be provided by the operator of the retirement village should the resident require them. Margaret entered into a separate written agreement with the operator, whereby the operator agreed to provide daily meals and laundry services to Margaret for a specified daily fee.*

65. *The separate written agreement that Margaret entered into with the operator satisfies the ‘written agreement’ requirement specified in paragraph 38-25(3A)(b). However, in the absence of this separate agreement, the general provision in the residence contract would not be sufficient to satisfy the requirement for a ‘written agreement’.*

When are services that are being provided in a ‘residential setting’ GST-free supplies of residential care?

66. Services supplied to residents of a privately funded nursing home or aged care hostel in a residential setting and to residents of serviced apartments in retirement villages that satisfy the requirements of subsection 38-25(3A) are GST-free supplies of residential care if:

- the Aged Care Minister has determined in writing that the services are of a kind covered by Schedule 1 to the Quality of Care Principles;¹¹ and
- the services include, and are only provided to people who require, the services set out in item 2.1 or item 3.8 of Schedule 1 to the Quality of Care Principles.¹²

Services are provided to residents who require item 2.1 or item 3.8 services and who have a continuing need for those services

67. Paragraph 38-25 (3)(c) requires services to be provided to a resident who requires item 2.1 services for daily living activities assistance or item 3.8 services. Similarly, the Minister’s Determination, referred to in paragraph 38-25(3)(b), requires a care recipient to have a continuing need for those services.¹³ Services supplied to residents who do not satisfy these requirements are not GST-free supplies of residential care under subsection 38-25(3).

68. It is not necessary for the resident to require and to have a continuing need for all of the item 2.1 and item 3.8 services set out in Schedule 1 of the Quality of Care Principles and in Schedule 1 to the Minister’s Determination. However, a resident must have a current existing need for one or more of those services that is ongoing rather than isolated or sporadic.

¹¹ Paragraph 38-25(3)(b).

¹² Paragraph 38-25(3)(c).

¹³ Subsection 5(a) of the *GST-free Supply (Residential Care – Non-Government-Funded Supplier) Determination 2000* (‘the Minister’s Determination’).

69. In determining whether this requirement is satisfied, the Commissioner will consider objective evidence of a resident's requirement and continuing need for item 2.1 or item 3.8 services. This objective evidence may include one or more of the following factors:

- a report of an assessment of a resident's care requirements by a qualified medical practitioner;
- a report of an assessment of a resident's care requirements by a registered nurse, a registered physiotherapist, or a registered occupational therapist;
- a report of an assessment of a resident's care requirements by a team of health professionals that includes at least one of the registered health professionals listed in the two previous dot points.

A package of services and accommodation under a written agreement

70. The Minister's determination referred to in paragraph 38-25(3)(b) also requires accommodation to be included in a package of services supplied to a resident under a written agreement, and the charges for both the services and accommodation must be payable to the same entity.¹⁴

71. However, accommodation is not required to be included in a package of services supplied to residents of serviced apartments when a serviced apartment is supplied by way of lease, hire or licence, or by sale, or by acquisition of certain securities; and the other circumstances stated in subsection 38-25(4A)¹⁵ apply.¹⁶ In those cases, the written agreement required by the Minister's Determination only has to provide for a supply of a package of services.

72. Where the supplier, as principal, contracts with a third party for the provision of some items in the package, the requirement in the Minister's Determination that the package be supplied by the one entity is met when the third party is the supplier's agent, or a subcontractor of the supplier, and the charges are payable to the principal.¹⁷

¹⁴ Subsection 5(b) of the Minister's Determination.

¹⁵ The operation of subsection 38-25(4A) is discussed at paragraphs 93 to 97 of this draft Ruling, and is further explained at paragraphs 182 to 185 of this draft Ruling.

¹⁶ See item 18 of Schedule 1 to *Tax Laws Amendment (Retirement Villages) Act 2004*.

¹⁷ Refer to Goods and Services Tax Ruling GSTR 2000/37 Goods and services tax: agency relationships and the application of the law.

73. However, if the supplier merely facilitates or arranges the provision of some part of the package by a third party, and the third party is making supplies in its own right directly to the resident, a separate package of supplies is made by each entity, and neither of the suppliers makes a GST-free supply of residential care under subsection 38-25(3).

74. The written agreement required under the Minister's Determination must stipulate the specific package of services that will be provided to the resident, and those services must include some item 2.1 or item 3.8 services. A general provision in an accommodation agreement, lease, licence, or hire agreement stating that item 2.1 or item 3.8 services can be provided to the resident if they require them is not sufficient to satisfy the requirements specified in subsection 5(b) of the Minister's Determination.

Example 10 – A package of accommodation and services under a written agreement

75. *Ambience Point is a residential facility that provides services and accommodation to aged and disabled people.*

76. *Each resident's individual accommodation agreement specifies the services specific to the resident's particular care requirements that will be provided to the resident and the fees that are payable to the owner/operator for those services. The services provided to each resident include some item 2.1 or item 3.8 services, or a combination of both.*

77. *Several of the residents require physiotherapy services. The owner/operator contracts with an external physiotherapy practice to provide these services and a qualified physiotherapist visits the facility twice a week to provide these services to residents on behalf of the operator as the operator's agent. Fees for these physiotherapy services are payable by the resident to the owner/operator.*

78. *The services supplied to residents of Ambience Point, including the physiotherapy services supplied by the agent, satisfy the requirements of subsections 5(b) and 5(c) of the Minister's Determination. That is, the services are supplied under a written agreement as a package of services and accommodation, and the charges payable for the services and accommodation are payable to the same entity (in this case, the owner/operator).*

Example 11 – Subsections 5(b) and 5(c) of the Minister's Determination are not satisfied

79. *Mountain Top Views is a residential complex providing supported accommodation to aged people.*

80. *Accommodation agreements between the manager and residents allow for residents to occupy bed-sit accommodation under a licence. The accommodation agreements also stipulate that the provision of care services will be arranged as, and when, they are required by the resident.*

81. *On-site support staff employed by Mountain Top Views provide some assistance to residents. For example, managing and supervising the taking of medication by residents, and arranging and supervising social activities for residents.*

82. *A number of residents at Mountain Top Views also require additional nursing care and/or personal care services. Mountain Top Views facilitates the provision of these services to residents by arranging for external care providers to visit residents, assess their care needs, and supply a tailored care package suitable for the care needs of each individual resident. The fees for these services are payable directly by the resident to the external care provider.*

83. *In this case, the requirements specified in subsections 5(b) and 5(c) of the Minister's Determination are not satisfied. The nursing and personal care services required by residents are not supplied under a written agreement as a package of services and accommodation. The accommodation and services are supplied by different entities, and the charges for the accommodation and services are payable to different entities.*

Accommodation

When is accommodation in a privately funded nursing home or aged-care hostel GST-free?

