

JOINT SUBMISSION BY

**The Taxation Institute, CPA Australia,
The Institute of Chartered Accountants in Australia,
the Institute of Public Accountants and Taxpayers Australia**

Draft Goods and Services Tax Ruling GSTR2011/D2

Goods and services tax: residential premises and commercial residential premises

Due Date: 12 August 2011 (Extension Granted)

GENERAL COMMENTS

The Professional Bodies welcome the opportunity to comment on Draft Goods and Services Tax Ruling GSTR 2011/D2 (**the Draft Ruling**). However, we would like to make the observation that we consider the time given to provide comments very short considering the complexity of the issues and the wide implications of the Draft Ruling. We acknowledge that a preliminary draft was circulated to some industry groups and professional bodies in late 2010. However, this was a "preliminary draft" and, therefore, it was not possible to provide the same level of feedback (as it was also not an "ATO view"). The issues contained in the Draft Ruling have been an area of great uncertainty for a number of years and, therefore, providing an opportunity for a thoughtful and fulsome response (and, to the greatest extent possible, a coordinated and cohesive response) is important for the robustness and usefulness of the Draft Ruling. We request that, in future, the Commissioner considers providing a longer period for comment on draft rulings.

At the outset we would also like to make the observation that many of the comments contained in this submission are not necessarily critical of the Commissioner's views as set out in the Draft Ruling, but observations of the problems that arise because of the current legislative provisions. Various piecemeal amendments have been made to the property provisions in the GST Act which we consider have made these provisions almost unworkable when it comes to determining whether premises are residential premises or commercial residential premises.

We, therefore, seek the Commissioner's support in logging issues for amendment under the TIES regime where it is evident that the text of the legislation does not achieve its intended policy outcome. To this end, we foreshadow organising the formation of a property working group to agree on areas and issues for amendment to be logged on TIES and propose discussing this initiative at future NTLG GST Subcommittee meetings.

SPECIFIC COMMENTS

1. Residential premises test

(a) Single Test?

The Draft Ruling begins with the statement in paragraph 6 that the requirement in sections 40-35, 40-65 and 40-70 that premises are residential premises to be used predominantly for residential accommodation is to be interpreted "as a single test" that looks to the "characteristics" of the property. In doing so, the Draft Ruling ignores various aspects of those sections which are important for a proper understanding of how the provisions work, for

example, the definition of residential premises which is incorporated in each of those provisions and, in addition, issues surrounding apportionment. We acknowledge that paragraph 5 together with paragraphs 108 to 119 provide a general introduction to the GST legislation, however, the ATO's views on the meaning of residential premises in section 195-1 and the two limbs of that definition are not in the Draft Ruling. It is strange that a ruling titled 'Residential Premises and Commercial Residential Premises' does not set out the ATO's views on both of those definitions but seeks to examine only the operative provisions, particularly as the latter definition, commercial residential premises additionally incorporates the meaning of residential premises.

Further, the professional bodies consider that paragraphs 6 and 7 of the Draft Ruling are not consistent with the legislation and the decisions in *Marana Holdings v FCT* [2004] FAFC 307 (**Marana**) and *Sunchen Pty Ltd v Federal Commissioner of Taxation* (2010) 190 FCR 38 (**Sunchen**). The paragraphs confuse the operation of the definition of residential premises in section 195-1 and the requirement in sections 40-35 and 40-65 that the "premises are to be used predominantly for residential accommodation".

(b) Physical Characteristics?

The Draft Ruling should make it clear what are "the characteristics of the property" that are referred to in the suggested single test as stated in paragraph 6. The heading following paragraph 6 is "Physical Characteristics and Objective Intention" which introduces two themes, however, paragraph 7 then goes on to explain what is **not** to be examined rather than what is required. The paragraph states that it is not an examination of the subjective intention or use of any person (that may well be the case), but what are the physical characteristics that the ATO has in mind and is it only physical characteristics that are to be examined? The ATO should be precise in its explanation.

Paragraph 7 states "this **focuses** on the physical characteristics...in terms of their suitability for residential accommodation" (bolding our emphasis). It is not clear whether "focuses on" means that the matters to be referred to are limited to physical characteristics or whether the character is determined by objective characteristics of which physical is one (albeit a large one), as in "focuses" being the centre of interest but not solely limited to that. The uncertainty is compounded by paragraph 8 which states that "only in limited circumstances where the premises' physical characteristics do not conclusively demonstrate suitability for occupation as residential accommodation" that design documents may assist. This seems to reinforce that the test is one limited to physical characteristics except in limited cases, allowing design documents to be introduced to the consideration, but those documents are presumably to understand the physical characteristics.

