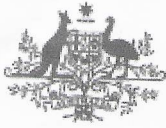


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**Edited version of private advice**

Authorisation Number: 1052063815301

Date of advice: 9 December 2022

Ruling

Subject: GST and property

**Question**

Will the supply of property located at <address> by way of lease to a registered special disability accommodation provider be an input taxed supply pursuant to section 40-35 of the *A New Tax System (Goods and Services Tax) Act 1999*?

**Answer**

Yes.

This ruling applies for the following period:

<date>

The scheme commences on:

<date>

Provider cannot use  
Head Lease SDA Reg Provide.  
\* Cannot argue  
SDA Property is a commercial  
residential (ie) hotel etc  
to claim GST

**Relevant facts and circumstances**

You are a partnership and are not registered for GST.

lot so important \*

You own property located at < address > (the Property) as tenants in common in the following proportions:

Partner	Percentage ownership
Partner 1	%
Partner 2	%
Partner 3	%

You acquired the Property on XX July 20XX (settlement date).

You will engage a builder to construct a building on each Lot containing:

- Three bedrooms with ensuites
- 'Support room'
- Kitchen
- Lounge and dining area
- Media room
- Laundry
- Garage
- Alfresco area

Upon completion of construction you will lease the Property to a registered special disability accommodation (SDA) Provider (SDA Provider) under a head lease.

\*

The SDA Provider will sub-lease the various tenant bedrooms to a National Disability Insurance Scheme (NDIS) participant.

The NDIS Participant will have SDA support approved under their NDIS plan.

The SDA Provider will licence the Support Room to a Supported Independent Living (SIL) Provider within the meaning of the NDIS Act.

The SIL Provider will use the Support Room as an office and quarters to reside. The SIL Provider will provide overnight on-site assistance to the tenants (NDIS Participants).

The SIL Provider will be onsite 24/7 to deliver assistance to tenants as needed including scheduled support, such as waking tenants to take medication, turning and repositioning, help with pain relief or using the toilet. NDIS tenants may also require food preparation.

A separate support package will be negotiated with each tenant in accordance with their NDIS funding package. The SIL Provider will liaise with the SDA Provider in terms of adjustments required to the Property to meet the changing needs of the NDIS tenants.

NDIS tenants will lodge complaints with the SDA provider in relation to difficulties with other tenants - for example, bad behaviour.

Prior to the NDIS tenants occupying the Property, the Property will be registered as a SDA property.

### Relevant legislative provisions

*A New Tax System (Goods and Services Tax) Act 1999*

Section 40-35

Paragraph 40-35(1)(a)

Subsection 40-35(2)

Section 195-1

### Reasons for decision

In this ruling,

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

- all legislative terms of the GST Act marked with an asterisk are defined in section 195-1 of the GST Act.
- all reference materials, published by the Australian Taxation Office (ATO), that are referred to are available on the ATO website [ato.gov.au](http://ato.gov.au)

Paragraph 40-35(1)(a) provides that a supply of residential premises by way of lease, hire or licence (other than a supply of commercial residential premises or a supply of accommodation in commercial residential premises provided to an individual by the entity that owns or controls the commercial residential premises) is input taxed.

Under subsection 40-35(2), the supply is input taxed only to the extent the premises are to be used predominately for residential accommodation (regardless of the term of occupation).

The definition of 'residential premises' in section 195-1 refers to land or a building that is occupied as a residence or for residential accommodation, or is intended to be occupied, and is capable of being occupied as a residence or for residential accommodation (regardless of the term of occupation or intended occupation).

Goods and Services Tax Ruling GSTR 2012/5 *Goods and services tax: residential premises* (GSTR 2012/5) outlines the characteristics of residential premises.

Paragraph 9 of GSTR 2012/5 explains that the requirement in section 40-35 that premises be 'residential premises to be used predominately for residential accommodation' is to be interpreted as a single test that looks to the physical characteristics of the property to determine the premises' suitability and capability for residential accommodation. Further, paragraph 15 of GSTR 2012/5 states that to satisfy the definition of residential premises, premises must provide shelter and basic living facilities.

Given the facts of this case the dwellings you will be constructing and leasing will constitute 'residential premises' as defined for GST purposes.

The next issue to consider is whether your supply of the Property to a registered SDA Provider under a head lease falls within the exclusion in paragraph 40-35(1)(a) by being a supply of commercial residential premises.

The term 'commercial residential premises' is defined in section 195-1 to include, amongst other things:

(a) a hotel, motel, inn, hostel or boarding house; or

(b) ...

...

(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.

Goods and Services Tax Ruling GSTR 2012/6 *Goods and services tax: commercial residential premises* (GSTR 2012/6) sets out the ATO view on how GST applies to supplies of commercial residential premises and supplies of accommodation in commercial residential premises.

