

## GST & retirement - a guide

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The topic of GST-free residential care services and accommodation has been the subject of various *ATO Interpretative Decisions* and more recently, a new draft GST ruling. However, overall, the application of the provisions on retirement accommodation and services, and GST remain confusing.

In this publication, we provide a guide on the GST-free status of supplies of residential care services and accommodation. In particular, we set out an overview of each of the different elements for GST-free status in the legislation and examine where each of the Commissioner's *Interpretative Decisions* and the new draft GST ruling fit into the overall scheme on retirement and GST.

### Overview

For commercial operators of retirement accommodation to supply GST-free residential care services and accommodation, various conditions need to be met. In particular, the conditions that need to be met depend on whether the accommodation is provided in a residential setting (that is **not** a retirement village) or in a residential setting that is retirement village (section 38-25(3) and (4) of the GST Act (i.e. the *A New Tax System (Goods and Services Tax) Act 1999* (Cth)). The conditions that need to be met are summarised in the table below:

Context	Conditions for GST-free treatment	References (GST Act)
Residential	3 conditions (all 3 of which must be met): 1. services are provided to one or more aged or disabled people in a residential setting;	Section 38-25(3) and (4)

setting	disabled people in a <b>residential setting</b> ; 2. the services provided are covered by the <b>Quality of Care Principles</b> ; and 3. the services include, and are only provided to, individuals who require <b>care services</b> such as <b>daily living activities assistance</b> or <b>nursing services</b> .	
Retirement village	5 conditions (all 5 of which must be met): 1. the services are provided in a <b>retirement village</b> ; 2. the individuals reside in a <b>serviced apartment</b> in the retirement village; 3. the operator provides <b>daily meals</b> and <b>heavy laundry services</b> to all residents under a written agreement; 4. condition 2 of the conditions for a residential setting (see above); and 5. condition 3 of the conditions for a residential setting (see above).  However, section 38-25(3B) must not apply to deny GST-free treatment.	Section 38-25(3A) and (3B)

The terms shown in bold above, and their elements, are examined in detail below.

## Residential setting

### *Condition 1: What is a residential setting?*

The table below outlines the main principles which have developed in relation to the requirement for a “residential setting”.

Principle	Comments	Reference
Meaning of “residential setting”	The expression “residential setting” is <b>not</b> defined in the GST Act, but has a meaning similar to that of “residential facility” in the <i>Aged Care Act 1997</i> (Cth). That is, accommodation that includes: <ul style="list-style-type: none"> <li>▪ appropriate staffing to meet the nursing and personal care needs of individuals;</li> <li>▪ meals and cleaning services; and</li> </ul>	ATO <i>Interpretative Decision</i> ID 2001/664

	<ul style="list-style-type: none"> <li>▪ furnishing, furniture and equipment for the provision of care and accommodation.</li> </ul> <p>Publicly funded residential care residences, such as nursing care homes, are examples of residential settings.</p>	
What is not a residential setting	<ul style="list-style-type: none"> <li>▪ private homes and residences; and</li> <li>▪ independent living units. Importantly, it is irrelevant whether the units are owned or leased, part of a specific complex or in the community at large.</li> </ul>	<p><i>ATO Interpretative Decision ID 2001/664</i></p>

***Condition 2: Services must be covered by Quality of Care Principles***

The Quality of Care Principles are those principles found in section 96.1 of the *Aged Care Act*. Also, the services provided must include certain care services (see condition 3 below).

***Condition 3: Services include daily living activities assistance or nursing services***

The following table summaries what daily living activities assistance of nursing services consist of:

Type of care service	Comments	Reference
Daily living care assistance	<p>Includes assistance with:</p> <ul style="list-style-type: none"> <li>▪ bathing;</li> <li>▪ hygiene;</li> <li>▪ walking;</li> <li>▪ feeding; or</li> <li>▪ communication.</li> </ul>	<p>Explanatory Memorandum to the <i>Tax Laws Amendment (Retirement Villages) Act 2004</i> (Cth), paragraph 1.7</p>
Nursing services	<p>Includes the following services:</p> <ul style="list-style-type: none"> <li>▪ pain management;</li> <li>▪ special feeding;</li> <li>▪ tube management; or</li> <li>▪ oxygen therapy.</li> </ul>	

For condition 3 to be met, either of the above 2 types of services need to be provided in the residential setting (or retirement village). That is, either, but not both, daily living care assistance services or nursing services need to be provided.