The professional bodies are concerned that it appears that the Draft Ruling has replaced the tests described in *Marana* and *Sunchen*, in the broad terms of "attributes", "character" and "characteristics" with a test based on the narrower term of "physical characteristics". It is our view that terms such as "attributes", "character" and "characteristics" can include things in addition to physical characteristics. For example, the Draft Ruling does not address any other objective factors relevant to the character of the property – e.g. zoning, neighbouring properties/environment, how the property is marketed for sale/lease, etc as per the decision of Jessup J in *Sunchen*. We do not believe that the *Marana* decision is sufficiently all encompassing that these objective factors are not relevant.

(c) Sunchen and Decision Impact Statement

Paragraph 121 of the Draft Ruling, states that in references to Sunchen, the Court held that the phrase "intended to be occupied" in the definition of residential premises and the phrase "to be used predominantly for residential accommodation" are both concerned with the characteristics of the property rather than the intended use of any person.

Paragraph 124 notes some of the following observations in Sunchen:

*"...the words 'to be used predominantly for residential accommodation' is not referring to use by any particular person, but to describe the attributes of the property to which its use is suited. Once it is accepted that the relevant words are not referring to use by any particular person, the intention of the future owner, even if determined solely by reference to objective circumstances and without regard to his stated intention, is totally irrelevant. **That is not to say that actual use of the property will necessarily be irrelevant**; as the Full Court (Bowen CJ, Deane and Fisher JJ) said in the Hamilton Island Enterprises case: **'[T]he use to which an item is actually put will ordinarily be illustrative of at least some aspects of its character'**". (per Edmonds and Gilmour JJ [41]) (bolding is emphasis added)*

However, the Draft Ruling does not refer to the following additional observation in Sunchen which the professional bodies consider to be very important:

*"...I consider that **the words "to be used" require an entirely objective prediction to be made as to the use to which the property will be put...**" (per Jessup J [70]) (bolding is emphasis added)*

Does the ATO take the view that the actual use to which the premises are put or proposed to be put have any bearing on whether they are residential premises in any circumstance? In particular, if the physical characteristics point one way and the usage points to a different outcome, will the usage have any impact on whether the premises are treated as residential premises? The ATO should, at the minimum, acknowledge the above statement in Sunchen and make some comment. The ATO should also provide its view on the emphasis to be placed on the (actual or proposed) usage of the premises if the physical characteristics point one way and the usage points to a different outcome.

In this regard, we refer to the Decision Impact Statement (**DIS**) on Sunchen and, in particular, the following statement:

"The decision confirms the long-held ATO view that subsection 40-65(1) requires an objective assessment of the nature of the premises rather than a prediction of future use or consideration of the subjective intention of the future owner."

Why does the ATO refer to "nature of the premises" in the DIS and to the "characteristics of the property" in the Draft Ruling? Is it intended in the DIS to limit the objective enquiry to the physical characteristics of the property (which seems to be what is set out in the Draft Ruling) or does the reference to "nature of the premises" in the DIS entail a wider enquiry including, in addition to an analysis of the physical characteristics, an objective assessment including a prediction of the actual or future use (per the decision of the Full Court in Sunchen discussed above). The professional bodies are of the view that the first approach (confined to physical characteristics on

their own) is not supported by the decision in Sunchen, but it appears that this is the view of the ATO. We consider that the latter approach (physical characteristics and other objective factors including usage) is the correct approach endorsed by Sunchen. Specifically, the Full Court made reference to the fact that actual use may be relevant and illustrative of a property's character. We infer that the use of a property is a factor relevant to its "nature" (per the DIS) or to the "characteristics" of the property (per paragraph 6).

(d) Suitable vs capable

Paragraphs 13 and 135 of the Draft Ruling state that a partially built building is not residential premises until the premises are "suitable" for human habitation. We believe that, in general, there is some erroneous inter-changing of the terms "suitable" and "capable" in the Draft Ruling. "Suitability" is not referred to in the legislation, but was a term used in Marana and Sunchen when referring to the "is intended to be occupied" part of the section 195-1 definition of residential premises and the "to be used" part of sections 40-65 and 40-70 focusing on how the premises were designed, built or modified (the objective test which the ATO says just looks at the physical characteristics).

"Capable" is, however, actually used in the section 195-1 definition of residential premises in paragraph (b) for premises that are not being occupied at the time of the supply. It not only must be intended to be occupied (i.e. suitable) but it must also be capable of being occupied. "Capable" is a further requirement and is a broader term covering more than just the element of shelter and basic living facilities and the physical condition of the premises.

