

## Interpretation Statement IS 10/08

### RETIREMENT VILLAGES – GST TREATMENT

This Interpretation Statement considers the legislation as it is before any relevant amendments to the Goods and Services Tax Act 1985 in the Taxation (GST and Remedial Matters) Bill 2010 take effect. When the form of any relevant amendments is finalised, a further item will be issued to address the GST position of retirement villages affected by the amendments.

- 1 All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

#### SUMMARY

- 2 This Interpretation Statement addresses the GST treatment of payments received by retirement villages (the owners and operators of retirement villages) and their entitlement to input tax credits in respect of goods or services acquired for the purposes of operating a retirement village.
- 3 To determine whether GST is chargeable on supplies made by a retirement village and whether retirement villages are entitled to input tax credits on goods and services acquired for the purpose of operating the retirement village, it is necessary to consider whether the supplies made by a retirement village are taxable or exempt supplies. For this purpose, it is necessary to consider the rights and obligations under contracts entered into between retirement villages and their residents.
- 4 Retirement villages supply accommodation and care services. The main legal structures used for the provision of occupation rights in a retirement village are sales, leases or licences. Where a unit is sold, a retirement village may have an obligation to re-purchase the unit or they may have an option to purchase the unit. The payments made by residents under their contracts include an entry payment (either the purchase price for a unit, a loan or deposit), a payment that is commonly described as the "facilities fee" or "amenities contribution", periodic services fees and termination charges. The nature of the supplies made by a retirement village and the consideration for the supplies are considered at paragraphs 44 to 106.
- 5 A retirement village may make the following types of exempt supplies:
  - The supply of financial services (the allotment or issue of a debt security): sections 14(1)(a) and 3(1)(c). The meaning of "debt security" is considered at paragraphs 58 to 61.
  - The supply of accommodation in a dwelling by way of hire, service occupancy agreement or licence to occupy: section 14(1)(c). The meaning of "accommodation" is considered at paragraphs 79 to 80 and the meaning of "dwelling" is discussed at paragraphs 116 to 145.
- 6 The Commissioner considers that a retirement village makes a supply of a financial service (the allotment of a debt security) under any transaction where the retirement village accepts an obligation to re-purchase a unit or

to repay a loan or deposit. That service is supplied for no consideration. Section 14(1)(a) is considered at paragraphs 111 to 113.

7 As section 14(1)(c) applies to the supply of accommodation by way of hire, service occupancy agreement or licence to occupy, it is necessary to consider whether section 14(1)(c) applies only where the right to occupy a unit in a retirement village is supplied under a lease or licence. For section 14(1)(c) to apply, accommodation must be supplied in a dwelling. If paragraph (f) of the definition of "commercial dwelling" applies to a unit in a retirement village, the unit is a dwelling rather than part of a commercial dwelling. To determine whether paragraph (f) applies, it is necessary to:

- identify the consideration that residents are contractually obliged to pay for the right to occupy a dwelling; and
- determine whether such consideration is for the supply of accommodation.

The Commissioner considers that paragraph (f) does not apply to units whose residents have purchased a package of care services; therefore, such units are part of a commercial dwelling so that the supply of accommodation in the units under a lease or licence is a taxable supply. On the basis of contractual arrangements that are currently entered into between retirement villages and residents, paragraph (f) applies to other units in a retirement village so that the supply of accommodation in such units under a lease or licence is an exempt supply.

The issue of whether section 14(1)(c) applies to the supply of accommodation in a retirement village is considered at paragraphs 114 to 145.

8 A retirement village may also supply a participatory security under which residents have a right to use the common areas and facilities in the village. If the right to use the common areas under a participatory security that is part of a taxable supply of accommodation is an "associated supply", section 14(1)(a) does not exempt the associated supply: section 14(1B). An associated supply is treated as a separate taxable supply: section 5(14B). This issue is considered at paragraphs 146 to 156.

#### *Input tax credits*

9 Whether an input tax credit is allowable on the individual goods and services that go into a retirement village development depends on whether the asset produced using those goods and services is acquired for the principal purpose of making taxable supplies.

