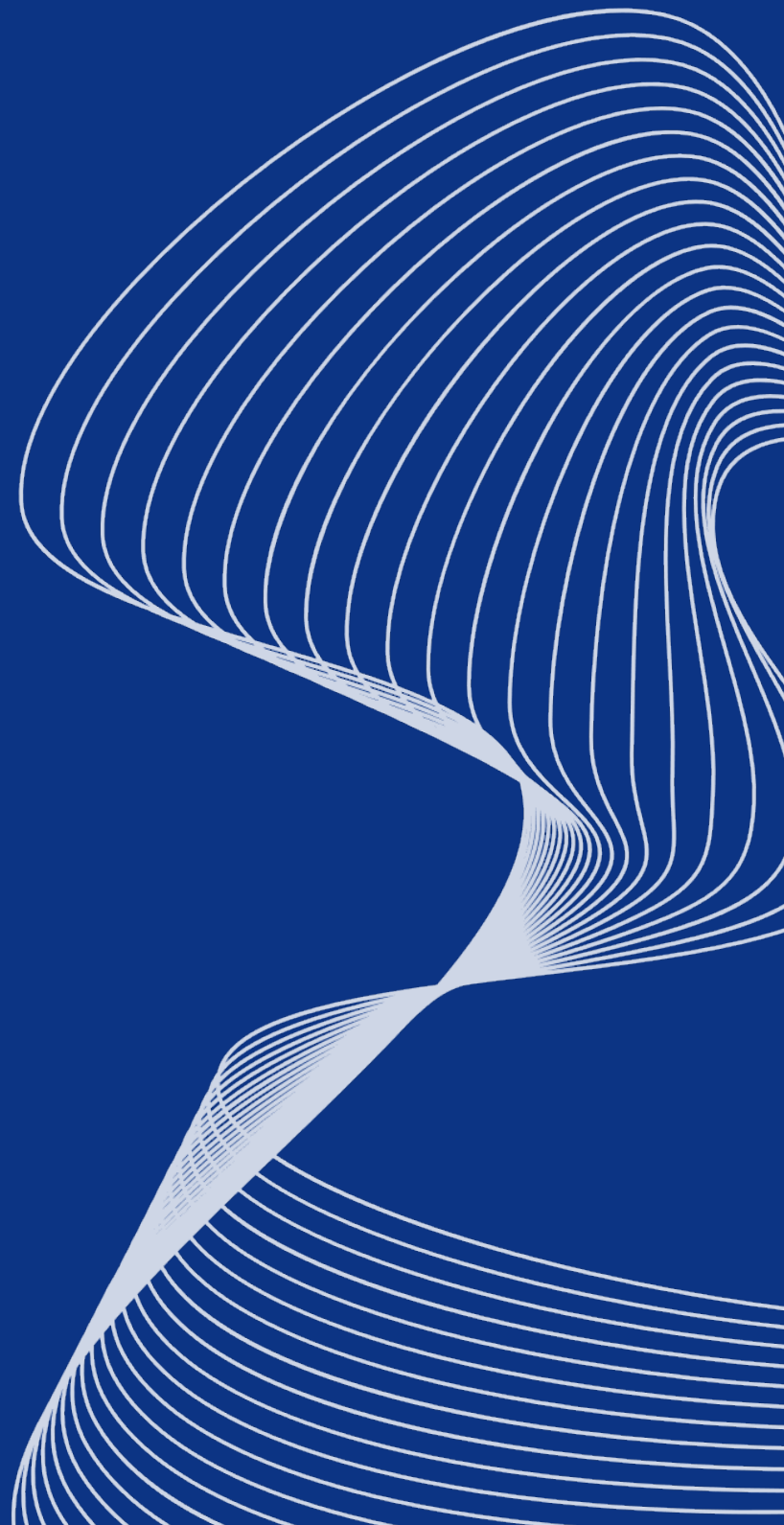


GST and Real Property

GST CLASSIFICATION ISSUES



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GST Classification in Property Matters

Introduction¹

The application of GST to real property has been the subject of much conjecture and dispute since the introduction of the tax. A combination of factors including the high value of supplies of real property, complexity surrounding the numerous ways property is held and the fact that you do not have to be a property developer to have GST property issues, have made property a hot GST topic. Also added to this mix is the fact that real property in Australia is subject to GST where other jurisdictions have specifically excluded land from the GST or VAT net.

The continuation of GST property related issues featuring heavily in the Australian Taxation Office's (ATO) Annual Compliance Programs, suggests it is an area that still troubles the Commissioner and taxpayers alike. One such GST property issue is the determination of whether 'residential premises' are considered to be 'commercial residential premises'.

Understanding the scope of these provisions can ensure their application does not negatively impact an entity's cash flow or their overall GST position as classifying a property as residential premises or commercial residential premises can make a significant difference to the GST treatment, for the property purchase, sale or a leasing arrangement. Misclassifying a premise can cause several consequences, including financial penalties, reputational damage, and reassessment of tax liability.

In the event that premises have changed in the way that it is used, especially from residential premises to commercial residential premises, GST adjustments may be required. There are also events where a change would cause a change in the GST treatment.

This paper will cover the following:

- The current jurisdictional and regulatory landscape
- Advanced GST classification matters
- The margin scheme: traps and contractual drafting.
- The going concern exemption: value to developers.
- Managing ATO scrutiny and aggressive tax planning.

Unless otherwise stated, all legislative references are to the *A New Tax System (Goods and Services Tax) Act 1999* (the **GST Act**).

1. The current jurisdictional and regulatory landscape

The current GST landscape for property transactions is best understood as a jurisdictional framework in which Commonwealth legislation, ATO public rulings, judicial authority and State-based conveyancing practices all operate together. Although GST is imposed under

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GST Classification in Property Matters

Commonwealth law, the practical consequences of classification commonly arise at the transaction level, particularly through contracts for sale, settlement statements, vendor notifications, leasing arrangements and the treatment of input tax credits. This means that the GST analysis cannot be confined to the wording of the GST Act alone; it must also account for the way the transaction is structured, documented and implemented.