The comment at paragraphs 13 and 135 of the Draft Ruling that contractual or legal prohibitions do not prevent premises from being suitable for residential accommodation might be correct although query whether, if suitable means "fitted for use", premises could ever be suitable for residential accommodation if such contractual or legal prohibitions exist. However, even if they are "suitable" for occupation as a residence or for residential accommodation, they are not legally "capable" of being occupied as a residence or for residential accommodation. They are not then residential premises within section 195-1. The professional bodies also recommend that the appropriate use of the words "suitable" or "suitability" in the Draft Ruling should be reviewed.

With respect to the comments under the heading "Fit for human habitation" (paragraph 13), we believe the Draft Ruling should expand the discussion regarding when premises first become capable of occupation as a residence. For example, many councils do not issue occupation certificates any more and only in rare circumstances will they withdraw them. Rather, developers are required to engage independent certifiers to issue the certificates. There are many buildings around the country where, for whatever reason, occupation certificates were issued before buildings were completed or were fit for occupation. In most cases, councils issue directives to correct defective or incomplete work rather than withdrawing the certificates. In many cases, owners, through their body corporate, have been required to complete work after purchase to ensure that the certificates will not be withdrawn. Given that the issue of an occupation certificate does not provide the level of comfort of occupancy as it did previously, we encourage the ATO to provide further explanation of the circumstances when premises first become capable of occupation as a residence.

If paragraph 13 is intended to rule that contractual or legal prohibitions are not relevant in determining whether land and buildings are intended to be occupied and to be used predominantly for residential accommodation, or capable of being so occupied, it should be reconsidered. Also, it appears that the ATO takes a different view in relation to such matters when it comes to determining whether premises are commercial residential premises without explaining this position.

(e) Other Premises

Paragraph 15 states that if it is clear from the physical characteristics of the premises that any suitability for living accommodation is ancillary to the premises' prevailing function, the premises are not residential premises to be used predominantly for residential accommodation. This statement highlights the ATO's inconsistent approach to determining the "nature" or "characteristics" of premises. This is because when it comes to looking at other premises and whether they are residential premises to be used predominantly for residential accommodation, the ATO resorts to examining the prevailing function of the premises, which requires an examination of the usage to which the premises are put. The professional bodies are of the view that this is precisely what Jessup J was referring to in *Sunchen* but which the ATO has ignored in the Draft Ruling.

(f) Legislative Policy

There are some inconsistencies and inaccuracies in paragraph 143 in relation to the policy for input taxing residential premises. The ATO states that those renting a house, flat or home are on the same footing as persons that own their own homes; neither is to bear the cost of GST in connection with such occupation. However, it is not technically correct to say that such persons do not bear any GST in connection with such an occupation. Home owners will bear GST on maintenance and other costs associated with ownership. Renters may also indirectly bear such GST costs in the rental paid.

Further, the statement that premises such as a factory that is being used as residential accommodation will not be treated as residential accommodation is also inconsistent with this policy expressed. It would be expected that, based on this policy informing the interpretation of the legislation, any type of premises being occupied as a residence would be treated as residential premises, even if the structure itself is non-residential as the policy says nothing about the physical characteristics of the premises. While we observe that the legislation may not provide for such an outcome, if references are made to the policy behind input taxing, this must be followed through to the scenario where an individual lives in a factory or office. What happens if such an individual was living in a factory or office under a residential tenancy agreement?

(g) Residential premises partly converted for business use

Examples 5 and 6 (paragraphs 26-30) need to be introduced with some more detailed preamble giving principles for which the examples are merely illustrative. We refer to Example 5 of the Draft Ruling and the comments above regarding the test as endorsed by the Full Court in *Sunchen*. We consider that the objective physical characteristics of the property in this Example cannot be determinative of the GST treatment of the property and the actual use in this case is relevant. While it is stated that significant modifications have been undertaken, the property would objectively still be a house and, therefore, it has been the use of the property that has influenced the outcome on the GST treatment (which we consider to be the correct

application of Sunchen but not consistent with the approach as contained in the Draft Ruling).

What are the critical physical characteristics that determine treatment? Would an architect's office in a house with a waiting room, car park and meeting room be different to the doctor's office in Example 5? Would the absence of hygiene facilities make a difference?

In our experience, the default position in the business community is to treat leases and sales of the entirety of houses used for business premises as taxable (see Example 6). We are not convinced that a Court would treat a building as residential premises where it is located in a business district, zoned to allow business use, owned by a business, leased to and occupied by a business and sold to a business just because it looks like a house. Even where the building had elements of shelter and basic living facilities, it has objective attributes of commercial premises. We are sceptical as to whether anyone will undertake the apportionment exercise that the ATO has suggested in Example 5. On the contrary, in our experience, the dedication of some rooms in houses as being for business purposes is treated as input taxed (and no apportionment is undertaken as suggested in Example 5).