10 The principal purpose at the time of acquisition must be ascertained. If at the time land is acquired development plans are not finalised, whether the principal purpose test is satisfied in respect of the land depends on whether the intended use of the land is principally for the making of taxable supplies. There must be objective evidence of the intended use of the land (such as planning applications, feasibility studies and preliminary designs).

11 Where a retirement village includes both dwellings and a commercial dwelling, the dwellings and the commercial dwelling are treated as separate supplies in applying the principal purpose test. Whether the

principal purpose test is satisfied in respect of the common areas and facilities depends on whether the retirement village principally supplies exempt supplies of accommodation or taxable supplies of accommodation and other services. The principal purpose test is to be applied to a supply as a whole. Areas within a community centre such as the kitchen, dining room and nursing station that are used exclusively for the purpose of making taxable supplies are not a separate supply for the purpose of the principal purpose test.

- 12 The principal purpose test is considered at paragraphs 157 to 171.

### *Adjustments*

- 13 If the principal purpose test is not satisfied in respect of goods and services acquired for the development or operation of a retirement village, an input tax adjustment is allowable to the extent that the goods and services are applied for making taxable supplies if:
- the goods and services were acquired on or after 1 October 1986; and
  - GST was charged on the supply of the goods or services; or
  - the goods are secondhand goods that have always been situated in New Zealand and were acquired by way of sale: section 21E.
- 14 The extent to which goods or services are applied for the purpose of making taxable supplies may be calculated by reference to the ratio of dwellings to commercial dwellings in a retirement village. However, another method of calculation would be acceptable if the method results in fair and reasonable amounts.
- 15 Taxpayers have an option of making input tax adjustments on a periodic or annual basis: section 21G(1). However, a one-off input tax adjustment is allowable in respect of goods and services costing more than \$18,000 only if the goods and services are wholly applied for the purpose of making taxable supplies and:
- the Commissioner consents to a one-off input tax adjustment in respect of goods and services; or
  - the goods and services are applied for a different purpose as a consequence of a change in the legislation: sections 21G, 21G(1A) and 21H.
- 16 An asset is a capital asset if it is acquired for retention and use in carrying on a taxable activity. In some circumstances, it may be necessary to consider whether an item is a separate asset. The Interpretation Statement on *Residential Rental Properties – depreciation of items of depreciable property* provides guidance as to the matters to be considered in determining whether an item is a separate asset.
- 17 An output tax adjustment is required in respect of goods and services acquired for the principal purpose of making taxable supplies to the extent the goods and services are applied for another purpose: section 21(1). An output tax adjustment would be required at one of the following times:

- In the first taxable period in which goods and services are applied for a purpose other than that of making taxable supplies;
  - In each taxable period in which goods and services are applied for a purpose other than that of making taxable supplies;
  - In each year in which goods and services are applied for a purpose other than that of making taxable supplies: section 21C.
- 18 Land acquired for the principal purpose of making taxable supplies would be applied for a purpose other than of making taxable supplies when it is determined that a particular part of the land is to be allocated for the construction of dwellings where exempt supplies of accommodation are to be made. This may occur before the land is actually used for the purpose of making taxable supplies.
- 19 Input tax and output tax adjustments are considered at paragraphs 172 to 192.

## **BACKGROUND**

- 20 A retirement village is a complex that is used for the provision of accommodation to retirees: *Norfolk Apartments Ltd v CIR* (1995) 17 NZTC 12,003 (HC). A central concept of retirement villages is the provision of accommodation: *Norfolk Apartments Ltd v CIR* (1995) 17 NZTC 12,212 (CA). Another feature of retirement villages is the provision of community facilities to residents. Care and other services may also be provided in a retirement village. The services other than accommodation that are provided to residents may vary from village to village. Residents within a retirement village may also receive different levels of care and services.
- 21 The Commissioner has referred to several sources that contain a broad outline of the legal and financial structure of arrangements between retirement villages and their residents. The Commissioner has also considered a range of contracts used in respect of particular retirement villages. These indicate that the main legal structures used for the provision of occupation rights in retirement villages are sales, leases or licences. The financial structures commonly entered into between retirement villages and their residents may broadly be described as follows:
- Generally, residents are required to pay a lump sum payment on entry to the retirement village, which, in legal terms, is either the purchase price for a unit or an interest-free loan or refundable deposit.
  - The entry payment may include a separate component (commonly known as the “facilities fee” or “amenities contribution”), which is treated as payment for either the provision of community facilities or for management services. A retirement village may be entitled to take the facilities fee or amenities contribution or it may accrue to the retirement village over a period of years. If the entry payment does not include a facilities fee or amenities contribution, the facilities fee or amenities contribution is payable when the resident leaves the village and is deducted from the amount that is repayable to the resident.