At the legislative level, the key distinction remains between taxable supplies, input taxed supplies and GST-free supplies. For property, this distinction is particularly significant because supplies of residential premises are generally input taxed, while supplies of new residential premises and commercial residential premises are generally taxable (unless a specific concession or exception applies). The result is that classification can materially alter the economics of a transaction: it determines whether GST is payable, whether input tax credits are available, whether GST withholding at settlement is required, and whether contractual gross-up mechanisms will be effective.

The regulatory environment is also shaped by the Commissioner's published guidance. Goods and Services Tax Ruling GSTR 2012/5 provides the Commissioner's view on residential premises, with a focus on the physical and design characteristics that make premises suitable and capable of occupation as a residence.

GSTR 2012/6 addresses commercial residential premises and adopts an evaluative approach by reference to the ordinary meaning of hotels, motels, inns, hostels and boarding houses, together with premises that are sufficiently similar to them. These rulings are not merely academic: they provide the framework through which the Commissioner assesses property arrangements, reviews GST positions and determines whether a taxpayer has taken reasonable care.

Recent developments show that the classification exercise remains dynamic. The Commissioner continues to update public-facing guidance on residential property, GST at settlement and build-to-rent developments, and has issued draft updates to its commercial residential premises ruling. This reflects the increasing complexity of accommodation models, including co-living, student accommodation, serviced apartments, build-to-rent projects, retirement villages and mixed-use developments. These models often sit close to the boundary between residential premises and commercial residential premises, making the objective character of the premises, the rights granted to occupants and the services provided by management central to the GST outcome.

From a compliance perspective, the Commissioner's focus is directed less toward arithmetic errors and more toward the underlying characterisation of the supply. In practice, disputes arise where contractual descriptions, commercial assumptions or marketing materials do not align with the physical and operational reality of the premises. This is particularly evident where parties assume that scale, centralised ownership, professional management or the presence of shared amenities is enough to convert residential accommodation into commercial residential premises. The case law demonstrates that these factors may be relevant, but they are not determinative.

The current landscape therefore requires advisers to approach GST classification as a front-end transaction risk rather than a post-settlement compliance issue. The correct treatment should

GST Classification in Property Matters

be identified before contracts are exchanged, reflected clearly in the GST clauses, supported by contemporaneous evidence and revisited if the use or configuration of the premises changes. Where the classification is uncertain, the better approach is to obtain specialist advice or, in appropriate cases, seek a private ruling before the transaction proceeds. This is especially important where the GST outcome affects pricing, funding, input tax credit recovery, purchaser withholding obligations or the ability to rely on concessions such as the margin scheme or going concern treatment.

2. Advanced GST classification matters

Commercial residential vs residential premises

In determining whether you have 'commercial residential premises', the starting point will be whether you even have 'residential premises'. This is obviously important as depending on what you are selling, the GST treatment will differ. In a property context, the sale of residential premises will be input taxed if it meets the requirements of section 40-65, which states:

Sales of residential premises

- (1) *A sale of real property is input taxed, but only to the extent that the property is residential premises to be used predominantly for residential accommodation (regardless of the term of occupation).*
- (2) *However, the sale is not input taxed to the extent that the residential premises are:*
 - (a) *Commercial residential premises; or*
 - (b) *New residential premises other than those used for residential accommodation (regardless of the term of occupation) before 2 December 1998.*

The definition of residential premises in section 195-1 is as follows:

Residential premises means land or a building that:

- (1) *Is occupied as a residence or for residential accommodation; or*
 - (2) *Is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation;*
- (regardless of the term of the occupation or intended occupation) and includes a floating home.*

With reference to the above legislative principles, a supply of property can only be a supply of input taxed residential premises where it meets both the definition of residential premises and the requirements of section 40-65. Whether a supply meets these criteria is a question of fact which must be determined with reference to the particular circumstances surrounding the relevant supply.

GST Classification in Property Matters

Definition of residential premises

The GST definition of ‘residential premises’ contains two discrete tests depending on whether the premises are occupied. An interest in real property will consist of residential premises to the extent that it is either ‘occupied’ as a residence or ‘intended to be occupied, and capable of being occupied’ as a residence. Land without certain physical characteristics does not satisfy these requirements, even where the land is adjacent to a residence.

The phrase ‘occupied’ in this context was considered by the Full Federal Court in *Vidler v Commissioner of Taxation*². In *Vidler*, it was held that vacant land is not land that is ‘capable of being occupied as a residence or for residential accommodation’, as vacant land must have facilities ordinarily associated with residency.

Whilst it is acknowledged that *Vidler* specifically considered the GST treatment of a vacant block of land, as opposed to the general consideration of land that is adjacent to a residence, the principles in this case are equally relevant. A supply of land should not be input taxed merely because it is situated on a title that includes a residence. Whether, and to what extent, the land comes within the GST definition of residential premises, should depend on the physical characteristics of the land, and whether the land is actually used or ‘occupied’ as a residence. This is consistent with the two tests set out in the definition of ‘residential premises’ in section 195-1.

The first test in section 195-1 considers whether land is ‘occupied’ as a residence or for residential accommodation. The ‘occupation’ in the context of vacant land will be satisfied only if it can be shown that the occupants of an adjacent residence make use of the land to an extent that is consistent with residential occupation. However, as per the decision in *Vidler*, such occupation will not amount to ‘residential premises’ unless the land possesses physical characteristics that are ordinarily associated with residency.

The second test in section 195-1 considers whether land is ‘intended to be occupied, and capable of being occupied’ as a residence or for residential accommodation. Land that is unoccupied (and therefore fails the first test) may still be characterised as residential premises if it can be demonstrated the land is intended to be used for residential purposes and is capable of being occupied in that manner.