(h) Land supplied with a building

Example 7 (paragraphs 32 - 35) is concerned with residential premises supplied with farmland. It addresses an 80 hectare parcel where 77 hectares are used in a farming enterprise, the 3 hectares are fenced off as a residential homestead. Is the treatment of the farmland in the example based solely on its physical characteristics as land for farming or is it treated in that way because it is land on which a GST registered farming enterprise is carried on? The example may need to be made clearer to address or distinguish differences where a GST registered farmer sells a farm house and a 'Pitt Street farmer' sells a hobby farm.

The professional bodies also note that Example 7 of the Draft Ruling apparently contradicts GSTA TPP 092 which continues to be a public ruling after the indirect tax rulings regime changes from 1 July 2010. In that public ruling, the ATO relevantly states as follows:

"...if the residence is used as part of the farming enterprise of the supplier, then the supply of the residence forms part of the GST-free supply of the going concern.... In these circumstances, an adjustment is not required under Division 135 if the going concern is a farming business and the residence forms part of land that has the essential characteristics of farmland..."

In other words, despite the house having the physical characteristics of a residence, the fact that it is used as part of the farming business means that it is not an input taxed supply and consequently, no Division 135 adjustment is required. The ATO needs to reconcile its approach and explain whether or not apportionment is required.

(i) Commercial premises converted to residential use

Either in the Draft Ruling or in GSTR 2003/3, further guidance needs to be given to the question at what point does a conversion or other renovations cause a building to "change in character" from being commercial/industrial to residential premises. That may help determine when the rental of former commercial premises becomes a section 40-35 input taxed residential supply. Similar, albeit more complex issues, arise for where there is a "change in

ownership” of premises as in the *South Steyne Hotel Pty Ltd v FCT* 180 FCR 409 (**South Steyne Hotel**). Further guidance should be provided as to when a change in ownership results in different GST outcomes.

2. Commercial residential premises test

(a) Physical characteristics only?

Paragraph 166 of the Draft Ruling states that “commercial residential premises may be identified by physical characteristics that establish the purpose of the premises”. It also states that “for some premises it is clear, based on their *overall* physical character, that they are commercial residential premises”. However, the discussion and examples that follow in the Draft Ruling appear to be inconsistent with this principle and suggest that the operation and use of the premises is also important, as well as the rights of occupants.

For example, in the context of paragraph (f) of the definition of commercial residential premises, the Draft Ruling lists characteristics common to hotels, motels, hostels and boarding houses at paragraph 50. Most of these characteristics are based on how these premises are operated and what is provided and not on the physical characteristics of the premises.

The professional bodies consider that the paragraphs addressing commercial residential premises need to be reconsidered. The definition of commercial residential premises is an exclusive one. We believe that only premises falling within paragraphs (a)-(f) of the definition have the identity or character of commercial residential premises.

Example 9 exposes a troubling circularity and confusion in the way the Draft Ruling tries to explain “commercial residential premises”. Neither Example 9 (nor the Marana decision surprisingly) define what the physical characteristics of a motel are. If the ATO wants the sale of a vacant motel to be “commercial residential premises” captured by paragraph (a), then a “motel” has to be defined or determined at least partially by reference to its physical design or construction. Similarly, the same applies for the other forms of premises defined in paragraph 171.

It is noteworthy that the physical characteristics of premises is not one of the eight characteristics listed in paragraph 176. Despite the Explanatory Memorandum to the 2006 changes, it is our view that the eight characteristics are best employed to define what are “premises” similar to paragraphs (a) to (e) (i.e., for the purposes of paragraph (f)), rather than to define what is in paragraphs (a) to (e) themselves. As it currently stands, the Draft Ruling identifies, for example, a motel by:

- its physical characteristics (paragraph 166) without listing them, and
- a dictionary definition primarily turning on the nature of its occupants and the services provided to them (paragraph 171) and
- eight characteristics (paragraph 176) drawn from overseas case law regarding other types of premises that also fall within the non-homogeneous bucket that is commercial residential premises.

As such, it is our view that determining what premises are treated as commercial residential premises may be no easier and may even be more difficult now than previously.

However, Example 9 appears to be consistent with paragraph 166 in that the physical characteristics of the premises are important because it states that the sale of a vacant motel would be the supply of taxable commercial residential premises even though it is not operated as such at the time of sale. However, one would expect that a vacant retirement village could be similar in its physical characteristics to a vacant motel and, therefore, the sale of a retirement village could also be a taxable supply of commercial residential premises. Paragraph 260 of the Draft Ruling states that accommodation provided in a retirement village is not accommodation in commercial residential premises because the main purpose is not to provide accommodation to a transient class of guests that are away from their home. The Draft Ruling should also discuss whether the sale of a vacant retirement village would be the supply of commercial residential premises. Based on paragraph 260, it appears that the view of the Commissioner is that this would not be the supply of commercial residential premises. If so, the Draft Ruling should explain the distinction between the sale of a vacant motel and a vacant retirement village and reconcile this view with the statement that it is the physical characteristics of the premises that determines whether they are commercial residential premises.