The terms hotel, motel, inn, hostel and boarding house are not defined in the GST Act and take their ordinary meaning. The *Macquarie Dictionary 5<sup>th</sup> Edition* provides the following definitions:

*Hotel a building in which accommodation and food, and alcoholic drinks are available*

*Motel a roadside hotel which provides accommodation for travellers in self-contained, serviced units, with parking for their vehicles.*

*Inn a small hotel that provides lodging, food etc., for travellers and others*

*Hostel a supervised place of accommodation, usually supplying board and lodging provided at a comparatively low cost, as one for students, nurses, etc.*

*Boarding house a dwelling in which lodging is provided to paying residents who share common facilities such as a kitchen, laundry, living room, etc.*

*a dwelling, usually a private house, in which board and lodging are provided for payment*

In their ordinary meanings, these terms share the common attribute of providing accommodation to guests.

Paragraph (f) of the definition of commercial residential premises extends the scope of the definition to premises that are 'similar' to the class of establishments described in paragraphs (a) to (e).

Premises that are 'similar' to establishments that are commercial residential premises must have sufficient characteristics in common with the class of premises described.

Paragraph 12 of GSTR 2012/6 contains a number of characteristics common to hotels, motels, inns, hostels and boarding houses:

- 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.
- Multiple occupancy

- The premises have the capacity to provide accommodation to multiple, unrelated guests or residents at once in separate rooms, or in a dormitory.
- Holding out to the public
- The premises offer accommodation to the public or a segment of the public.
- Accommodation is the main purpose
- Providing accommodation is the main purpose of the premises.
- 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.
- Management offers accommodation in its own right.
- The entity operating the premises supplies accommodation in its own right rather than as an agent.
- Provision of, or arrangement for, services
- Management provides guests and residents with some services and facilities, or arranges for third parties to provide them.
- Occupants have status as guests
- Predominantly, the occupants are travellers who have their principal place of residence elsewhere. The occupants do not usually enjoy an exclusive right to occupy any particular part of the premises in the same way as a tenant.

In this case we do not consider the Property to be a hotel, motel, inn or anything similar to these types of establishments. As such, we will consider whether the Property is a hostel, boarding house or anything similar.

Paragraphs 26 to 35 of GSTR 2012/6 discuss the features typically displayed in a hostel with paragraphs 36 to 40 containing the features of a boarding house.

#### *Features of hostels*

26. The term 'hostel' includes premises that can be described as a hostel, a hotel or inn. The features of hotels and inns identified at paragraphs 13 to 25 of this Ruling are relevant to these types of premises.

27. The term 'hostel' also includes a supervised place of accommodation usually supplying board and lodging provided at a comparatively low cost.
28. The physical characteristics of a hostel, or premises similar to a hostel, reflect that the premises are designed to supply accommodation at a comparatively low cost to the occupants. Physical characteristics may include a commercial kitchen where meals are prepared, a communal area suitable for a dining area for occupants, and a communal laundry.
29. Hostels are typically centrally managed by an on-site manager who manages the accommodation and arranges or provides services. The feature that a hostel, or premises similar to a hostel, be a supervised place of accommodation can be evident where occupants can raise queries and concerns pertaining to the management of the premises with an on-site manager.
30. Hostels provide accommodation for a commercial purpose. Non-profit entities can also operate commercial residential premises. For example, various non-profit organisations operate hostels in a business-like manner.
31. Hostels have the capacity to supply accommodation for multiple occupancies.
32. Accommodation in hostels may be provided either in a dormitory environment or in separate bedrooms.
33. Accommodation may be supplied within a hostel to occupants as the occupant's principal place of residence. It is not necessary for accommodation in the premises to be limited to guests who need or desire accommodation while away for business or pleasure.
34. The operator of the hostel supplies the accommodation in its own right and not in the capacity of agent for a third party. The arrangement between the parties will reveal whether there is an agent-principal relationship.
35. Occupants of a hostel may be provided meals by the operator of the premises. However, the provision of meals is not an essential feature of a hostel.

#### *Features of boarding houses*

36. A boarding house is a dwelling at which board and lodging are provided to guests or residents.
37. A boarding house provides accommodation for a commercial purpose. Non-profit entities can also operate commercial residential premises. For example, various non-profit organisations operate boarding houses in a business-like manner.
38. A boarding house has the capacity to supply accommodation for multiple occupancies.

39. While the term 'boarding house' indicates that the premises ordinarily consist of a single dwelling, premises are not precluded from being a boarding house where the premises consists of a building with an additional stand alone structure in which board (meals), or lodging, or both, is provided. However, premises are not a boarding house where the premises consist of a central building used as a communal dining/meeting area with a number of independent living units.

40. A boarding house may provide accommodation to occupants as the occupant's principal place of residence. It is not necessary for accommodation in the premises to be limited to guests who need or desire accommodation while away for business or pleasure.