To this end, the importance placed on the ‘intention to occupy’ characteristic in determining the correct GST treatment was highlighted by the Full Federal Court in *South Steyne Hotel Pty Ltd v Commissioner of Taxation*³ (see paragraph 21 of the Judgment of Emmett J). Relevantly, Emmett J noted that in the context of the definition of residential premises, the “requirement as to the purpose of the occupation” must still be satisfied.

The word ‘intended’, in this context, was considered by the Full Federal Court in *Marana Holdings Pty Ltd v Commissioner of Taxation*⁴. At paragraph 62 of that judgment, the Full Court held that the words ‘intended to be occupied’ describes the “intention with which it was designed, built or modified, which intention will be reflected, to greater or lesser extent, in its suitability for that purpose”.

² [2010] FCAFC 59.

³ [2009] FCAFC 155.

⁴ [2004] FCAFC 307.

GST Classification in Property Matters

Section 40-65

Further to the definition of residential premises, it is important to recognise that a supply of real property that satisfies the definition of residential premises in section 195-1 will not be input taxed unless it also satisfies the requirements of section 40-65. The core requirement of section 40-65 is that the supply of residential premises must be 'used predominantly for residential accommodation'.

The decision of the Full Federal Court in *Sunchen v Commissioner of Taxation*⁵ confirmed this approach, stating that the phrase doesn't refer to use by any particular person, but describes the attributes of the property to which its use is suited at the date of acquisition. The Commissioner outlined a similar view at paragraph 9 of Goods and Services Tax Ruling GSTR 2012/5, that the phrase 'to be used predominantly for residential accommodation' is to be interpreted as a single test that looks at the physical characteristics of the property to determine the premises' suitability and capability for residential accommodation.

Definition of commercial residential premises

In determining whether premises are 'commercial residential premises', the GST Act sets out a number of requirements for 'residential premises' to be considered commercial in nature. Relevantly, the definition of commercial residential premises includes a 'hotel, motel, inn, hostel or boarding house' or 'anything similar'. Further, it is a requirement the premises must not be used to provide accommodation to students in 'connection with' an education institution that is not a 'school'. These requirements are considered in turn below.

The GST Act definition includes:

commercial residential premises means:

- (a) a hotel, motel, inn, hostel or boarding house; or*
- (b) premises used to provide accommodation in connection with a school; or*
- (c) a ship that is mainly let out on hire in the ordinary course of a business of letting ships out on hire; or*
- (d) a ship that is mainly used for entertainment or transport in the ordinary course of a business of providing ships for entertainment or transport; or*
- (da) a marina at which one or more of the berths are occupied, or are to be occupied, by ships used as residences; or*
- (e) a caravan park or a camping ground; or*
- (f) anything similar to residential premises described in paragraphs (a) to (e).*

However, it does not include premises to the extent that they are used to provide accommodation to students in connection with an education institution that is not a school.

⁵ [2010] FCAFC 138.

GST Classification in Property Matters

The Commissioner's View

The Commissioner's key ruling outlining his view on what he considers to be 'commercial residential premises' is GSTR 2012/6. That Ruling deals with the application of section 9-5, Subdivision 40-B and Subdivision 40-C with respect to supplies of commercial residential premises and supplies of accommodation in commercial residential premises. The key points contained in the Ruling include:

Hotels, motels, inns, hostels and boarding houses

The Commissioner considers the meaning of the terms "hotel, motel, inn, hostel or boarding house" in paragraph (a) of the definition of commercial residential premises, and notes that they must be considered by reference to their ordinary meanings, and the context in which the term "commercial residential premises" is used in the GST Act, including Divisions 40 and 87. In this context, the Commissioner considers that the list of premises in paragraph (a) creates a class of premises that share common characteristics. These characteristics may be used to classify premises under paragraph (a) of the definition, and to identify premises "similar to" these under paragraph (f).

These characteristics include:

- *Commercial intention* - The premises are operated on a commercial basis or in a business-like manner even if they are operated by a non-profit body.
- *Accommodation is the main purpose* - Providing accommodation is the main purpose of the premises.
- *Multiple occupancy* - The premises have the capacity to provide accommodation to multiple, unrelated guests at once in separate rooms, or in a dormitory.
- *Occupants have status as guests* - The premises are used to provide accommodation of a transient nature to guests. A guest is someone who is away from their usual home, or who has no other home. The accommodation may be of a short- or long-term nature. As a guest, a person has the right to occupy and enjoy the premises but accepts as part of the hire of accommodation that the management maintains overall control of both their room, and the premises as a whole.
- *Holding out to the public* - The premises offer accommodation for guests to the public or a segment of the public.
- *Central management* - The premises have central management to accept reservations, allocate rooms, receive payments and perform or arrange services. This can be provided through facilities on-site or off-site.
- *Provision of, or arrangement for, services* - Management provides guests with some services and facilities, or arranges for third parties to provide them.

GST Classification in Property Matters

- *Management offers accommodation in its own right* - The entity operating the premises supplies accommodation in its own right rather than as an agent.

In addition to these eight operating characteristics, other objective factors may be relevant to determining whether the premises are a hotel, motel, inn, hostel or boarding house. These additional objective factors include the overall physical character of the premises as well as government zoning and planning permissions.

Premises that are not operating

The Ruling states that premises may be characterised under paragraphs (a) or (f) of the definition of commercial residential premises even when they are not operating. Premises that are not being operated at the time of supply may be classified by their overall physical character, considered with other objective characteristics.

Prior use, physical characteristics, contractual documentation that provides evidence of how the premises will be used in the future, architectural plans, or council or other government planning and/or zoning restrictions may all be indicative of the premises' nature. For example, the supply of premises that were previously operated as a hotel, motel, inn, hostel or similar premises, and have not been physically modified in any way that changed their character, is a supply of commercial residential premises. Alternatively, the supply of a vacant house that was not designed, built or modified as a boarding house is not a supply of commercial residential premises.