In relation to the above point regarding the reference to the physical characteristics, we note that in Example 10 (paragraph 62), the premises are noted to have physical characteristics that allow the premises to be used in a manner similar to a hotel. If the physical characteristics have been satisfied, why is it necessary in paragraph 63 to discuss how it is operated?

- (b) Applying the Draft Ruling to other scenarios – e.g. student accommodation, army barracks, nurses' quarters and convents

The inconsistency in the Draft Ruling between the statement that it is the physical characteristics that determine whether premises are commercial residential premises and many of the examples and discussion regarding the use and operation of certain premises makes it difficult to apply the Draft Ruling to other types of premises not discussed in the Draft Ruling. For example, the Draft Ruling does not expressly discuss student accommodation, army barracks, nurses' quarters and convents. We acknowledge that it would be difficult for the ATO to provide guidance on all the different kinds of premises occupied, however, we wish to point out that it is also extremely difficult to apply the examples in the Draft Ruling to different situations without coherent principles. As a minimum, we suggest that the Draft Ruling should include specific examples regarding student accommodation (having regard to the growth in this industry) and explain whether these are residential premises or commercial residential premises.

With respect to student accommodation, we note that ATO ID 2010/194 states that student accommodation would not constitute commercial residential premises because the occupants have rights akin to tenants. We note that paragraph 261 and 262 of the Draft Ruling under the heading 'Rooming houses' canvasses what might also be student accommodation because of the references in those paragraphs to the rights enjoyed by occupants e.g. exclusive possession or similar rights akin to those of a tenant.

The professional bodies are of the view that the physical characteristics of student accommodation would not differ substantially from many hotels or boarding houses and it may be similar to the camp-style accommodation discussed in Examples 19 and 20 which the ATO considers to be commercial residential premises.

However, the professional bodies are also aware of the ATO's position in the case recently heard by Nicholas J of *ECC Southbank Pty Ltd & Ors v Commissioner of Taxation (ECC Southbank)* (judgment has been reserved). The professional bodies understand that the ATO considers that premises which provide accommodation for students in purpose built student accommodation buildings are not commercial residential premises. The Commissioner's written submissions reveal that he started with an analysis of the physical characteristics of the building, by submitting as follows:

"...it is a purpose designed student accommodation building constructed and consisting of 14 storeys of shared and studio apartments configured towards the needs of students" and

"each apartment has its own kitchen and living areas and each bedroom has its own ensuite"

However, the Commissioner was also emphatic, it appears, about the rights of the occupants as in the type of possession granted, and the length of stay. The Commissioner submitted that:

" each resident was obligated to pay a rental bond; complete an entry condition report; and was expected to clean. The "house rules" constitute a significant factor of difference ...

...the type of possession granted and the kind of requirements imposed ... are characteristic of a supply of residential premises – not that of accommodation provided in a 'hotel'...or something similar thereto...

...while the length of stay is irrelevant in determining residential premises... there is no reason to disregard the term of occupation...in determining whether premises are commercial residential premises".

We find it curious that the Commissioner, in examining whether premises are residential premises and not commercial residential premises, argues criteria that he does not otherwise argue or consider to be relevant in determining the "characteristics" of property for the purposes of working out whether they are just residential premises.

While only observing this litigation from the sidelines, it also appears strange to the professional bodies that the Commissioner would take these points for the purpose of suggesting that the above criteria disqualify premises from being commercial residential premises, in circumstances where paragraph (f) of the definition applies to premises that are residential premises and that are similar to those in paragraphs (a) – (e). In other words, it would be expected, that the premises share some of the same characteristics as residential premises. But when the ATO examines the criteria of whether they are residential premises, it does not appear (at least from the written submissions) that the ATO confines itself to the physical characteristics test that it promotes as the proper approach. The professional bodies consider this area of the law to be uncertain and, also, the ATO's analysis to be unsatisfactory. Accordingly, it is another area that may need to be escalated through TIES for amendments although it makes sense in the circumstances to wait for the outcome of the litigation.

- (c) Strata titled apartments supplied under an arrangement

Example 12 in the Draft Ruling states that the supplies under a single arrangement of 90 separate leases over 90 of 120 serviced apartments in a

complex, a lease for the management lot which includes the reception area, management offices, the restaurant and conference facilities and a further lease for the parking lot would constitute supplies of commercial residential premises. However, this does not appear to be consistent with the statement in South Steyne Hotel that:

"...there is nothing in the GST Act or the policy underlying the GST Act that suggests that the characterisation of an individual supply can be approached by treating it as if it was the aggregate of that supply and other supplies".