- Residents are also required to pay periodic fees, which are a proportionate share of village overheads such as rates, insurance, security, management expenses and maintenance.
  - An additional payment or a higher service fee is chargeable where residents receive other services such as laundry, cleaning, nursing and meals.
  - Residents may also be required to pay refurbishment costs relating to their unit when they leave the village.
  - Residents may be required to pay a termination fee or the legal costs incurred by the retirement village in granting the occupation right.
  - The amount that is repaid to the resident will often be less than the amount originally paid by the resident. Residents may not be entitled to share in the capital gain on their units and, if they are entitled to do so, a higher entry payment may be required.
- 22 It is not possible in the context of an Interpretation Statement to address every type of arrangement that may be entered into between retirement villages and their residents. This Interpretation Statement deals with sales, leases and licences (which are the main legal structures used in retirement villages) and the financial structures outlined above. It is hoped that the principles outlined in this Interpretation Statement will be relevant in the majority of cases.

## LEGISLATION

### *Goods and Services Tax Act 1985*

- 23 Under section 3(1)(c) and (d), the following activities are financial services:
- (c) The issue, allotment, drawing, acceptance, endorsement, or transfer of ownership of a debt security:
  - (d) The issue, allotment, or transfer of ownership of an equity security or a participatory security:
- 24 Section 5(14B) provides:
- If part of a supply of an equity security or participatory security is the supply of a right to receive supplies of goods and services that are not exempt supplies, the supply of the right is treated as being a supply of goods and services made for a consideration.
- 25 Section 8(1) provides:
- Subject to this Act, a tax, to be known as goods and services tax, shall be charged in accordance with the provisions of this Act at the rate of 15 percent on the supply (but not including an exempt supply) in New Zealand of goods and services, on or after the 1st day of October 1986, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.
- 26 Section 10(2) provides:
- Subject to this section, the value of a supply of goods and services shall be such amount as, with the addition of the tax charged, is equal to the aggregate of,—

- (a) To the extent that the consideration for the supply is consideration in money, the amount of the money:
- (b) To the extent that the consideration for the supply is not consideration in money, the open market value of that consideration.

27 Section 10(6) provides:

Where and to the extent that any supply of goods and services consists of the supply, to any individual, of domestic goods and services in a commercial dwelling, the value attributable to that part of that supply of domestic goods and services that is for a period in excess of 4 weeks shall be deemed to be reduced to an amount equal to 60 percent of the amount that would, if that part of that supply were chargeable with tax at the rate of 9.0 percent, be the value of that part of that supply of domestic goods and services:

Provided that to the extent that any supply is a supply of domestic goods and services, and where that commercial dwelling is a residential establishment, and where the supplier and the recipient have agreed that that supply shall be for a period of or in excess of 4 weeks, or for a number of periods which in the aggregate will exceed 4 weeks, the value attributable to that supply of domestic goods and services shall, from the commencement of that supply, be deemed to be reduced to an amount equal to 60 percent of the amount that would, if that supply were chargeable with tax at the rate of 7.5 percent, be the value of that supply of domestic goods and services.

28 Section 10(18) provides:

Where a taxable supply is not the only matter to which a consideration relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.

29 Section 14(1)(a) and (c) provides:

The following supplies of goods and services shall be exempt from tax:

- (a) The supply of any financial services (together with the supply of any other goods and services, supplied by the supplier of those financial services, which are reasonably incidental and necessary to that supply of financial services), not being a supply referred to in subsection (1B):  
....
- (c) The supply of accommodation in any dwelling by way of—
  - (i) Hire; or
  - (ii) A service occupancy agreement; or
  - (iii) A licence to occupy:

30 Section 14(1B) provides:

The following supplies are excluded from the exemption under subsection (1):

- (a) A supply of financial services that, in the absence of subsection (1)(a), would be charged with tax at the rate of zero per cent under section 11A:
- (b) A supply described in paragraph (b) of the definition of associated supply:
- (c) A supply of goods and services which (although being part of a supply of goods and services which, but for this paragraph, would be an exempt supply under subsection (1)(a)) is not in itself, as between the supplier of that first-mentioned supply and the recipient, a supply of financial services in respect of which subsection (1)(a) applies.