Separately titled rooms

A supply by sale or lease of premises that contain rooms, apartments, cottages or villas as well as commercial infrastructure is a supply of commercial residential premises under paragraph (a) or (f) of the definition even where the rooms, apartments, cottages or villas are separately titled.

Furthermore, premises that are commercial residential premises include commercial infrastructure to support the commercial operation of the premises, such as, reception areas, dining and bar areas, meeting/function areas, kitchens, laundry facilities, storage areas and car parks. The supply by sale or lease of part of a building cannot be characterised by reference to another supply. Therefore, a supply by sale of residential apartments without sufficient commercial infrastructure will not be a supply of commercial residential premises. This is consistent with the analysis of the Full Federal Court in *South Steyne Hotel Pty Ltd v Commissioner of Taxation*.⁶

The role of the manager

A key feature of commercial residential premises is that the entity operating the premises offers accommodation in its own right. This means the manager is not merely performing administrative functions for owners, nor simply introducing occupants to separately owned premises as an agent. Rather, the manager is the supplier of the accommodation to the guest or resident and assumes the commercial risk and responsibility associated with that supply. The

⁶ [2009] FCAFC 155.

GST Classification in Property Matters

distinction is important because the GST characterisation turns on what is supplied, by whom, and in what capacity.

Where management offers accommodation in its own right, the occupant's legal and commercial relationship is with the operator of the premises. The operator accepts reservations, allocates rooms, collects charges, controls access, deals with complaints, arranges services and determines the terms on which accommodation is made available. These functions point to an integrated accommodation business rather than a passive letting arrangement. In this context, the manager's role supports the conclusion that the premises operate in a manner similar to a hotel, motel, inn, hostel or boarding house.

By contrast, where a manager acts only as agent for individual owners, the position is more difficult. In that case, the owner may be the relevant supplier of the accommodation, and the manager may simply provide booking, marketing, cleaning or letting services to the owner. The existence of centralised management, a reception function or common branding will not, by itself, convert the owner's supply of an individual apartment or room into a supply of commercial residential premises. This is particularly relevant for strata-titled serviced apartment arrangements, holiday letting pools and other structures where ownership and operation are separated.

The point is not simply one of contractual description. Labelling a manager as an agent or principal will be relevant, but the practical operation of the arrangement must also be considered. Relevant factors include who contracts with the occupant, who sets and receives the accommodation fee, who bears vacancy and default risk, who has authority to grant occupation, who controls the premises during the stay, and who is responsible for services such as cleaning, linen, maintenance, security and guest support. The more those functions sit with the manager as principal, the stronger the case that the manager is supplying accommodation in its own right.

This characteristic also assists in distinguishing commercial residential premises from ordinary residential leasing. In a conventional residential lease, the landlord grants possession of defined premises and the tenant occupies them as a home, with limited ongoing intervention from the landlord or agent. In commercial residential premises, the operator retains a continuing role in the accommodation experience. The occupant commonly receives a right to occupy as part of a managed accommodation facility, rather than a leasehold interest equivalent to ordinary residential tenancy.

For GST purposes, this means advisers should examine the full operating model, not merely the physical layout of the premises. If the manager is the party holding out the accommodation to the public, contracting with occupants and supplying the accommodation package as principal, that will weigh in favour of commercial residential character. If, however, the manager is only an intermediary for separate owners, the GST treatment may need to be analysed at the level of each owner's supply, with the manager's separate management services characterised independently.

GST Classification in Property Matters

Shared accommodation and build-to-rent developments

Shared accommodation and build-to-rent developments create particular GST classification challenges because they often adopt features commonly associated with commercial accommodation while still operating, in substance, as long-term residential housing. Co-living projects, student-style shared housing, key worker accommodation and institutional build-to-rent assets may include centralised ownership, professional management, communal amenities, digital booking platforms and branded resident experiences. Those features are relevant, but they do not automatically convert the premises into commercial residential premises.

The critical question remains whether the premises, viewed objectively, are sufficiently similar to a hotel, motel, inn, hostel or boarding house. In shared accommodation models, the presence of multiple unrelated occupants and shared kitchens, laundries, lounges, co-working spaces or recreational areas may point toward a hostel or boarding house comparison. However, the analysis must go further. It is necessary to examine whether the operator retains meaningful control over the premises, whether occupants are treated as guests or residents, whether accommodation is provided for a limited purpose or transitory stay, and whether management provides services beyond those ordinarily expected in residential leasing.

Build-to-rent developments are especially difficult because they are usually designed, financed and managed as a single commercial asset, yet the accommodation supplied to residents is commonly self-contained residential accommodation. A professionally managed apartment building with concierge services, gyms, parcel rooms, resident lounges, event programming and shared workspaces may still be residential premises where each occupant leases a self-contained apartment, has quiet enjoyment, and uses the apartment as their home. In that case, the commercial character of the investment platform does not necessarily alter the character of the premises supplied to the resident.

The distinction between a tenant and a guest is therefore central. Where an occupant has exclusive possession of a defined apartment or room, enjoys privacy and quiet enjoyment, supplies their own day-to-day living needs, and occupies for an extended or indefinite period, the arrangement is more likely to resemble ordinary residential accommodation.

Conversely, where the operator controls allocation of rooms, retains extensive access rights, provides regular cleaning, linen, meals, reception, security, guest support and other services, and offers accommodation for shorter or limited-purpose stays, the arrangement moves closer to commercial residential premises.

Shared amenities should also be treated with caution. Modern residential developments increasingly include facilities that were once more commonly associated with hotels or serviced accommodation, such as gyms, rooftop areas, communal dining spaces, theatres, work hubs and concierge-style services. Those amenities may enhance the resident experience, but they are not determinative.