The Draft Ruling should address this inconsistency and should also provide detail as to what the Commissioner considers to be an "arrangement".

We note the Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006 sets out:

"... a sale or lease of, for example, the whole of a hotel complex will be a supply of commercial residential premises, whether or not the hotel complex is strata titled. Where a sale or lease of anything less than the whole of a hotel complex (eg not all of the rooms within the complex or not all of the hotel infrastructure such as lobby, kitchen or pool areas) would constitute a supply of commercial residential premises, will depend on the facts of each case."

The Explanatory Memorandum does not indicate whether it is necessary for there to be one lease or whether multiple leases will still qualify. The Draft Ruling accepts that multiple leases will be acceptable. However, given the decision in South Steyne Hotel noted above, this should be addressed. The difficulty with the approach contained in the Draft Ruling is that it becomes one of fact and degree. The Commissioner has made it clear that it is necessary to supply the "infrastructure" of the premises in order for it to qualify as commercial residential premises but there is no indication of how many apartments must also be supplied. It appears that more than one could be enough (ie multiple occupancy) but the Draft Ruling does not make this clear.

We also observe that with the current view set out in the Draft Ruling a tenant (ie operator) of a serviced apartment complex could have GST on some apartments it acquires under a lease and not on others. This is another matter which we think needs to be escalated through TIES.

We also observe that the outcome in paragraph 250 means that there will be an input taxed supply in the chain of transactions even though the ultimate supply to the consumer is taxable. We submit that this is not the correct outcome from a policy perspective and is something that should also be raised with Treasury.

(d) Occupants have the status of guests

In paragraph 50 the characteristics that are common to operating hotels are set out and this includes that the occupants have the status of guests. Paragraph 52 goes on to say that it is not necessary that all characteristics are exhibited but it is a matter of examining the extent and manner to which the characteristics are exhibited.

However, paragraph 214 outlines that if an accommodation provider enters into an arrangement granting rights similar to that of a tenant, the presence of this feature is strongly indicative of the premises not being commercial

residential premises. In the example in paragraph 260 of a retirement village and in paragraph 261 of a rooming house (see also above in relation to the ECC Southbank case), the fact that the occupants are granted "exclusive possession or similar rights akin to a tenant" appears to be the determinative factor in the conclusion that these are not commercial residential premises. If that is the ATO's view, the importance of this factor should be noted within paragraph 50.

In relation to this point, it would also be useful for the Draft Ruling to set out exactly what features of a tenancy arrangement other than exclusive possession are determinative of the status of the occupant. Also, the ATO is asked to explain precisely what it means when it refers to "similar rights akin to a tenant". As the ATO is aware, the laws with respect to residential tenancies are State and Territory based, so there may well be differences in various places. For example, it is understood that an agreement to let premises to occupants in Queensland for a term of 3 months or more is governed by the relevant residential tenancy laws regardless of where the person is staying, e.g. a 5 star hotel or a student dormitory. What implications does this have for determining the criterion of "similar rights akin to a tenant"? Has the ATO considered that it is possible that there may be different GST outcomes around Australia where the occupants are governed by different residential tenancy laws? This matter probably also needs to be brought to the attention of Treasury.

(e) Accommodation is the main purpose

In paragraph 50 the characteristics that are common to operating hotels are set out and this includes that accommodation is the main purpose, in that "the premises provide accommodation to a transient or floating, though not necessarily short stay, class of occupants as their primary purpose".

In the example in paragraph 261 of a retirement village, the fact that the occupants are not a "transient class of guests", also seems to be an important factor in why this is not considered to be commercial residential accommodation.

The Draft Ruling does not make it clear what is meant by the term "transient". On the basis that the legislation deals with scenarios where 'long term accommodation' can be provided to an individual in commercial residential premises (see Division 87), we submit that the term "transient" cannot be intended to relate to the term of occupation. Therefore, the Draft Ruling should explain what is meant by this term. Is it intended to refer to persons who are away from their home?

(f) Demountable home parks and caravan parks

Can the ATO provide additional guidance on the characteristics of these properties that make them similar? (Refer to paragraphs 54 and 227 of the Draft Ruling).

3. Relationship between residential and commercial residential premises

(a) Paragraph 45

(i) Comparison with a retirement village

The Draft Ruling sets out that separately titled adjacent cottages or villas that are combined and operated similar to a hotel, motel, inn, hostel or boarding house to provide accommodation can form

commercial residential premises. If the test to be applied predominantly focuses on the physical characteristics of the premises, we submit that the scenario set out in paragraph 45 is similar to that of a retirement village. This example highlights the apparent inconsistency in the ATO's approach in determining whether a property is commercial residential premises.