31 Section 20(3) provides:

Subject to this section, in calculating the amount of tax payable in respect of each taxable period, there shall be deducted from the amount of output tax of a registered person attributable to the taxable period—

- (a) In the case of a registered person who is required to account for tax payable on an invoice basis pursuant to section 19 of this Act, the amount of the following:
  - (i) Input tax in relation to the supply of goods and services (not being a supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies), made to that registered person during that taxable period:
  - (ia) Input tax in relation to the supply of secondhand goods to which section 3A(1)(c) of the input tax definition applies, to the extent that a payment in respect of that supply has been made during that taxable period:
  - (ii) Input tax invoiced or paid, whichever is the earlier, pursuant to section 12 of this Act during that taxable period:
  - (iii) Any amount calculated in accordance with any one of sections 25(2)(b), 25(5), 25AA(2)(b) or 25AA(3)(b); and
- (b) In the case of a registered person who is required to account for tax payable on a payments basis or a hybrid basis pursuant to section 19 of this Act, the amount of the following:
  - (i) Input tax in relation to the supply of goods and services made to that registered person, being a supply of goods and services which is deemed to take place pursuant to section 9(1) or section 9(3)(a) or section 9(3)(aa) or section 9(6) of this Act, to the extent that a payment in respect of that supply has been made during the taxable period:
  - (ii) Input tax paid pursuant to section 12 of this Act during that taxable period:
  - (iii) Input tax in relation to the supply of goods and services made during that taxable period to that registered person, not being a supply of goods and services to which subparagraph (i) of this paragraph applies:
  - (iv) Any amount calculated in accordance with any one of sections 25(2)(b), 25(5), 25AA(2)(b) or 25AA(3)(b), to the extent that a payment has been made in respect of that amount; and

32 Section 21E provides:

- (1) Section 21F applies if—
  - (a) A person acquires goods and services on or after 1 October 1986 for the principal purpose other than that of making taxable supplies; and
  - (b) The goods and services are applied in a taxable period for a purpose of making taxable supplies either by the person or, if the person is a member of a partnership, by the partnership; and
  - (c) Either subsection (2) or subsection (3) applies.
- (2) This subsection applies if—
  - (a) Tax has been charged under section 8(1) on the supply of the goods and services made to the person; or
  - (b) Tax has been levied under section 12(1) of this Act on the goods that have been entered for home consumption under the Customs and Excise Act 1996 by the person.
- (3) This subsection applies if—
  - (a) The goods are secondhand goods that are supplied to the person by way of sale and the goods—
    - (i) Have always been situated in New Zealand; or
    - (ii) Have had tax levied on them under section 12(1); and
  - (b) The supply is not a taxable supply; and

- (c) The person has not supplied the goods to another registered person who has entered them for home consumption under the Customs and Excise Act 1996.
- (4) For the purpose of subsection (1)(a), goods and services are treated as if they were acquired for the principal purpose other than that of making taxable supplies to the extent that—
  - (a) Section 21 or 21I have treated the goods and services as being supplied; or
  - (b) Section 5(3) has deemed the goods and services as being supplied by a person who ceases to be a registered person and the goods or services are subsequently applied by the person, or by a partnership of which the person is a partner, for a purpose of making taxable supplies.

33 Section 21F provides:

- (1) For the purpose of this Act, the goods and services referred to in section 21E are treated as being supplied in the taxable period to the person or partnership, and the Commissioner must, to the extent that the goods and services are applied, allow the person or partnership to make a deduction under section 20(3) for the tax fraction of the lesser of—
  - (a) The cost of the goods and services, including any tax charged or input tax deduction claimed for the goods and services; and
  - (b) The open market value of the supply of the goods and services.

Subsection (1) does not apply to a supply of services provided by an employee.