The better view is that amenities must be assessed in the context of the whole operating model. If they are ancillary to self-contained residential occupation, they are unlikely to be sufficient. If

GST Classification in Property Matters

they form part of an integrated managed accommodation facility with substantial services and operator control, they may carry greater weight.

For developers and investors, the GST consequences can be significant. If a project is characterised as residential premises, leasing supplies will generally be input taxed and input tax credits on development and operating costs may be denied or subject to adjustment. If the premises are commercial residential premises, supplies of accommodation will generally be taxable, potentially allowing input tax credits, but also requiring GST to be accounted for on accommodation charges and any eventual sale. The classification may therefore affect project feasibility, pricing, funding assumptions, valuation, investor modelling and exit strategy.

The practical lesson is that shared accommodation and build-to-rent projects should be analysed before construction and before leasing documentation is finalised. Relevant evidence includes architectural plans, room configuration, lease or licence terms, house rules, management agreements, service schedules, marketing materials, planning approvals and operational manuals. The GST position should be tested against the actual resident experience, not merely the asset class label. A project described commercially as build-to-rent, co-living or managed accommodation may still be residential premises if, in substance, it provides homes to residents rather than accommodation to guests.

Student accommodation

The 'connection' exclusion

Paragraph 150 of Goods and Services Tax Ruling GSTR 2001/1 contains a list of factors that are considered in determining whether a supply is in connection with an education institution that is not a school. These include:

- Whether the education institution has any input in the running of the accommodation facility including the setting of rental charges and determining the relationship between the supplier of the accommodation and the occupier. The input may be made through a third party.
- Whether there is any specific or implied requirement that preference must be given to students of the education institution.
- Whether the housing facility is constructed on land owned by the education institution.
- Whether the land has been acquired or utilised by the education institution for the purpose of entering into agreements for the construction and running of the housing facility.
- Whether the facility is in fact to be occupied by students of the education institution during the academic year or at other times.
- Whether the education institution has any interest in the entity that is providing the accommodation. The interest may not always be directly reflected.

GST Classification in Property Matters

- How the housing facility is marketed.
- The identity of the operator and the nature of their business (is their business the supply of accommodation to students).
- The intention of the education institution in entering into any arrangements and any relevant agreements relating to the housing facility.
- Whether the provision of the facility reflects an education institution's charter or other governing instruments.

Where the particular student accommodation facility does not exhibit any of the above characteristics outlined above, the Commissioner considers the facility is likely to be not used to provide accommodation to students in connection with an education institution that is not a school (i.e. does not fall within the exclusion in the definition of 'commercial residential premises').

What is a 'school'

In order to be 'commercial residential premises', the premises must not be used to provide accommodation to students in connection with an education institution that is not a 'school'. For GST purposes, 'school' is specifically defined to include pre-school, primary, secondary and special education courses but does not include tertiary education courses (e.g. universities).

Supplies of long-term accommodation

Goods and Services Tax Ruling GSTR 2012/7 deals with the application of Division 87 and section 40-35 to supplies of long-term accommodation in commercial residential premises.

ECC Southbank v Commissioner of Taxation

The matter of *ECC Southbank Pty Ltd as trustee for Nest Southbank Unit Trust v Commissioner of Taxation*⁷, considered whether student accommodation fell within the definition of 'commercial residential premises' for the purposes of the GST. While superficially it may seem odd for a taxpayer to seek to change a non-taxable treatment (that of input taxed supplies of residential accommodation) to one of taxable, the main prize here was the potential application of Division 87, whereby supplies of long term accommodation in commercial residential premises can be taxed at a concessional rate. Thus unlocking all of the construction and operating input tax credits, while only paying GST at a reduced rate.

Facts

The taxpayer developed student accommodation premises consisting of the following features:

- Shared apartments, studio apartments and various common areas;

⁷ [2012] FCA 795.

GST Classification in Property Matters

- Each study/bedroom included a single bed (in the single occupancy rooms) or a bunk bed (in the double occupancy rooms) and also included a private ensuite bathroom, study desk, air-conditioning and storage spaces;
- Each cluster of study/bedrooms shared kitchen and living facilities located within each shared apartment;
- Residents of the shared apartments were given two keys to the apartment - the first key is to the main entrance to the apartment and the second is to his or her study/bedroom;
- The single occupancy study/bedrooms and the studio apartments were classified as either “standard” or “premium” - the distinction related to the location of the rooms within the building and to the level of equipment and furnishings provided within the rooms;
- The premises also incorporated within its common areas game rooms, TV areas, coin operated laundry, group study rooms, library, meeting rooms and a cafeteria-style eating area etc; and
- The common areas also included a reception desk that operated 24 hours per day providing services such as check in, check out, room changes, maintenance requests, customer queries, parcel delivery, making reservations, and monitoring telephones. Goods and services supplied or arranged through the reception desk included internet top-up cards, bed and kitchen packs, air-train tickets, room cleaning services and laundry services.

The ultimate issue before the Federal Court was whether supplies of the student accommodation were supplies of ‘commercial residential premises’ (taxable) or residential premises (input taxed).

The Commissioner’s Submissions

The Commissioner argued that a resident of the student accommodation rented the premises in much the same way as a person would rent any apartment for the purpose of exclusive or shared residence. As a result, the premises were ‘similar to that which would be expected for those who own or rent a house or apartment’ and not analogous to a ‘hotel’, ‘motel’, ‘inn’, ‘hostel’ or ‘boarding house’. The Commissioner further argued that the policy underpinning the GST legislation was that those renting a house or apartment are to be on the same footing as persons who own their own homes - i.e. neither should pay GST in connection with such occupation.

The Taxpayer’s Submissions

The taxpayer argued that the premises were ‘commercial residential premises’, because they possessed similar characteristics to a hotel, motel, inn, hostel or boarding house. Therefore, the

GST Classification in Property Matters

supply of the student accommodation was a taxable supply upon which it was entitled to claim input tax credits.