84. Under subsection 38-25(4)¹⁸ a supply of accommodation to a resident of a privately funded nursing home is GST-free if it is made to a resident *in the course of making a supply of services to that resident that is GST-free residential care services under subsection 38-25(3).*

85. Accommodation is only supplied in the course of making a supply of services that is GST-free under subsection 38-25(3) if the services and the accommodation are supplied at the same time. If a resident enters a privately funded facility, only for the provision of accommodation, without the provision of GST-free residential care services that satisfy the requirements of subsection 38-25(3), the supply of accommodation is not GST-free under subsection 38-25(4).

¹⁸ The supply of accommodation in serviced apartments, in particular circumstances, is addressed in subsection 38-25(4A). See paragraphs 93 to 97 and paragraphs 182 to 185 of this draft Ruling.

86. Also, services supplied to a resident must be of a sufficient level that it can be said that the accommodation facilitates the supply of care services, and that the accommodation is therefore being supplied in the course of supplying those care services. That is, the accommodation is integral to the supply of the care, and the residents are accommodated at the facility so that they can receive the care services which they require.

87. A supplier of accommodation in a private facility that merely facilitates or arranges for an external provider to supply GST-free community care services or flexible care services directly to a resident is not making a GST-free supply of accommodation under subsection 38-25(4).

Temporary absences

88. GST-free residential care services and associated accommodation are considered to continue to be supplied as a package during short, temporary periods of absence of a resident from a nursing home, aged-care hostel, or a serviced apartment in a retirement village.

Example 12 – Accommodation not ‘in the course of’ a supply of GST-free residential care

89. *Eleanor resides in a privately funded residential complex that provides accommodation to aged and disabled people. The operator of the complex provides all of Eleanor’s daily meals and assists with her laundry. Eleanor also requires item 2.1 services, including regular assistance with personal hygiene and showering.*

90. *Eleanor’s personal care requirements have been assessed by an external community care provider, and the assistance that Eleanor requires is provided to her directly by the external community care provider through a community care package that has been tailored to her own personal care requirements. Eleanor pays a weekly fee to the external care provider for this service.*

91. *The accommodation that is being supplied to Eleanor by the operator of the complex is an input taxed supply of residential accommodation and is not a GST-free supply of accommodation under subsection 38-25(4).*

92. *Although the community care services that are being supplied to Eleanor may be GST-free supplies of community care, the operator of the complex is not supplying accommodation to Eleanor in the course of supplying GST-free residential care services, under subsection 38-25(3).*

When is a supply of a serviced apartment in a retirement village GST-free?

93. A supply is GST-free under subsection 38-25(4A) if:
- it is a supply of residential premises, consisting of a serviced apartment in a retirement village, by way of sale, lease, hire, licence, or a supply of a right under a security to participate in a retirement village scheme (a share arrangement); and
 - the premises are supplied to a resident, who requires daily living activities assistance (item 2.1 services) or nursing services (item 3.8 services); and
 - the premises are supplied in connection with one or more supplies, or proposed supplies, to the person that is or will, be the recipient of a GST-free supply of care services under subsection 38-25(3).
94. For a supply of a serviced apartment to be GST-free under subsection 38-25(4A), the supply must be made to a resident who:
- requires daily living activities assistance or nursing services when the supply is made;¹⁹ and
 - is, or will be, receiving services that are GST-free supplies of residential care under subsection 38-25(3),²⁰

but the supplier of the services does not need to be the same entity that supplies the serviced apartment to the resident.

Example 13 – GST-free supply of a serviced apartment

95. *Barney has been assessed by a medical practitioner as requiring some item 2.1 and item 3.8 services and decides to move into a serviced apartment at the Babbling Brook Retirement Village (Babbling Brook).*

96. *Barney leases a serviced apartment from Bernard Co, the owner of Babbling Brook, for \$1200 per month. Baxter Co is the operator of Babbling Brook and, under a written agreement, supplies daily meals and a heavy laundry service to Barney, together with all of the item 2.1 and item 3.8 services that he requires.*

97. *The supply to Barney, by way of lease by Bernard Co, of the serviced apartment at Babbling Brook is GST-free under subsection 38-25(4A) because:*

- *Barney is a person who requires item 2.1 or item 3.8 services; and*

¹⁹ Paragraph 38-25(4A)(a).

²⁰ Paragraph 38-25(4A)(d).

- *The supply is made 'in connection with' the GST-free supplies of residential care services that Baxter Co is making to Barney under subsection 38-25(3).*

Date of effect

98. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

Transitional administrative arrangements

99. Issue 10 of the Retirement Villages Industry Partnership – issues register ('item 10 of the issues register') and the fact sheet – 'GST and serviced apartments in retirement villages':NAT 12761 ('the fact sheet') will be withdrawn when the final Ruling is issued.

100. For tax periods commencing prior to the date of issue of the final Ruling, the Commissioner will not seek to disturb the GST treatment of care services and accommodation supplied to residents of retirement villages and privately funded nursing homes and hostels where you have followed and applied the views set out in item 10 of the issues register or the fact sheet.

Commissioner of Taxation

14 December 2011

Appendix 1 – Explanation

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

Section 38-25 background

101. Section 38-25 addresses the GST treatment of services and accommodation provided to aged or disabled persons in a residential care facility.