(ii) Reference to the cottages being adjacent

We further note the reference in this paragraph to the cottages or villas being adjacent or abutting. We submit that there may be scenarios where holiday cottages may be combined and operated similar to a hotel (if that is a relevant factor) but the cottages are not adjacent. If it is necessary to only consider the physical characteristics of a property, then the need to have cottages next to each other might be relevant (ie similar to a hotel because of the location of rooms next to each other) but as it appears that further considerations such as the way a property is operated also need to be considered, it would seem that separately titled cottages can form commercial residential premises even in circumstances where they are not adjacent eg a developer has retained a cottage within a complex for its own use.

This issue can apply equally to the serviced apartment examples contained at Examples 11 and 12 where a developer sells 30 apartments on the top three levels of a building. Does the conclusion regarding the remaining apartments and the management lot depend on whether the apartments that form the commercial residential premises are all located on the same levels? Would the premises still be commercial residential premises if the 30 apartments that were sold were situated on the lower three floors (near the management lot) or disbursed throughout the building with the result that the apartments that potentially form the commercial residential premises are not next to each other?

4. Apportionment

(a) Retirement village vs serviced apartments

We consider that there is an inconsistency in approach between paragraphs 259 and 72. The Draft Ruling requires that the "commercial premises" of a retirement village should be apportioned when sold and treated as taxable. (Query whether this should be in the binding part of the Draft Ruling). However, there is no requirement to separate the commercial areas of a serviced apartment complex which would necessarily result in a supply of commercial premises and probably (on the ATO's view) a supply of residential premises.

Why is it necessary to apportion areas in a retirement village? Is it only where the areas in question can be considered to be a separate commercial area such as a shop, golf course or restaurant? If so, this should be stated. What features mean these areas should be given a separate GST treatment when supplied with other areas if they are on the same legal title? The inclusion in paragraph 259 of staff rooms and site offices is not consistent with the approach that separate commercial areas need to be apportioned. If such offices and staff rooms are required to be apportioned and are subject to GST, this would result in irrecoverable GST for a retirement village operator (on the basis that it uses these areas to make input taxed supplies).

(b) Commercial and residential premises

A common property type is a ground floor shop with premises originally designed to be residential on the first floor. The ATO's default position appears to be that apportionment is required because a sale or lease will be a mixed supply. It is our view that in some, perhaps many, cases the supply of the residential component, no matter how valuable it might appear in its own right, is in fact ancillary or subsidiary to the supply of commercial premises below it.

(c) Garage

Paragraph 14 states that there is no requirement to apportion a garage but paragraph 145 suggests that an apportionment would be required if part of a premises was for a shop. The Draft Ruling should explain the distinction between these examples.

5. Vacant Land

Some consideration needs to be given, per paragraphs 36 and 147, to the broad statements about vacant land where land is occupied without traditional structures. Examples might include aboriginal settlements and premises built into rock walls or underground.

6. Specific scenarios

(a) Mining accommodation

From a policy perspective, we agree with the outcome that this kind of accommodation is taxable. However, we do not agree with the reasoning contained in the Draft Ruling to reach the conclusion that this type of accommodation is commercial residential premises.

As noted in our introductory comments, we consider that this issue largely arises because of the current legislative provisions and, specifically, the amendments made in 2006 to sections 40-35 and 40-65 (i.e. the inclusion of the phrases "residential accommodation" and "regardless of the term of occupation"). These amendments have resulted in a wider range of accommodation falling into the definition of residential premises. This includes the camp-style accommodation dealt with in Example 19 of the Draft Ruling. It was our understanding that in most circumstances this style of accommodation would not be considered to be residential premises and, therefore, there was no need to consider the commercial residential premises provisions. See, for example, paragraph 39 of GSTR 2000/20. Now, the ATO has to re-interpret the legislation in such a way as to arrive at the intended policy outcome.

In Example 19 the Commissioner has done this by dispensing with the requirement that the premises needs to be offered to the public. This criterion is, in our view, significant and is considered to be of importance by the ATO in GSTR 2000/20. It is implicit, after all, in the very words of "commercial residential premises" and all of the premises described in paragraphs (a) to (e) of that definition that residential premises constitute commercial residential premises when they are marketed to the public. Also, if the Commissioner is applying tests involving physical characteristics and how premises are operated, it would seem critical that for something to be similar to a hotel, it needs to be held out to the public. Again, we note the importance placed on the mode of operation (usage) in these examples.

There is an inconsistency between the conclusions in Examples 19 and 20 in the Draft Ruling. Example 19 concludes that the supply of accommodation is a supply of accommodation in commercial residential premises. By contrast, Example 20 concludes that the supply of accommodation is a taxable supply. For consistency, Example 19 should also conclude that the supply of the accommodation would be a taxable supply.