Decision

In finding that there had been taxable supplies of 'commercial residential premises', Nicholas J considered whether the student accommodation as a whole was a hotel, motel, inn, hostel or boarding house or whether it was similar to any of those types of establishment. The application of this test necessarily raised questions of fact involving matters of impression and degree.

Nicholas J considered the characteristics of hotels and motels and identified a number of ways in which the accommodation in question differed from those establishments. For example, most of the student accommodation consisted of shared accommodation; there was no kitchen/restaurant; residents were responsible for their own cleaning; residents entered into agreements which were more like tenancy agreements; and residents were primarily students rather than visitors. Next, he considered the ordinary meaning of the term 'hostel', defined in the Macquarie Dictionary as 'a supervised place of accommodation usually supplying board and lodging provided at comparatively low cost particularly to students'. On that basis, Nicholas J found that if the premises were not a hostel, they were very similar to a hostel because they were intended to be inexpensive and were supervised 24 hours a day via a reception desk.

Nicholas J also referred to *Meridien Marinas Horizon Shores Pty Ltd v Federal Commissioner of Taxation*⁸ and the Explanatory Memorandum to the Tax Laws Amendment (2006 Measures No. 3) Bill 2006, both of which set out the following indicia typically exemplified by 'commercial residential premises':

- are run by a controller for a commercial purpose;
- have multiple occupancy;
- are held out to the public as such;
- have central management;
- provide services in addition to commercial accommodation; and
- Are used for the main purpose of accommodation.

On the basis that the student accommodation exhibited all of the indicia, Nicholas J regarded it as 'commercial residential premises' for the purpose of the GST Act. The supplies could properly be characterised as taxable supplies, and were not input taxed.

Implications arising from the decision

Certain off-campus student accommodation may properly be regarded as 'commercial residential premises' for the purposes of the GST Act. The supply of that accommodation may be treated as a taxable supply that is subject to GST and eligible for input tax credits. However if

⁸ [2009] FCA 1594.

GST Classification in Property Matters

the premises fail the “hotel, motel, hostel” test because they fail to exemplify the indicia above, then they may be input taxed.

Although the taxpayer in this case was successful, not all suppliers of such accommodation (or the occupants of their premises) will be as fortunate. This decision favours suppliers of newly constructed complexes, who will get the benefit of large upfront input tax credits where their supplies are characterised as taxable. In long-standing complexes, however, GST imposed on charges will either need to be borne by the supplier or recovered from the occupants, subject to whether the concessions for long-term commercial accommodation in Division 87 of the GST Act can be accessed.

3. The Margin Scheme

Eligibility criteria and the necessity of strict written agreements

The margin scheme is not a general concession that can be applied whenever it produces a more favourable GST outcome. It is a statutory method for calculating GST on eligible taxable supplies of real property, and its availability depends on both the vendor’s acquisition history and the parties’ compliance with the formal requirements in Division 75. In practical terms, the scheme is usually available where the vendor acquired the property before 1 July 2000, acquired it through a non-taxable supply, acquired it under the margin scheme, or acquired it through a GST-free transaction such as a going concern or certain farmland supplies. It is generally not available where the vendor acquired the property through a fully taxable supply on which GST was charged in the ordinary way.

The written agreement requirement is central. The supplier and recipient must agree in writing that the margin scheme is to apply, and that agreement must be made no later than the time of supply, which will ordinarily be settlement for a sale of land. The agreement may appear in the contract, in a special condition, or in a separate written exchange, but it must be clear, final and referable to the particular supply. A shared commercial assumption that the margin scheme would be used is not enough. Nor is it sufficient that the contract price was modelled on a margin scheme outcome if the parties have failed to record the agreement in a legally effective way.

Drafting fail safes: Common contractual errors that invalidate the margin scheme

Most margin scheme failures are drafting failures rather than substantive eligibility failures. Common errors include leaving the relevant GST schedule item blank, ticking inconsistent GST boxes, stating that the price is “GST inclusive” without separately confirming that the margin scheme applies, using generic wording such as “GST, if any, applies”, or relying on a special condition that conflicts with the standard GST provisions in the contract. Another recurring problem is the use of language that records only the vendor’s intention or election, rather than an agreement between both parties that the margin scheme is to apply.

A robust contract should contain several failsafes. First, the contract schedule should state expressly whether the margin scheme applies. Secondly, the operative GST clause should confirm that the parties agree in writing for the purposes of Division 75 that the margin scheme applies to the supply. Thirdly, the price clause should explain whether the stated price is GST-

GST Classification in Property Matters

inclusive and, if so, that the GST component is to be calculated under the margin scheme rather than as one-eleventh of the total price. Fourthly, the contract should address the consequences if the margin scheme is later found not to be available, including whether the vendor can recover additional GST, whether the purchaser must gross up the price, and whether settlement adjustments or tax invoices are required.

The contract should also avoid implying that the purchaser will receive an input tax credit for GST embedded in a margin scheme price. Where the margin scheme applies, the purchaser cannot claim an input tax credit for GST included in the price of the property. This commercial consequence should be understood at negotiation stage, particularly where the purchaser is a registered developer, investor or business acquirer that has priced the transaction on the assumption that input tax credits will be available.

Interaction with land tax, stamp duty, and the Australian Consumer Law regarding misleading price representations

GST drafting should not be treated in isolation from State taxes and consumer law obligations. Transfer duty is generally calculated by reference to the dutiable value of the transaction, and State revenue authorities commonly treat the GST-inclusive consideration, or the highest consideration payable under the instrument, as relevant to duty. This means that an error in the GST clause can affect not only the GST liability but also the duty base. If a contract is unclear as to whether GST is included in or added to the price, the purchaser may face a higher duty exposure or a dispute about the amount on which duty should be assessed.