102. Each of subsections 38-25(1), 38-25(2) and 38-25(3) refers to services listed in Schedule 1 to the Quality of Care Principles, or services *of a kind* covered by Schedule 1 to the Quality of Care Principles. Schedule 1 to the Quality of Care Principles specifies the services and care required to be provided to residents of residential care facilities that qualify for Commonwealth funding under the Aged Care Act.

103. Subsection 38-25(1) specifically addresses the GST treatment of services supplied by an approved provider, in a residential care facility that qualifies for government funding from the Commonwealth under the Aged Care Act.

104. Subsection 38-25(2) treats as GST-free the supply of services *of a kind* covered by Schedule 1 to the Quality of Care Principles to aged or disabled people when the supplier receives government funding from the Commonwealth state or territory in connection with the supply. Unlike subsection 38-25(1), the scope of subsection 38-25(2) extends to government funded programs outside the ambit the Aged Care Act, and specifically applies to disabled people.

105. In contrast to subsections 38-25(1) and 38-25(2), subsection 38-25(3) allows equivalent care services to be supplied GST-free to aged or disabled people through non-government funded residential care facilities. Subsection 38-25(3A) impacts upon the application of subsection 38-25(3) such that, in specified circumstances, residential care services can also be supplied GST-free to residents of serviced apartments in privately funded retirement villages.

106. Subsection 38-25(3) ensures that people in like care situations who are living in privately funded residential care facilities are treated similarly in their access to GST-free services as aged or disabled people living in Commonwealth funded residential aged-care services under the Aged Care Act.²¹

²¹ See the Explanatory Statement to the *GST-free Supply (Residential Care – Non-Government-Funded Supplier) Determination 2000*.

Approach adopted in this explanation

107. The GST treatment of services and accommodation supplied to residents of privately funded residential care facilities and residents of serviced apartments in retirement villages is explained in two main parts:

PART A – Services:

- The setting in which the services are provided:
 - when the requirement in paragraph 38-25(3)(a) that services be supplied in a ‘residential setting’ is satisfied, and how the construction of paragraph 38-25(3)(a) is impacted by subsections 38-25(3A), 38-25(3B) and 38-25(3C) about serviced apartments in retirement villages;
- The nature of the services supplied and how they are supplied:
 - when services satisfy paragraphs 38-25(3)(b) and 38-25(3)(c), including the requirements specified in the Aged Care Minister’s Determination made for the purposes of paragraph 38-25(3)(b); and

PART B – Accommodation:

- When a supply of accommodation is GST-free under subsection 38-25(4); and
- When a supply of a serviced apartment in a retirement village is GST-free under subsection 38-25(4A).

PART A – Services

108. A supply of services to a resident living in a privately funded residential facility is GST-free under subsection 38-25(3) if the following criteria are satisfied:

- the services are provided to one or more aged or disabled people in a residential setting **[paragraph 38-25(3)(a)]**; and
- the Aged Care Minister has determined in writing that the services are of a kind covered by the Quality of Care Principles **[paragraph 38-25(3)(b)]**; and
- the services include, and are only provided to people who require item 2.1 services or item 3.8 services **[paragraph 38-25(3)(c)]**.

When are services provided in a ‘residential setting’?

109. A supply of services to an aged or disabled person can only be a GST-free supply of residential care under subsection 38-25(3) if they are provided in a ‘residential setting’.

110. The expression ‘residential setting’ is not defined in the GST Act. The meaning of ‘residential setting’, as it appears in paragraph 38-25(3)(a) is informed by the context in which subsection 38-25(3) appears in the GST Act and, more specifically, the context in which it appears in Division 38. Subsection 38-25(3A) which is specifically concerned with residents of serviced apartments in a retirement village also impacts upon the application of subsection 38-25(3); and must be considered when determining whether or not services are provided in a ‘residential setting’ for the purposes of paragraph 38-25(3)(a).

111. The structure of Division 38 of the GST Act recognises the types of care that are separately provided for and defined in the Aged Care Act. In particular, section 38-25 is concerned with residential care, section 38-30 is concerned with community care, and section 38-35 is concerned with flexible care.

112. Acts in *pari materia* may be consulted when interpreting another Act. An Act in *pari materia* is an Act which deals with the same subject matter as the Act being interpreted.²² Therefore, it is appropriate to refer to the definitions of residential care, community care and flexible care in the Aged Care Act when interpreting relevant provisions of the GST Act concerned with the GST treatment of residential care, community care and flexible care.

113. In the Aged Care Act, residential care is defined to include personal care and/or nursing care provided to a person in a residential facility, and specifically excludes care provided to a person in their private home, and care provided in a hospital or a psychiatric facility.²³

114. Community care is defined in the Aged Care Act as a package of personal care services and other personal assistance provided to a person who is not being provided with residential care.²⁴ Community care services provide assistance to people to enable them to stay in their own homes rather than having to move into a nursing home.²⁵ Flexible care is care that addresses the needs of a care recipient in an alternative way to residential or community care.²⁶

²² Statutory Interpretation in Australia, Pearce and Geddes, 5th edition, paragraph 3.33 at page 77.

²³ Section 41-3 of the *Aged Care Act 1997*; paragraph 5.17 of the Explanatory Memorandum to the *A New Tax System (Goods and Services Tax) Act 1999*.

²⁴ Section 45-3 of the *Aged Care Act 1997*.

²⁵ Paragraph 5.22 of the Explanatory Memorandum to the *A New Tax System (Goods and Services Tax) Act 1999*.

²⁶ Section 49-3 of the *Aged Care Act 1997*.

115. Considering the nature of residential care and community care, as reflected by their respective definitions in the Aged Care Act, it is apparent that section 38-30 which is about community care addresses the GST treatment of personal care and assistance provided to a person in their own private home. Whereas section 38-25 which is about residential care is concerned with the GST treatment of personal care and nursing care provided to residents in both government and privately funded residential care facilities, rather than in a person's own private home.

116. The reference to the services, or services *of a kind*, listed in Schedule 1 to the Quality of Care Principles, in each of the subsections of section 38-25, also provides contextual support for the view that the application of section 38-25, including subsection 38-25(3), is confined to a supply of services in circumstances and in a setting equivalent to those described in the definition of residential care in the Aged Care Act.