It would be worth considering an example where accommodation at a remote location is constructed solely for mine employees and contractors. We suspect that the ATO will not treat the accommodation as commercial residential premises where the occupants additionally have rights akin to a tenant. If the ATO is to provide practical guidance to taxpayers, the ATO might also consider adding an explanation as to the issue of input tax credits for construction and running costs of such premises which is the critical issue.

The professional bodies are of the view that the apparent use of such premises to make input taxed rental supplies is best rationalised as involving taxable supplies by reference to the usage of the premises and general characterisation of supply tests, namely, their use as residential accommodation being ancillary to the prevailing commercial use of the premises by the mining company to ensure staff are available to work in the mine.

(b) Offshore mobile drilling unit

Footnote 11 states that accommodation provided to employees and contractors on an offshore mobile drilling unit in similar circumstances to that set out in Example 19 is also a supply of accommodation in commercial residential premises.

We note that the definition of floating home as contained in section 195-1 of the GST Act means a structure that is composed of a floating platform and a building designed to be occupied as a residence. However, we query whether an offshore mobile drilling unit could ever be a "building designed to be occupied...as a residence." Presumably the accommodation forms part of the larger commercial structure and, therefore, would not meet the definition of floating home.

If so, it is difficult to see how these structures can constitute residential premises as under the definition of residential premises in section 195-1 of the GST Act, it is necessary to be land or a building. The ATO is referred to the definition of "land" in section 22(1) (c) of the *Acts Interpretation Act* 1901. We note that the definition of "building" in The Macquarie Dictionary is "a substantial structure with a roof and walls, as a shed, house, department, store, etc." The professional bodies consider it is difficult to see how a mobile drilling unit can be described as either residential premises or commercial residential premises (it is plainly not a hotel etc). Rather, it would be more practical to view any residential accommodation that takes place on such a unit as ancillary and incidental to the commercial use of the unit.

(c) Farmland – Example 7

Applying the views expressed in Examples 19 and 20, if the property also contained shearers' quarters how would this be treated? The shearers are not charged to live in the quarters but the building may exhibit the physical characteristics similar to other examples contained in the Draft Ruling such as camp-style accommodation or even a bed and breakfast. When vacant, should these areas also be apportioned as part of the sale of the farmland? Would these be commercial residential premises and require apportionment?

What about manager's quarters (eg a two bedroom house where two employees stay while they are working)? If the manager's quarters have been used in a way similar to a bed and breakfast, applying the Draft Ruling, if this was supplied vacant, would this be commercial residential premises and also need to be apportioned?

7. Structure of Draft Ruling and the use of examples

We welcome the use of examples and in particular welcome the inclusion of all the examples within the binding section of the Draft Ruling. However, there are inherent difficulties in applying examples rather than statements of principle.

In paragraph 251 of the Draft Ruling, it states that the supply of accommodation in bed and breakfasts, farm stays and home stays will be an input taxed supply of residential premises unless the premises are operated in a similar manner to a hotel, motel, inn, hostel or boarding house (query whether this statement should be contained in the binding part of the ruling). However, in Examples 15 and 17 a bed and breakfast and a farmstay are respectively considered to be commercial residential premises and it is not clearly stated why. These examples appear to be inconsistent with the statement in paragraph 251. Example 17, in particular, does not clearly state that it is operated like a hotel. In Example 17, the determining factors appear to be that the accommodation is being operated on a commercial basis aimed at transient guests who are temporarily away from their usual homes. However, these factors are also present in Example 16 which the Draft Ruling states is not commercial residential premises.

Further, the distinguishing features of Example 15 and 16 of the Draft Ruling are not addressed. One can glean that the key distinguishing feature is the multiple occupancy point, but this is not stated. If Harrison in Example 16 had two rooms available in his house would the outcome be different? It seems an odd outcome if this was the case. Paragraph 194 indicates that accommodation provided to one person or a small group living or travelling together do not demonstrate the characteristic of multiple occupancy. The ATO is asked to consider whether this is a statement of principle that should be included in the binding part of the Draft Ruling. An explanation as to the ATO's view on the key differences between the two examples is needed. We further note that arguably Example 15 is not similar to a hotel in that the accommodation is only available on the weekends. We consider that the premises contained in Examples 15 and 16 are likely to be physically the same. Therefore, again, the test that is being applied must be more than just the physical characteristics but this is not clearly stated.

The Draft Ruling should explain more clearly why in Examples 15 and 17 the premises are operated in a similar manner to a hotel and in Example 16 the premises are not operated in a similar manner to a hotel.

8. Minor amendments

- Para 89 – replace “quarter” with “quarters” which covers singular and plural