To date, the construction of the dwellings on the Property has not been completed. Paragraphs 86 to 88 of GSTR 2012/6 discuss the Commissioner's approach in such scenarios:

### ***Characterising premises that are not operating***

86. Premises may be characterised under paragraphs (a) or (f) of the definition of commercial residential premises 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.

87. Evidence that may objectively indicate whether premises are a hotel, motel, inn, hostel or boarding house includes:

- the premises' physical characteristics,
- architectural plans and drawings,
- contractual documentation that provides evidence of how the premises will be used in the future, or
- council or other government planning and zoning restrictions and approvals and permissions.

These types of evidence may be relevant where the premises have been newly constructed and not yet operated. Where these indicators reveal that the premises have been specifically constructed for a different purpose (for example, to be used as a retirement village), or not designed as a hotel, motel, inn, hostel, boarding house or similar premises, the non-operating premises are not commercial residential premises.

88. 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. Therefore, in the absence of contractual documentation and council or other government planning and zoning restrictions or approvals or permissions that objectively evidence that the premises are to be operated as a boarding house, the supply of a vacant house is not the supply of commercial residential premises.



## Application to your situation

As observed by Nicholas J in *ECC Southbank* [at 50], the question of whether premises are considered 'commercial residential premises' for GST purposes raises questions of fact involving matters of degree and impression.

In this case, the physical characteristics of the Property as illustrated in the floor plans provided do not display that the premises are designed as a hotel, motel, inn, hostel or boarding house. The floor plans provided are typical of a three/four bedroom residential house and do not contain features that would distinguish the premises in question apart from this description.

You contend that the Property should be characterised as, or is similar to, a hostel with the Property acting as a 'house of residence for a special class of people' (NDIS participants). Furthermore, in support of your contention you consider the Property will exhibit the features of commercial residential premises as discussed in paragraph 12 of GSTR 2012/6.

Whilst the Property may exhibit many of the general features of a hotel, motel, inn, hostel and boarding house as discussed in paragraph 12 of GSTR 2012/6, we also need to consider the more specific characteristics each of these types of establishments typically display.

The Commissioner discusses at paragraph 27 of GSTR 2012/6 that the term 'hostel' includes a 'supervised place of accommodation usually supplying board and lodging provided at a comparatively low cost'.

In your submission you made reference to *ECC Southbank Pty Ltd as trustee for Nest Southbank Unit Trust & Anor v. Commissioner of Taxation* [2012] FCA 795 (*ECC Southbank*). Nicholas J [at 65] considered the premises in question (*Urbanest*) to be supervised in the sense:

'... that the reception desk is manned 24 hours a day. I infer that residents may lodge complaints with management through the reception desk about the behaviour of other residents or visitors including in relation to excessive noise, failures to maintain the cleanliness of shared apartments and like matters dealt with in the House Rules'.

Example 6 and Example 7 of GSTR 2012/6 illustrate the feature of 'supervision' as being the on-site presence of a manager whereby occupants are able to raise complaints and concerns about the management and operation of the premises.

In this case, whilst it is acknowledged a SIL Provider will be on site at the Property 24/7, we do not consider the role of the of the SIL Provider to be that of a supervisory one in the same context as illustrated in Example 6 and 7 of GSTR 2012/6 or as found in *ECC Southbank*. In this case, the primary function of the SIL Provider is to assist and support occupants with daily tasks including:

- waking occupants to ensure medication is taken when needed

- turning or repositioning occupants (assumingly where occupants remain in the one position for extended periods either during the day or at night)
- assist with pain relief
- use of the toilet
- meal preparation (if needed)

Whilst the above duties may be said to be supervisory in nature, we do not consider the Property to be a 'supervised place of accommodation' in the same manner as a traditional 'hostel'.

It was also noted in ECC Southbank [at 67] that the fact meals were not provided to residents, as they might usually be in the case of a more traditional hostel, did not mean that the Urbanest premises may not be fairly described as a hostel or, at least, as being similar to a hostel.

In this case, meals, as such, will not be provided with the SIL Provider providing assistance with meal preparation to a resident if needed and in accordance with the individual resident's NDIS funding package.

In this case we do not consider the Property to fall within the definition of 'commercial residential premises' for GST purposes. We do not consider the Property to be a 'hostel' or something that is similar to or has a likeness or resemblance to, a hostel. The Property is not a 'supervised place of accommodation' in the traditional sense when describing a hostel.

Furthermore, we do not consider the Property to be a 'boarding house' or something similar. In this case, meals are not provided to residents which is an essential feature of a 'boarding house'. In this case, a resident is responsible for their own meals with the SIL Provider providing assistance with preparation.

## Conclusion

Your supply of the Property by way of lease to a SDA Provider under a head-lease will be an input taxed supply pursuant to section 40-35.

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