117. The considerations set out at paragraphs 110 to 116 of this draft Ruling demonstrate that the meaning of 'residential setting' in paragraph 38-25(3)(a) is intended to be limited to residential care facilities where care services are provided, and does not take on its broadest meaning to include any setting in which a person resides, including their private home. This is subject to the application of subsection 38-25(3A) which is discussed at paragraphs 15 to 65 and 121 to 158 of this draft Ruling.

118. When considered in conjunction with the meaning of residential care in the Aged Care Act, which excludes care provided in a person's private home and care provided in a hospital or psychiatric facility, these contextual considerations also demonstrate that 'residential setting' in paragraph 38-25(3)(a) is intended to exclude settings in which care may be provided but which are medical in nature, such as a hospital or a psychiatric facility.

119. There is a variety of facilities that provide care and accommodation for aged or disabled residents that are not government funded, including privately funded nursing homes and aged-care hostels. Facilities that provide care services to aged or disabled people and that have the following characteristics are ordinarily considered to be a residential setting, rather than being a person's private home:

- residents do not have a proprietary interest in the property;
- residents can be moved at the operator's discretion under certain circumstances;
- premises are marketed and held out to the public as a place for care and accommodation, rather than just accommodation; and
- residents have limited rights compared to residents who lease or own their premises.

120. Determining whether a resident is residing in a residential setting, as opposed to their own home, requires a weighing up of all of the relevant facts and circumstances. Paragraph 119 of this draft ruling sets out some factors which indicate that a resident is residing in a residential setting rather than their own home. However, any one factor, in its own right, is not determinative.

Serviced apartments in a retirement village

121. An independent living unit or serviced apartment in a retirement village is not ordinarily considered to be a residential setting for the purposes of subsection 38-25(3) because:

- residents do not have the status of a guest or lodger; instead they have a proprietary interest in the property;
- residents have an exclusive right of occupancy of a specific unit or apartment;
- a resident has the right to refuse entry to others and the right to invite guests to stay overnight without seeking approval;
- residents are required to pay considerable entry contributions to secure their residency in a specific apartment;
- residents may be entitled to share in the growth in the capital value of their unit or apartment;
- premises are marketed and held out to the public as a type of residential lifestyle rather than as a facility that provides residential care.

122. Services provided to a resident of an independent living unit or serviced apartment in a retirement village would not usually be considered to be provided in a 'residential setting' for the purposes of paragraph 38-25(3)(a). However, subsection 38-25(3A) expands the application of paragraph 38-25(3)(a) with respect to 'retirement villages'.

123. Subsection 38-25(3A) specifically allows for services provided to a resident of a 'retirement village' to be taken, for the purposes of paragraph 38-25(3)(a), to be provided in a residential setting if, and only if (emphasis added):

- he or she is a resident of a 'serviced apartment' in the retirement village [paragraph 38-25(3A)(a)]; and
- there is in force a written agreement under which the operator of the retirement village provides daily meals and heavy laundry services to all of the residents of the apartment [paragraph 38-25(3A)(b)].

124. For services to be taken to be provided in a 'residential setting' under subsection 38-25(3A), the services must be supplied to a resident of a 'serviced apartment' in a 'retirement village'. The terms 'retirement village' and 'serviced apartment' are both defined in section 195-1.

125. The words 'if and only if' as they are used in subsection 38-25(3A) mean services provided to a resident of a retirement village, as defined in section 195-1, are not provided in a 'residential setting', for the purposes of paragraph 38-25(3)(a), unless the resident resides in a 'serviced apartment' in the 'retirement village'. That is, services supplied to a resident of a retirement village will only be provided in a residential setting if the resident resides in a serviced apartment in the retirement village. For example, services provided to residents of independent living units in the 'retirement village' that are not serviced apartments are not taken to be provided in a 'residential setting'.

Retirement village

126. A retirement village is defined in section 195-1 of the GST Act as residential premises²⁷ in which:

- accommodation is intended for people who are at least 55 years old, or who are a certain age that is more than 55 years [paragraph (b)]; and
- there are communal facilities for use by residents of the premises [paragraph (c)].

However, a retirement village is not:

- premises used, or intended to be used, for the provision of residential care (within the meaning of the Aged Care Act 1997) by an approved provider as defined in that Act [paragraph (d)]; or
- commercial residential premises [paragraph (e)].

127. Residential complexes comprising units that are subject to the retirement village legislation applicable in the state or territory where they are located are residential premises²⁸ that satisfy paragraph (a) of the definition of retirement village in section 195-1.

128. Whether accommodation in those residential premises is intended for persons at least 55 years of age, or a specified age greater than 55, as required by paragraph (b) of the definition of retirement village in section 195-1, is evidenced by the entry requirements of a particular complex.

²⁷ Paragraph (a) of the definition of retirement village in section 195-1.

²⁸ See paragraph 258 of Draft Goods and Services Tax Ruling 2011/D2, Goods and services tax: residential premises and commercial residential premises (GSTR 2011/D2).

129. The views and explanation set out in GSTR 2007/1 must be considered when determining whether a particular retirement village premises includes communal facilities as required by paragraph (c) of the definition of retirement village in section 195-1. As set out at paragraph 19 of GSTR 2007/1, retirement village residential premises include communal facilities when:

- the communal facilities are physical; and
- the communal facilities are within, attached or connected to the residential building(s), or constructed on the surrounding land that actually or substantially contributes to the enjoyment of the building(s) or to the fulfilment of its purpose as a residence (although communal facilities need not themselves be residential premises).

130. Communal facilities include the following types of facilities located within a retirement village complex: a library, a dining room, a recreation room, a chapel, a gymnasium, and outdoor recreational and leisure facilities such as a tennis court, a swimming pool or a barbeque area.²⁹

131. In a retirement village context, communal facilities do not include reception areas, pathways, gardens, driveways and landscaping. Any incidental use of such facilities for a group activity would not qualify them as communal facilities. Facilities that are for the resident's own use in their individual units or apartments, such as a television antenna, internet connections or call button facilities are also not communal facilities.³⁰

132. Paragraph (d) of the definition of retirement village in section 195-1 excludes a facility that is used, or intended to be used, to provide residential care as defined in section 41-3 of the Aged Care Act by an approved provider. This includes residential care facilities that are managed by an approved provider who supplies care services to the residents as a lessee of the premises under a lease granted by the owner of the premises.