34 Section 21G provides:

- (1) A person to whom section 21F applies may make the deduction at either of the following times:
  - (a) In each taxable period in which goods and services are applied for a purpose of making taxable supplies; or
  - (b) In each year in which goods and services are applied for a purpose of making taxable supplies.
- (1A) Despite subsection (1) and subject to subsection (1B), if section 21F(1) applies to goods that are capital assets with a cost of less than \$18,000, the person or the partnership referred to in section 21F(1) may make a single deduction in the taxable period during which the goods are applied for a purpose of making taxable supplies.
- (1B) Subsection (1A) does not apply to a registered person if the goods referred to in section 21E are applied for a different purpose as a consequence of a change in this Act.
- (2) If a person makes a deduction at the time allowed by subsection (1)(b), the person must reduce the amount of the deduction allowed under section 21F by the amount of deductions made in earlier taxable periods in relation to the supply.
- (3) A person may change the time at which the person makes a deduction only with the Commissioner's approval.

35 Section 21H provides:

- (1) Despite section 21G(1), a person to whom section 21F applies may apply to the Commissioner to make a single deduction in the taxable period in which goods and services are wholly applied for a purpose of making taxable supplies.
- (2) Subsection (1) does not apply to goods and services that—
  - (a) Cost less than \$18,000;
  - (b) Are applied for a different purpose as a consequence of a change in this Act.
- (3) When determining whether to allow a person to make a single deduction, the Commissioner must take the following factors into account:



- (a) The nature of the goods or services:
- (b) Whether it is practical to require a deduction at either of the times specified in section 21G(1):
- (c) Whether the person has previously made an attribution under section 21C(1)(a):
- (d) Whether the person has previously made a single adjustment under section 21(1), as it was before the enactment of the Taxation (GST and Miscellaneous Provisions) Act 2000:
- (e) Whether the person has previously made a single deduction under either—
  - (i) This section; or
  - (ii) Section 21(5), as it was before the enactment of the Taxation (GST and Miscellaneous Provisions) Act 2000.
- (4) If the Commissioner allows the person to make a single deduction and the goods and services are subsequently applied for a purpose other than that of making taxable supplies, the person must apply section 21C(1)(a) in the taxable period in which the change occurs.

36 Section 25(1) provides:

This section shall apply where, in relation to the supply of goods and services by any registered person,—

- (a) That supply of goods and services has been cancelled; or
- (aa) The nature of that supply of goods and services has been fundamentally varied or altered; or
- (b) The previously agreed consideration for that supply of goods and services has been altered, whether due to the offer of a discount or otherwise; or
- (c) The goods and services or part of those goods and services supplied have been returned to the supplier,—

and the supplier has—

- (d) Provided a tax invoice in relation to that supply and as a result of any one or more of the above events, the amount shown thereon as tax charged on that supply is incorrect; or
- (e) Furnished a return in relation to the taxable period for which output tax on that supply is attributable and, as a result of any one or more of the above events, has accounted for an incorrect amount of output tax on that supply.

37 Section 25(2) provides:

Where a supplier has accounted for an incorrect amount of output tax as specified in subsection (1)(e) of this section, that supplier shall make an adjustment in calculating the tax payable by that supplier in the return for the taxable period during which it has become apparent that the output tax is incorrect, and if—

- (a) The output tax properly charged in relation to that supply exceeds the output tax actually accounted for by the supplier, the amount of that excess shall be deemed to be tax charged on a taxable supply made by that supplier and be attributable to the taxable period in which the adjustment is to be made, and not attributable to any prior taxable period:
- (b) The output tax actually accounted for exceeds the output tax properly charged in relation to that supply, that supplier shall make a deduction under section 20(3) of this Act of the amount of that excess.