## Retirement village

### ***Condition 1: What is a retirement village?***

Premises are a retirement village if **all** of the following 3 conditions are met:

Condition	GST Act (section 195-1)
A	The premises are residential premises
B	Accommodation is <b>intended</b> for persons 55 years or over
C	Premises include communal facilities for use by residents

The ATO's recently released *Draft GST Ruling GSTR 2006/D3* addresses the following issues (paragraph 1):

- what are the premises of a retirement village;
- when do premises include communal facilities; and
- when are communal facilities for use by the residents of the premises.

At this stage, the draft ruling represents only the preliminary views of the ATO and cannot yet be relied upon as binding on the Commissioner. However, the draft ruling does set out the considered views of the ATO. Also, the ruling is expected to be finalised on or about February 2007.

#### **A. Residential premises**

For premises to form part of a retirement village, the premises must be "residential premises". "Residential premises" refer to land or a building that:

- is occupied as a residence or for residential accommodation; or
- is intended to be occupied, and is capable of being occupied as a residence or for residential accommodation (section 195-1 of the GST Act).

Serviced apartments and independent living units are considered residential premises (paragraphs 29). However, commercial residential premises, and premises used for the provision of residential care, are **not** considered residential premises (paragraph 14).

Residential premises of a retirement village include (paragraph 17):

- the land on which the residential building is constructed; **and**
- any surrounding land that actually or substantially contributes to the enjoyment of the building or to the fulfilment of its purposes as a residence (whether or not on separate legal titles).

#### **B. Accommodation in premises**

Section 195-1 of the GST Act requires an **intention** that the accommodation be for individuals who are 55 or over. Unfortunately, GSTR 2006/D3 does not examine the issue of what happens if the **actual use** of premises is different to their intended use. That is, it would appear that you can have a retirement village if there is an **intention** that the accommodation be provided to persons who are at least 55, even if the **actual use** of the accommodation is by persons under 55.

On a strict view of the GST Act, it would appear that even if the residence actually accommodates persons **under** 55, it may still be a retirement village provided that that accommodation is **intended** for persons over 55. For completeness, GSTR 2006/D3 should address this issue even though at present it does not do so.

#### **C. Communal facilities**

There is no definition of “communal facilities” in the GST Act and the expression would therefore seem to take on its ordinary meaning (paragraph 30). The requirements for facilities to be considered “communal facilities” are that (paragraphs 18, 34 and 37):

- the facilities be physical;
- the facilities be within, attached to or connected to the residential buildings, or constructed on the surrounding land that actually or substantially contributes to the enjoyment of the building or to the fulfilment of its purposes as a residence; and
- the facilities' primary purpose, determined objectively, be for communal use by residents.

The following table sets out examples of the Commissioner's view on what constitutes communal facilities:

Facility	Communal facility?	Comments
Library	/	Primary purpose is for communal use. For a facility to be a communal facility, though, it must be within, attached to, or connected to the residential buildings, or constructed on the surrounding land that actually or substantially contributes to the enjoyment of the building or to the fulfilment of its purposes as a residence (paragraphs 19 and 36).
Dining room	/	
Recreation room	/	
Swimming pool	/	
Barbeque area	/	
Pathways	X	Primary purpose is <b>not</b> for communal use. Although they may be used by all residents, the use is only incidental (paragraphs 19 and 38).
Gardens	X	
Driveways	X	
Landscaping	X	
Television antenna	X	This is an example of a facility for the resident's own use, rather than for communal use (paragraphs 20 and 39).
Services (e.g. maintenance, administration, transport and social activities)	x	Services cannot be communal facilities as they are not physical (paragraphs 21 and 35).

The following table examines some common issues on communal facilities:

Question	Answer	Comments
How many communal facilities are necessary?	At least one	There needs to be at least one communal facility to satisfy the retirement village requirement (paragraphs 22 and 40).
How do you determine whether a facility's primary purpose is for communal use by residents?	By applying an objective test	Applying an objective test, the Commissioner considers relevant factors, such as whether the communal facility is in a practical sense, accessible to, and able to be used by, residents (paragraph 41).
Can non-residents also use the communal facilities?	Yes	Residents need not have exclusive rights to the communal facilities (paragraphs 23 and 42).
Do residents have to use the communal facilities?	No	Provided communal facilities are available for use, there is no requirement for them to actually be used by residents (paragraphs 24 and 43).
Do off-site facilities count as communal facilities (for example, a community hall)?	No	Even if the off-site facility is close-by, this requirement is not met (paragraphs 25 and 45).
Do planned communal facilities count as communal facilities?	No	The facilities must be in actual use or made available for use (i.e. they must be in existence) (paragraphs 26 and 47).
What happens if communal facilities become temporarily unavailable?	Requirement still met	Provided the facilities were already in existence and they are temporarily unavailable due to maintenance or improvement, the requirement is still met (paragraph 44).