133. Premises that are commercial residential premises³¹ are also excluded from the meaning of retirement village by paragraph (e) of the definition of retirement village in section 195-1. Retirement villages that are covered by the retirement village legislation applicable in the state or territory where the retirement village is located are not commercial residential premises³² and are not excluded from the definition of retirement village in section 195-1.

²⁹ See paragraph 23 of GSTR 2007/1.

³⁰ See paragraphs 25 and 26 of GSTR 2007/1.

³¹ The term 'commercial residential premises' is defined in section 195-1 of the GST Act. The meaning of 'commercial residential premises' is considered in GSTR 2011/D2.

³² See paragraph 260 of GSTR 2011/D2.

Serviced apartment

134. An apartment is a 'serviced apartment' in relation to a retirement village if:

- the apartment is designed to be occupied by aged residents who require either or both of the following:
 - item 2.1 services;
 - item 3.8 services [paragraph (a) of the definition of serviced apartment in section 195-1]; and
- at least one responsible person is continuously:
 - on call to render emergency assistance to the residents of the apartment; and
 - in reasonable proximity to the apartment [paragraph (b)]; and
- the apartment is part of a single complex of apartments to which the above dot points apply, and is accessible from a common corridor linking the apartment to the other apartments in the complex [paragraph (c)]; and
- there is in the retirement village a communal dining facility that is available for use by the residents of apartments in the retirement village to which all of the dot points above apply [paragraph (d)].

However, a detached house, row house, terrace house, town house or villa unit is not a serviced apartment (section 195-1).

135. The definition of 'serviced apartment' in section 195-1 specifies several physical and other characteristics that an apartment must exhibit in order for it to be a 'serviced apartment' for the purposes of subsection 38-25(3A). An apartment must satisfy all of the requirements specified in the definition of 'serviced apartment' in section 195-1 to be a 'serviced apartment'.

Physical characteristics of serviced apartments

136. Paragraph (a) of the definition of serviced apartment in section 195-1 requires the apartment to be designed so that it can be occupied by aged residents who require the full range of daily living activities assistance or nursing services set out in Schedule 1 of the Quality of Care Principles, even if an individual resident does not require all of the services.

137. The Explanatory Memorandum to the Bill³³ (‘the Explanatory Memorandum’) that amended the GST legislation to incorporate section 38-25(3A), and the definition of ‘serviced apartment’ in section 195-1, distinguishes serviced apartments in a retirement village from the other category of accommodation commonly provided in retirement villages; that is, independent living units.

138. Paragraph 1.25 of the Explanatory Memorandum explains that independent living units are designed for occupants who are capable of living independently without the need for care services or other regular services including the provision of meals and heavy laundry by the retirement village operators. Whereas paragraph 1.26 of the Explanatory Memorandum explains that serviced apartments are designed for aged residents with a level of frailty, disability or medical condition that requires they receive a range of services to enable them to continue to reside in the retirement village.

139. Serviced apartments may share many features and characteristics with independent living units. Any one factor, on its own, may not identify an apartment as one designed for residents that require a broad range of daily living activities assistance and nursing services, as required by paragraph (a) of the definition of serviced apartment in section 195-1. However, there are some characteristics commonly exhibited by serviced apartments which are consistent with the apartments being designed for that purpose.

140. For example, serviced apartments are generally smaller in physical layout than independent living units, being either a one room studio style apartment, or an apartment comprising one or two bedrooms with a separate living area. Serviced apartments may not be designed for self-catering. For example, they may only contain limited cooking facilities, such as a small kitchenette with a microwave and bar fridge.

141. Physical characteristics such as the presence of a laundry, carport or garage, kitchen with cooking facilities, and a private garden or courtyard may distinguish independent living units from serviced apartments. These features identify independent living units as being premises designed for persons who are capable of living independently and who do not require daily living assistance and nursing services.

142. Under paragraph (c) of the definition of serviced apartment in section 195-1, an apartment in a retirement village is not a serviced apartment unless it is part of a single complex of apartments and is accessible from a common corridor linking it to the other apartments in the complex. As explained in paragraph 1.31 of the Explanatory Memorandum, this requirement reflects the fact that serviced apartment accommodation is generally higher density accommodation than independent living units.

³³ Tax Laws Amendment (Retirement Villages) Bill 2004.

143. The term ‘corridor’ is not defined in the GST Act. Paragraph (c) of the definition of serviced apartment in section 195-1 refers to a ‘complex of apartments’ and ‘a common corridor linking an apartment to the other apartments in the complex’. In this context, the ordinary meaning of ‘corridor’ relevantly includes a passage into which several rooms or apartments open,³⁴ or a long passage from which doors lead into rooms.³⁵

144. Section 195-1 excludes dwellings such as detached houses, row houses, terrace houses, townhouses and villa units from being serviced apartments for the purposes of subsection 38-25(3A). This exclusion is also reflective of the higher density arrangements for serviced apartments.

145. Having regard to the matters discussed in paragraphs 142 to 144 of this draft Ruling, a common corridor referred to in paragraph (c) of the definition of serviced apartment in section 195-1 is a passage in a building that connects an apartment to other apartments in that building. A common corridor, in the context of paragraph (c) of the definition of serviced apartment in section 195-1, does not include covered or uncovered passageways that connect an apartment to another apartment that are outside the building. It also does not include pathways and roads, including pathways and roads connecting groups of apartments with other groups of apartments, within the retirement village.

146. One retirement village may comprise more than one complex of apartments. Paragraph (c) of the definition of serviced apartment in section 195-1 only requires the apartments in a particular complex to be accessible from a common corridor and does not require each individual complex of apartments to also be connected by a common corridor.