Land tax adjustments create a separate but related drafting issue. In Queensland and other jurisdictions, modern contract forms increasingly require parties to identify how land tax is to be adjusted at settlement. If the GST clause, price clause and adjustment provisions are not aligned, parties may unintentionally calculate GST on adjustments, fail to account for GST on reimbursement-style amounts, or create uncertainty about whether land tax recoveries are part of the consideration for the supply. This is particularly important where a vendor seeks to recover outgoings in addition to the stated purchase price.

There is also an Australian Consumer Law overlay where property is marketed to consumers or small investors. Price representations must not be misleading, and consumer-facing prices should generally disclose the total price payable, including taxes, duties, fees and unavoidable charges that can be calculated. A marketing campaign that advertises a price without clearly explaining whether GST is included, whether the margin scheme applies, or whether additional amounts may be payable at settlement can create misleading price representation risk. The risk is heightened where brochures, listing materials or agent communications are inconsistent with the contract.

The safest approach is to align the transaction documents from the outset: the expression of price, the GST schedule, the margin scheme agreement, the land tax adjustment provision, the transfer duty assumptions and all marketing materials should tell the same story. Where they do not, the issue is not merely one of poor drafting. It can become a GST dispute, a duty dispute and a consumer law problem at the same time.

GST Classification in Property Matters

4. The Going Concern Exemption

Strategic and commercial benefits of structuring a sale as a going concern

Structuring a property or business sale as the supply of a going concern can deliver significant commercial value where the statutory requirements are properly satisfied. The immediate benefit is cash flow: the purchaser does not need to fund an additional GST amount at settlement and then wait to recover that amount through an input tax credit. This can materially improve transaction certainty, particularly for high-value commercial property, development sites with operating leases, hotel assets, management rights businesses and other enterprise sales where the GST component would otherwise be substantial.

The going concern treatment can also reduce transaction friction. If the sale is taxable, the purchaser must usually consider funding, tax invoice timing, input tax credit entitlement and any GST withholding or settlement mechanics. By contrast, a GST-free going concern treatment can simplify the settlement cashflows and avoid disputes about whether the contract price is GST-inclusive or GST-exclusive. It may also have transfer duty consequences because duty is often calculated by reference to GST-inclusive consideration or dutiable value. Where GST is not added to the price, the purchaser may avoid duty being imposed on a GST gross-up amount.

The commercial benefit is not limited to the purchaser. For the vendor, going concern treatment may preserve deal value by making the asset more attractive to purchasers who are sensitive to settlement funding. It may also reduce the risk of a purchaser seeking a price reduction to compensate for GST funding costs. However, the treatment should not be adopted merely because it is commercially convenient. The parties must be able to identify a real enterprise that is being supplied and must be satisfied that the statutory conditions in section 38-325 are met at the time of supply.

Drafting requirements and the “supply of all things necessary” test

The drafting starting point is that the contract must contain a clear written agreement that the supply is the supply of a going concern. A general statement that the sale is “GST-free” is preferable to no statement, but it is not enough on its own if the operative clauses do not identify the enterprise, the things being supplied, the purchaser’s GST registration status and the consequences if the treatment is later found to be unavailable. The agreement should be expressed as an agreement between both parties, not merely a unilateral assertion by the vendor.

The most important drafting exercise is identifying the relevant enterprise. In property transactions, the enterprise is commonly a leasing enterprise, a hotel or accommodation business, a management rights business, or another operating business conducted from the land. Once the enterprise is identified, the contract must ensure that all things necessary for the continued operation of that enterprise are supplied to the purchaser. In a leasing enterprise, that will ordinarily include the land, existing leases, tenant covenants, rent and security arrangements, management agreements, records and other rights necessary for the purchaser to continue deriving rental income from settlement.

GST Classification in Property Matters

The “all things necessary” test does not require the vendor to supply every asset used in the business, but it does require the supply of everything essential to allow the identified enterprise to continue. This is a functional test. The question is whether, immediately after settlement, the purchaser has the legal and practical ability to continue operating the same enterprise without having to acquire some essential element from another source. If the purchaser must separately obtain a critical licence, lease, contract, management agreement or operating asset before the enterprise can continue, the exemption may fail.

The contract should also require the vendor to carry on the enterprise until the day of supply. This obligation is particularly important where the enterprise depends on a lease or operational activity. If a commercial building is sold as a leasing enterprise, the vendor should avoid promising vacant possession unless that is consistent with the identified enterprise. If premises become vacant before settlement, the vendor may need to continue actively marketing the space for lease, maintaining the property and preserving the leasing enterprise. A lease that commences only after settlement, or an enterprise that exists only as a future intention, will not ordinarily be enough.

Managing the risk of ATO re-classification and clawbacks

The principal risk is that the Commissioner later concludes that the supply was not GST-free because no relevant enterprise was supplied, not all necessary things were provided, the enterprise was not carried on until settlement, the purchaser was not registered or required to be registered, or the written agreement was defective. If that occurs, the vendor may be assessed for GST on the sale price, together with general interest charge and penalties. The commercial problem is that the reassessment may occur long after settlement, when the vendor’s ability to recover GST from the purchaser depends entirely on the contract.

For this reason, the contract should contain protective mechanisms. These include a clear GST gross-up clause if the going concern treatment is denied, a warranty that the purchaser is registered or required to be registered for GST at settlement, undertakings by the vendor to carry on the enterprise until completion, warranties about the existence and assignment of leases or operating agreements, and a no-merger clause preserving GST recovery rights after settlement. The contract should also require cooperation if the COMMISSIONER reviews the transaction, including the provision of records, lease documents, settlement materials and evidence of operational continuity.