38 The definitions of “associated supply”, “commercial dwelling”, “domestic goods and services”, “dwelling” and “consideration” in section 2 read as follows:

Associated supply means—

- (a) A supply for which the supplier and recipient are associated persons:
- (b) A supply of a right, under an equity security or participatory security, to receive for no consideration, or consideration at other than the open market value, a supply of goods and services that is—
  - (i) Not an exempt supply; and
  - (ii) Not a supply relating to the control of the issuer of the equity security or participatory security:

Commercial dwelling means—

- (a) Any hotel, motel, inn, hostel, or boardinghouse; or
- (b) Any camping ground; or
- (c) Any convalescent home, nursing home, rest home, or hospice; or
- (d) Any establishment similar to any of the kinds referred to in paragraphs (a) to (c) of this definition;—

but does not include—

- (e) A hospital except to the extent that that hospital is a residential establishment:
- (f) A dwelling situated within a retirement village or within a rest home, where the consideration paid or payable for the supply of accommodation in that dwelling is for the right to occupy that dwelling:

**Domestic goods and services** means the right to occupy the whole or part of any commercial dwelling, including, where it is provided as part of the right to so occupy, the supply of—

- (a) Cleaning and maintenance:
- (b) Electricity, gas, air-conditioning, or heating:
- (c) Telephone, television, radio, or any other similar chattel:

**Dwelling** means any building, premises, structure, or other place, or any part thereof, used predominantly as a place of residence or abode of any individual, together with any appurtenances belonging thereto and enjoyed with it; but does not include a commercial dwelling:

**Consideration**, in relation to the supply of goods and services to any person, includes any payment made or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods and services, whether by that person or by any other person; but does not include any payment made by any person as an unconditional gift to any non-profit body:

39 “Debt security” and “participatory security” are defined in section 3(2) as follows:

**Debt security** means any interest in or right to be paid money that is, or is to be, owing by any person; but does not include a cheque:

**Participatory security** means any interest or right to participate in any capital, assets, earnings, or other property of any person where that interest or right forms part of a contributory scheme (as defined in section 2 of the Securities Act 1978); and includes an interest in a unit trust within the meaning of the Unit Trusts Act 1960; but does not include an equity security, a debt security, money, or a cheque:

40 “Input tax” is defined in section 3A(1) and (2) as follows:

- (1) **Input tax**, in relation to a registered person, means—
- (a) Tax charged under section 8(1) on the supply of goods and services made to that person, being goods and services acquired for the principal purpose of making taxable supplies:
  - (b) Tax levied under section 12(1) of this Act on goods entered for home consumption under the Customs and Excise Act 1996 by that person, being goods applied or acquired for the principal purpose of making taxable supplies:
  - (c) An amount determined under subsection (3) after applying subsection (2).
- (2) In the case of a supply by way of sale to a registered person of secondhand goods situated in New Zealand, the amount of input tax is determined under subsection (3) if—
- (a) The supply is not a taxable supply; and
  - (b) The goods are not supplied by a supplier who—
    - (i) is a non-resident; and
    - (ii) as previously supplied the goods to a registered person who has entered them for home consumption under the Customs and Excise Act 1996; and
  - (c) The goods are acquired for the principal purpose of making taxable supplies and—
    - (i) The taxable supplies are not charged with tax at the rate of 0% under section 11A(1)(q) or (r); or
    - (ii) The taxable supplies are charged with tax at the rate of 0% under section 11A(1)(q) or (r) and the goods have never, before the acquisition, been owned or used by the registered person or by a person associated with the registered person.

### **Scheme of the legislation**

- 41 GST is chargeable on the supply of goods and services in the course of a taxable activity carried on by a registered person by reference to the value of the supply. Exempt supplies are not subject to GST: section 8(1).
- 42 The value of a supply is the consideration paid for the supply. Where the consideration relates to both a taxable supply and an exempt supply, it is necessary to identify the portion of the consideration that is attributable to each supply. Only the part of the consideration that is attributable to a taxable supply is subject to GST.
- 43 In calculating the tax payable in respect of any taxable period, an input tax credit is allowable on goods and services supplied to a registered person in that period, if such goods and services were acquired for the principal purpose of making taxable supplies: section 20(3); definition of "input tax" in section 3A. If the principal purpose test is not satisfied and the goods and services were acquired on or after 1 October 1986, an input tax credit is allowable to the extent that the goods or services are applied for the purpose of making taxable supplies: sections 21E to 21H. An output tax adjustment is required in respect of goods and services acquired for the purpose of making taxable supplies to the extent the goods and services are applied for another purpose: section 21(1).