Other characteristics of serviced apartments

147. The physical characteristics of an apartment, on their own, are not determinative of whether an apartment is a serviced apartment in a retirement village for the purposes of section 38-25(3A). The definition of serviced apartments in section 195-1 also requires that:

- at least one responsible person is continuously on call to provide emergency assistance to the residents of the apartment, and is in reasonable proximity to the apartment [paragraph (b)]; and
- there is a communal dining facility in the retirement village that is available for use by the residents [paragraph (d)].

³⁴ *The Macquarie Dictionary*, [Multimedia], version 5.0.0, 1/10/01

³⁵ *The Concise Oxford English Dictionary*, Twelfth edition, Oxford University Press, 2008. *Oxford Reference Online*.

148. The requirement specified in paragraph (b) of the definition of serviced apartment in section 195-1 requires a person to be available on-site to provide first aid or arrange other mobility, nursing or medical assistance to residents of serviced apartments. This requirement is consistent with the fact that serviced apartments are designed for residents who require daily living activities assistance or nursing services.

149. The provision of a personal medical emergency call device that alerts an off-site external service provider of a potential medical emergency when activated by the resident is not sufficient to satisfy paragraph (b) of the definition of serviced apartment in section 195-1. However, an emergency call device which alerts at least one responsible person who is on-site within the precincts of the retirement village, but who may be an external service provider, is sufficient to satisfy this requirement. Paragraph (b) of the definition of serviced apartment in section 195-1 is also met where at least one responsible person is shared between two adjacent retirement villages and such a person is on-site at one of those retirement villages at any time.

150. As reflected by paragraph (d) of the definition of 'serviced apartment' in section 195-1, residents of the apartments must also have access to a communal dining facility that is available for use by them, and is located within the retirement village in which the apartment is situated. The communal dining facility does not have to be connected to the complex of serviced apartments.

Provision of daily meals and heavy laundry to all residents of a serviced apartment

151. For services provided to a resident of a 'serviced apartment' in a 'retirement village' to be taken to be provided in a residential setting for the purposes of paragraph 38-25(3)(a), the operator of the retirement village must, under a written agreement, provide daily meals and heavy laundry services to all of the residents of the apartment.³⁶

152. To satisfy the requirement for the provision of daily meals, there needs to be an arrangement in place where the retirement village operator provides all of a resident's daily meal requirements. Ordinarily, this includes the provision of breakfast (or ingredients for the residents to prepare their own breakfast), lunch and dinner to all of the residents of a serviced apartment. This requirement is not satisfied if the residents are supplied with breakfast each day but cook their own lunch and dinner.

153. In contrast, the requirement that daily meals be provided is satisfied even if a resident is absent from the retirement village on a particular day and receives their meals elsewhere. For example, the resident dines at a relative's home.

³⁶ Paragraph 38-25(3A)(b).

154. Paragraph 38-25(3A)(b) requires that there is a written agreement in force under which the operator of the retirement village provides the specified daily meals and heavy laundry services. In *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Aust) Pty Ltd*³⁷ ('Sara Lee') it was stated:

'the words 'under a contract' direct attention to the source of the obligation which was performed by the transfer of assets which constituted the relevant disposal.'³⁸

155. Similarly in *Chan v Cresdon Pty Ltd*³⁹ (*Chan and Cresdon*), and quoted with authority in *Asciano Services Pty Ltd v Chief Commissioner of State Revenue*⁴⁰ ('Asciano'), it was said that:

'the word 'under' appearing in a covenant to pay rent 'under this lease' referred to an obligation created by, in accordance with, pursuant to or under the authority of the lease.'⁴¹

156. In addition, in *Asciano* it was considered that, in its ordinary meaning, 'by which' identifies the means by which or owing to which a certain result or effect is obtained. That is, the agreement must be the source of the rights rather than there being merely a causal connection between the agreement and the rights.⁴²

157. Having regard to the decisions of the High Court in *Sara Lee*, *Chan and Cresdon*, and *Asciano*, we consider that for the purposes of paragraph 38-25(3A)(b), there must be a written agreement in place which obligates the operator of the retirement village to provide daily meals and heavy laundry services to all residents of an apartment. A specific provision in an accommodation agreement or residence contract that obligates the operator to provide these services to the resident satisfies this requirement. Paragraph 38-25(3A)(b) is satisfied if under the written agreement an external provider provides the daily meals and heavy laundry services to residents as an agent, or as a subcontractor, of the operator.

158. However, a general provision in an accommodation agreement or a residence contract stating that meals and heavy laundry services are available should the residents require them, or request them, does not satisfy the written agreement requirement in paragraph 38-25(3A)(b). In the absence of a more specific provision or separate written agreement creating an ongoing obligation to provide meals and heavy laundry services, paragraph 38-25(3A)(b) is not satisfied. Services supplied to a resident of a serviced apartment in a retirement village, in those circumstances, are not taken to be provided in a residential setting for the purposes of paragraph 38-25(3)(a).

³⁷ (2000) 201 CLR 520; 44 ATR 370; 74 ALJR 1094.

³⁸ [2011] HCA 35 at [42], per Gleeson CJ, Gaudron, McHugh and Hayne JJ.

³⁹ (1989) 168 CLR 242; 89 ALR 522; 64 ALJR 110

⁴⁰ (2008) 235 CLR 602; (2008) 249 ALR 429; (2008) 82 ALJR 1491; (2008) 70 ATR 1; [2008] ATC 20-047

⁴¹ [1989] HCA 63 at [14], per Mason CJ, Brennan, Deane and McHugh JJ.

⁴² [2008] HCA 46 at [32] and [36], per Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

Subsections 38-25(3B) and (3C) – Aged Care Minister's Determination about the level of services required by residents of 'serviced apartments'

159. Subsection 38-25(3B) allows the Aged Care Minister to determine, in writing, the level of services that a resident of a serviced apartment in a retirement village must require in order for those services to be taken to be provided in a residential setting for the purposes of paragraph 38-25(3)(a). Subsection 38-25(3B) also allows the Aged Care Minister to determine, in writing, the way in which the level of care services required by residents of serviced apartments in retirement villages are to be assessed.