Purchasers also face clawback risk. If a purchaser acquires property as part of a GST-free going concern but later uses it to make input taxed supplies, such as residential rent, Division 135 may require an increasing adjustment. This adjustment can effectively claw back the GST benefit where the purchaser’s intended or actual use is not creditable. Purchasers should therefore model the GST consequences of their post-settlement use, particularly where a commercial asset is to be converted to residential accommodation, build-to-rent, retirement living or another input taxed use.

The best risk-management approach is to build an evidence file before settlement. That file should identify the enterprise, list the things being supplied, confirm the purchaser’s GST registration status, preserve the written going concern agreement, document how the vendor carried on the enterprise until settlement, and retain evidence that leases, licences,

GST Classification in Property Matters

management agreements and operating records were transferred or made available. Where the transaction is high value, unusual or close to the line, a private ruling should be considered before settlement rather than relying on a post-completion contractual dispute to allocate the GST cost.

5. Managing ATO Scrutiny

ATO scrutiny in property matters is usually driven by a mismatch between the commercial story told by the transaction documents and the GST outcome adopted by the parties. In property syndicates and development joint ventures, that risk is heightened because there are often multiple parties, layered entities, nominee arrangements, related-party funding, staged contributions, development management agreements and shifting roles between landowner, developer, financier and investor. The Commissioner's focus is not limited to whether GST has been calculated correctly; it will also test whether the correct entity has registered, whether the correct entity is carrying on the enterprise, whether input tax credits have been claimed by the party legally entitled to them, and whether the structure has been used to obtain a GST advantage inconsistent with the statutory scheme.

The first red flag is entity confusion. Many syndicate and joint venture documents use commercial labels such as "joint venture", "nominee", "bare trustee", "manager" or "operator", but those labels do not determine the GST outcome. The critical question is who is making the relevant supplies and acquisitions. If a nominee holds legal title but another entity conducts the development enterprise, claims input tax credits or enters into sale contracts, the ATO may challenge whether the claimant is the entity that made the creditable acquisitions.

Similar issues arise where the parties describe the arrangement as a joint venture but the legal rights and obligations point instead to a partnership, trust or agency relationship. That re-characterisation can alter GST registration, attribution, input tax credit recovery, liability allocation and penalty exposure.

Other red flags include circular or poorly documented funding flows, related-party loans that do not reflect commercial terms, inflated development or management fees, inconsistent GST treatment across the contract, settlement statement and BAS, and claims for input tax credits before there is sufficient evidence that an enterprise is being carried on.

The Commissioner is also likely to examine arrangements where losses or input tax credits are allocated to one participant while profits or asset value accrue to another, where land is transferred between related entities shortly before sale, or where the margin scheme, going concern exemption or residential premises classification is adopted without contemporaneous evidence supporting that position.

A proactive risk strategy starts before contracts are signed. The parties should map the transaction by supply, not merely by entity chart. For each supply, advisers should identify the supplier, recipient, consideration, GST classification, timing of attribution, entitlement to input tax credits, availability of special rules and the evidence that supports the adopted treatment. This should be recorded in a transaction GST position paper and aligned with the sale contract, development agreement, management agreement, trust deed, joint venture agreement, funding documents, tax invoices and settlement adjustments. Where the GST treatment depends on

GST Classification in Property Matters

facts that may change, the documents should include warranties, notification obligations, cooperation clauses and post-completion gross-up mechanisms.

Where the position is uncertain or commercially material, early engagement with the Commissioner should be considered. A private ruling can provide protection where the facts are complete and stable, while a voluntary disclosure may reduce penalty exposure if an error is identified after lodgment. In larger or higher-risk projects, maintaining a tax governance file is often as important as the technical answer itself. That file should include advice received, assumptions tested, board or investment committee papers, valuation and apportionment support, evidence of GST registration, proof of enterprise activity, copies of agreements and records showing why the adopted treatment was reasonably open at the time.

If the Commissioner commences a review or audit, the response should be disciplined and evidence-led. The first step is to identify the precise issue: entity entitlement, classification, attribution, valuation, apportionment, margin scheme eligibility, going concern treatment or anti-avoidance. The taxpayer should then provide a coherent narrative supported by primary documents, rather than a collection of isolated explanations. If the Commissioner maintains an adverse view, the dispute pathway may involve position papers, alternative dispute resolution, objection, independent review where available, settlement discussions and, if necessary, review by the Administrative Review Tribunal or appeal to the Federal Court. The objective is not merely to win the technical argument, but to manage tax, penalties, interest, funding, commercial relationships and reputational risk at the same time.

Conclusion

GST classification in property matters is no longer a peripheral compliance issue. It is a central transaction risk that can determine price, cash flow, input tax credit recovery, settlement mechanics, funding assumptions and post-completion liability. The recurring theme across residential premises, commercial residential premises, shared accommodation, the margin scheme and the going concern exemption is that GST outcomes turn on substance, evidence and timing. Courts and the Commissioner will look beyond labels, marketing descriptions and commercial expectations to the objective character of the premises, the legal rights supplied, the identity of the supplier and the practical operation of the arrangement.

For advisers, the practical lesson is clear. GST must be addressed at the structuring and drafting stage, not after exchange, settlement or audit. The correct treatment should be tested against the statutory provisions, ATO guidance, case law and the commercial documents before the parties commit to pricing. Where the treatment depends on special rules, such as the margin scheme or the going concern exemption, the contract should do more than state an outcome. It should record the necessary agreements, allocate risk if the treatment fails, preserve recovery rights after completion and require cooperation if the ATO later reviews the transaction.

The broader message is that GST risk is best managed through alignment. The physical characteristics of the property, the legal form of the transaction, the operating model, the contractual drafting, the settlement documents and the BAS reporting must all tell the same story. Where they do not, the risk is not merely technical. It may produce reassessments, penalties, denied input tax credits, purchaser disputes and reputational consequences. In high-value property transactions, the cost of resolving a GST dispute after the event will almost always exceed the cost of identifying and documenting the correct position at the outset.



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