## Unresolved issues

It would appear that GSTR 2006/D3 has left a number of issues unresolved in relation to retirement villages. In particular, the draft ruling does **not** address:

- whether facilities such as lavatories, laundries, lounges, courtyards and parking spaces are communal facilities. The draft ruling cites a number of cases concerning such facilities, but does not endorse or reject these cases.
- whether non-communal facilities can form part of a retirement village.
- why the legislation refers to “communal facilities”, and yet the Commissioner has come to the view that **one** communal facility is sufficient to meet the retirement village requirement.
- how the objective test of the primary purpose of a facility has actually been applied to arrive at each of the various examples of communal facilities provided by the Commissioner. For example, both a barbeque area and a garden are in a practical sense accessible to, and able to be used by residents. However, the Commissioner has come to the view that a barbeque area has the primary purpose of communal use, while a garden’s use would seem to be only incidental to its communal use.

Indeed, if applied in its current form the draft ruling could have some very puzzling results. For example, the requirement of only one communal facility means that an assortment of residential premises in a complex with a swimming pool may qualify as a retirement village (regardless of whether the pool is actually used).

Similarly, residential premises with a simple BBQ area could be a retirement village provided that the accommodation is **intended** for persons over 55 (without regard to the actual use of the premises).

***Condition 2: Individuals must reside in serviced apartments***

For accommodation in a retirement village to be GST-free it must be provided in serviced apartments (section 38-25(3) and (4)).

Serviced apartments are designed for aged residents with a level of frailty, disability or medical condition that requires that they receive a range of services to enable them to continue to reside in the retirement village (*Explanatory Memorandum (EM) to Tax Laws Amendment Retirement Villages) Act 2004*, paragraph 1.26).

Serviced apartments can be contrasted to independent living units. Independent living units are designed for occupants who are capable of living independently without the need for care services (EM, paragraph 1.25).

The definition of “serviced apartment” is found in section 195-1 of the GST Act and consists of a number of elements. The following table sets out in more detail the necessary features of serviced apartments:

Required features
<ul style="list-style-type: none"> <li>▪ The apartment must be designed to be occupied by aged residents <b>who require daily living activities assistance and/or nursing services.</b></li> <li>▪ At all times, at least <b>one person of reasonable proximity to the apartment</b> is on call to render emergency assistance to residents.</li> <li>▪ The apartment must be part of a <b>single complex</b> of apartments, which is accessible from a <b>common corridor</b> linking the apartment to the other apartments in the complex.</li> <li>▪ There is, in the retirement village, a <b>communal dining facility</b> that is available for use by residents of the apartments.</li> </ul>

In addition, a number of principles have developed in relation to serviced apartments, and these are summarised in the table below:

Issue	Principle
Corridors	<p>The term “corridor” refers to a passage in a single building that connects an apartment to other apartments in the building (EM, paragraph 1.31).</p> <p>Further, the ATO has indicated that the term corridor does not include passages that connect an apartment to another apartment that is outside the building but part of the retirement village, such as pathways and roads (<i>ATO Interpretative Decision ID 2006/111</i>).</p>
Accommodation <b>not</b> considered serviced apartments	<ul style="list-style-type: none"> <li>▪ detached houses</li> <li>▪ row houses</li> <li>▪ terrace houses</li> </ul>

	<ul style="list-style-type: none"><li>▪ town houses</li><li>▪ villa units</li></ul>
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***Condition 3: Operator provides daily meals and heavy laundry services to residents under a written agreement***

For the accommodation in a retirement village to be GST-free, there must be 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 (section 38-25(3A)(b)).

Daily meals include breakfast, lunch and dinner, and the provision of breakfast alone does **not** amount to the provision of daily meals (EM, paragraph 1.12). In addition, the ATO has ruled that the provision of meals to residents of independent living units does **not** attract GST-free treatment (*ATO Interpretative Decision ID 2001/664*).

## **Conclusion**

The provision of residential care services and retirement accommodation must satisfy a number of conditions before it will be considered GST-free. In this publication, we have sought to consolidate the various conditions that need to be met and examine the Commissioner's views on the different elements of each of the conditions. It is evident from our discussion that there are still a range of issues that need to be resolved before we have heard the final word on the GST treatment of retirement accommodation and associated services.