160. At the time of issue of this draft Ruling, the Minister has not made a Determination under subsection 38-25(3B). In the absence of a determination made by the Aged Care Minister under subsection 38-25(3B), services provided to a resident of a 'serviced apartment' in a 'retirement village' are GST-free if they satisfy the requirements of paragraph 38-25(3A)(b) and subsection 38-25(3). In the absence of a subsection 38-25(3B) determination, subsection 38-25(3C) and paragraph 38-25(4A)(c) have no practical application.

When are services that are being provided in a 'residential setting' GST-free supplies of residential care?

161. Once it is established that services are being provided to one or more aged or disabled people in a residential setting, the supply of these services is GST-free if they satisfy the requirements specified in paragraphs 38-25(3)(b) and 38-25(3)(c).

162. Paragraph 38-25(3)(b) requires that the services must be determined by the Aged Care Minister⁴³ ('the Minister') to be of a kind covered by Schedule 1 to the Quality of Care Principles.⁴⁴ The determination that the Minister has made for the purposes of paragraph 38-25(3)(b) is the *GST-free Supply (Residential Care – Non-Government-Funded Supplier) Determination 2000* ('the Minister's Determination').

163. Schedule 1 of the Minister's Determination lists all the types of services that are able to be provided GST-free to eligible residents. The services listed in Schedule 1 to the Minister's Determination reflect the same range of services as those in Schedule 1 to the Quality of Care Principles under the Aged Care Act, and which are GST-free to residents of Commonwealth funded residential aged care services.

⁴³ The Aged Care Minister is defined in section 195-1 of the GST Act to mean the Minister administering the Aged Care Act.

⁴⁴ The Quality of Care Principles are defined in section 195-1 of the GST Act to mean the principles made under section 96 of the Aged Care Act.

Services are provided to residents who require item 2.1 or item 3.8 services and who have a continuing need for those services

164. Paragraph 38-25(3)(c) provides that the services must be provided to a care recipient who requires item 2.1⁴⁵ or item 3.8 services.⁴⁶ This requirement is also reinforced in the Minister's Determination which specifies particular circumstances in which the services listed in Schedule 1 to the Minister's Determination must be supplied for them to be GST-free. Subsection 5(a) of the Minister's Determination requires a care recipient to have a continuing need for item 2.1 services or item 3.8 services.

165. It is a question of fact whether a resident requires, and has a continuing need for, item 2.1 services or item 3.8 services. It is not necessary for the resident to require, and to have a continuing need, for all of the services under item 2.1 or 3.8 services. However, a resident must have a currently, existing need for the services that is ongoing, rather than isolated, or sporadic.

166. In determining whether this requirement is satisfied, the Commissioner will consider objective evidence of a resident's requirement and continuing need for item 2.1 or item 3.8 services. This objective evidence may include one or more of the following factors:

- a report of an assessment of a resident's care requirements by a qualified medical practitioner;
- a report of an assessment of a resident's care requirements by a registered nurse, a registered physiotherapist, or a registered occupational therapist;
- a report of an assessment of a resident's care requirements by a team of health professionals that includes at least one of the registered health professionals listed in the two previous dot points.

A package of services and accommodation under a written agreement

167. For services to be able to be provided GST-free under subsection 38-25(3), subsection 5(b) of the Minister's Determination also requires the services to be supplied under a written agreement as a package made up of:

- daily living assistance (item 2.1 services) or nursing services (item 3.8 services) listed in Schedule 1 of the Determination; and
- any other Schedule 1 services needed by the resident; and
- accommodation.

⁴⁵ Refer to sub-paragraph 38-25(3)(c)(i) of the GST Act.

⁴⁶ Refer to sub-paragraph 38-25(3)(c)(ii) of the GST Act.

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168. Subsection 5(c) of the Minister's determination also requires the charges for both the services and the accommodation be payable to the same entity.

169. An amendment to the GST legislation⁴⁷ alters the way in which subsections 5(b) and 5(c) of the Minister's Determination apply to residents of 'serviced apartments' in 'retirement villages', in specified circumstances. The requirement that accommodation be included in a package of services, and the requirement that charges for the services and accommodation be payable to the same entity, does not apply where the serviced apartment is supplied to the resident in the circumstances contemplated by subsection 38-25(4A)⁴⁸ (that is, by way of lease, hire or licence; or by sale; or by acquisition of certain securities).

170. However, to satisfy the paragraph 38-25(3)(b) and the requirements of the Minister's Determination, the services supplied to a resident of a 'serviced apartment' in a 'retirement village' are required to be supplied under a written agreement in accordance with subsection 5(b) of the Minister's Determination and all of the charges for the package of services must be payable to the same entity as required by subsection 5(c) of the Minister's Determination.

171. Where the supplier, as principal, contracts with a third party for the provision of some items in the package, the requirement that the package be supplied by the one entity is met when the third party is the supplier's agent, or a subcontractor of the supplier, and the charges are payable to the principal.⁴⁹

172. However, there are circumstances where the supplier merely facilitates and/or arranges the provision of some part of the package by a third party, and the third party is making supplies in its own right directly to the care recipient. In these cases, a separate package of supplies is made by each entity, and neither of the suppliers makes a GST-free supply of residential care under subsection 38-25(3).

173. The written agreement required under subsection 5(b) of the Minister's Determination must stipulate the specific package of services that will be provided to the resident, and those services must include some item 2.1 services or item 3.8 services. The supplier must be obligated to supply the particular services set out in the agreement. The analysis set out at paragraphs 154 to 158 of this draft Ruling is also applicable to written agreements required under subsection 5(b) of the Minister's Determination. Therefore, a general provision in an accommodation agreement, lease, licence, or hire agreement merely stating that item 2.1 and item 3.8 services can be provided to the resident if they require them is not sufficient to satisfy subsection 5(b) of the Minister's Determination.

⁴⁷ See item 18 of Schedule 1 to *Tax Laws Amendment (Retirement Villages) Act 2004*.

⁴⁸ The operation of subsection 38-25(4A) is discussed at paragraphs 93 to 97 and paragraphs 182 to 185 of this draft Ruling.

⁴⁹ Refer to Goods and Services Tax Ruling GSTR 2000/37 Goods and services tax: agency relationships and the application of the law.

PART B - Accommodation

When is accommodation in a privately funded nursing home or aged-care hostel GST-free?

174. Under subsection 38-25(4)⁵⁰ a supply of accommodation is GST-free if it is made to a person *in the course of* making a supply to the person that is GST-free under subsection 38-25(1), 38-25(2) or 38-25(3). Subsection 38-25(4) only has application if services that are GST-free under subsections 38-25(1), 38-25(2) or 38-25(3) are being supplied.

175. In *Hatzimanolis v ANI Corporation*, the High Court considered the meaning of 'in the course of' in a workers compensation context. In particular, the Court considered whether an incident has occurred in a person's employment. It was held that in determining whether something has occurred in the course of a person's employment regard must be had to the general nature, terms and circumstances of the employment.⁵¹

176. Similarly, the general nature, terms and circumstances of a supply of accommodation must be considered to determine whether it is supplied in the course of making a supply to a person that is GST-free under subsection 38-25(1), 38-25(2) or 38-25(3). The link between care services and the related accommodation is fundamental to the concept of residential care, and for a supply of accommodation to be GST-free, the care services and the accommodation must be supplied at the same time and the supply of accommodation must facilitate the supply of the care services.

177. In other words, the aged or disabled person has moved into the accommodation in order to receive the care, and the accommodation is provided 'in the course of' providing that care. The requirement that accommodation be provided 'in the course of' making a supply of services is also reinforced by the requirement in the Minister's Determination that accommodation be included in a package of services supplied to a resident.⁵²

178. If a resident enters a privately funded facility only for the accommodation without the provision of GST-free residential care services that satisfy the requirements of subsection 38-25(3), the supply of accommodation is not GST-free under subsection 38-25(4).

⁵⁰ Supplies of accommodation in serviced apartments, in particular circumstances, are addressed in subsection 38-25(4A). See paragraphs 93 to 97 and paragraphs 182 to 185 of this draft Ruling.

⁵¹ (1992) 173 CLR 473 at 484; 106 ALR 611 at 618; 66 ALJR 365 at 369.

⁵² See paragraphs 167 to 173 of this draft Ruling.

179. The primary focus of some premises is to provide a type of residential lifestyle accommodation for older persons, rather than to provide residential care services. Some services such as basic first aid and social activities may be provided for some or all of the residents if, and when, they require them. However, the level of services is such that it cannot be said that the accommodation is being supplied 'in the course of' supplying those services. In these circumstances, the accommodation does not facilitate a supply of care services required by residents.

180. In some instances, an operator of a private facility may facilitate or arrange the provision of the services that a resident requires through a community care package offered by an external provider. In these cases, although the external community care provider may be making a GST-free supply of community care to the resident under section 38-30, the resident's accommodation at the facility is not GST-free under subsection 38-25(4). The accommodation is not being supplied in the course of supplying services that are GST-free under subsections 38-25(1), 38-25(2) or 38-25(3).⁵³

Temporary absences

181. GST-free services and associated accommodation are considered to continue to be supplied as a package during short, temporary periods of absence. For example, a resident of a residential care facility may be temporarily absent for a period whilst they are receiving medical treatment in a hospital, or a resident of a serviced apartment in a retirement village may stay overnight at a relative's house.

When is a supply of a serviced apartment in a retirement village GST-free?

182. Subsection 38-25(4A) specifically relates to a supply of serviced apartments in retirement villages.⁵⁴ A supply is GST-free under subsection 38-25(4A) if:

- it is a supply of residential premises, consisting of a serviced apartment in a retirement village, by way of sale, lease, hire, licence, or a supply of a right under a security to participate in a retirement village scheme (a share arrangement) [paragraph 38-25(4A)(b)]; and

⁵³ The requirements specified in paragraph 5(b) and 5(c) of the Minister's Determination, for the purposes of subsection 38-25(3)(b) would also not be satisfied in these circumstances.

⁵⁴ 'Serviced apartment' and 'retirement village' are defined terms for the purposes of the GST Act, as discussed at paragraphs 18 to 50 and 126 to 150 of this draft Ruling.

- the premises are supplied to a resident, who requires daily living activities assistance (item 2.1 services) or nursing services (item 3.8 services) [paragraph 38-25(4A)(a)]; and
- the premises are supplied in connection with one or more supplies of care services, or proposed supplies of care services, to the person that are, or will, be GST-free under subsection 38-25(3) [paragraph 38-25(4A)(d)].

183. The term '*... in connection with one or more supplies...*' is used in paragraph 38-25(4A)(d) as opposed to the term '*... in the course of making a supply...*' used in subsection 38-25(4). This confirms that under subsection 38-25(4A) a one-off supply of a serviced apartment (for example, a sale of real property) in a retirement village can be GST-free. Subsection 38-25(4), on the other hand, requires the supply of accommodation to be made contemporaneously (or continuously) in conjunction with the supply of the care services.

184. The words 'in connection with' have a wide meaning but are to be interpreted in the context of the statute in which they are contained.⁵⁵ Having regard for the context in which subsection 38-25(4A) appears in section 38-25 which is about residential care, and the link between care services and the related accommodation that is fundamental to the concept of residential care, a supply of a serviced apartment in a retirement village, of a kind contemplated by subsection 38-25(4A) is 'in connection with' a GST-free supply of care services under subsection 38-25(3) if it is supplied to a resident in order for them to access and receive those care services.

185. For a supply of a serviced apartment to be GST-free under subsection 38-25(4A), the supply must be made to a person of a kind referred to in paragraph 38-25(3), that is a person who requires item 2.1 or item 3.8 services. The resident must also be receiving, or will receive, care services that are GST-free under subsection 38-25(3). However, the supplier of the services does not need to be the same entity that supplies the serviced apartment to the resident.

⁵⁵ *Hatfield v Health Insurance Commission* (1987) 15 FCR 487 at 491; 77 ALR 103 at 106-107.

Appendix 2 – Your comments

186. You are invited to comment on this draft Ruling. Please forward your comments to the contact officer by the due date.

187. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 10 February 2012

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Appendix 3 – Detailed contents list

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Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

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GSTR 2011/1; GSTR 2011/D2

Subject references:

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