## ***Nature of the supply***

- 44 The Court of Appeal in *Gulf Harbour Gulf Harbour Development Ltd v CIR* (2004) 21 NZTC 18,915 and *CIR v Motorcorp Holdings Ltd* (2005) 22 NZTC 19,126 confirmed that the principles in *Marac Life Assurance Ltd v CIR* (1986) 8 NZTC 5,086 are to be applied in determining the nature of a supply. To determine the nature of a supply, it is necessary to consider the legal rights and obligations entered into between the parties in the light of the surrounding circumstances. The relevant principles were stated by Richardson J in *Marac* as follows:

The true nature of a transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out: not on an assessment of the broad substance of the transaction measured by the results intended and achieved or of the overall economic consequences. The nomenclature used by the parties is not decisive and what is crucial is the ascertainment of the legal rights and duties which are actually created by the transaction into which the parties entered. The surrounding circumstances may be taken into account in characterising the transaction. Not to deny or contradict the written agreement but in order to understand the setting in which it was made and to construe it against that factual background having regard to the genesis and objectively the aim of the transaction. Of course the documentation may be a sham hiding the true agreement or its implementation. Or there may be a statutory provision mandating a broader or different approach. But at common law there is no halfway house between sham and characterisation of the transaction, according to the true nature of the legal arrangements actually entered into and carried out. (p. 5,098)

- 45 Where a single supplier makes a supply of a package of services or a package of goods and services, the elements in the transaction may be so closely linked that objectively they constitute a single supply.

- 46 The principles in VAT cases were adopted in *Auckland Institute of Studies Ltd v CIR* (2002) 20 NZTC 17,685. In that case the principles for determining whether there is a single supply were summarised as follows:

[a] In determining whether a supply may be apportioned for GST purposes, it is necessary to examine the true and substantial nature of the consideration given to determine whether there is a sufficient distinction between the allegedly different parts to make it reasonable to sever them and apportion them accordingly.

[b] The enquiry is to determine whether one element of the transaction (or consideration given) is a necessary or integral part of another or whether it is merely ancillary to or incidental to that other element.

[c] A service will be ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied. [para 36]

- 47 VAT cases decided after the *Auckland Institute* case clarify that a single supply made up of a number of elements, none of which are the ancillary (in the sense of subservient, subordinate or ministering to) element in the transaction: see *College of Estate Management v C & E Commrs* [2005] 4 All ER 933 *Levob Verzekeringen Bv v Staatssecretaris van Financiën* [2007] BTC 5186. It is necessary to consider the true and substantial nature of the consideration given for the payment. This will identify the core supply (which may consist of a number of supplies that are integral to each other, none of which is the dominant element in the core supply). It

would then be necessary to consider whether there are supplies that are ancillary to the core supply: *C & E Commrs v FDR Ltd* [2000] BTC 5277.

48 Viewed in isolation, an ancillary feature of a transaction could be regarded as an independent supply. However, an ancillary feature is not in any real and substantial sense part of the consideration (objectively ascertained) for the payment made. An ancillary feature is a minor, peripheral and non-essential element of the transaction. It is a question of fact and degree whether the relationship between the elements in a transaction is such that the transaction cannot be regarded as a single supply. In *British Airways plc v C & E Commrs* [1990] BTC 5,124 (where the issue was whether in-flight catering was a separate supply from air transport) the court accepted that the supply of food and beverages was not necessary or essential to the supply of air transport but had concluded in-flight catering was merely an optional extra. The cost of the food and beverages was reflected in the price of the ticket but the food and beverages supplied were not in any real and substantial sense part of the consideration (objectively ascertained) for the payment made by passengers. However in *Sea Containers Ltd v C & E Commrs* [2000] BVC 60 the court considered that food and drink provided on day train excursions was a separate supply from the supply of transport. The court considered that the catering was an important part of what the customer was paying for. Its importance was demonstrated by the references in the marketing brochures to “a unique series of lunch and dinner excursions”.

49 Cases in the VAT context establish that in order to determine whether a single supply is made and the nature of the supply or supplies:

- It is necessary to identify the essential features of the transaction (the true and substantial nature of the consideration provided for the payment made by the customer). This requires consideration of the contract between the parties. The true and substantial nature of the consideration is to be ascertained objectively.
- All the circumstances in which the transaction takes place must be considered.
- Whether a separate charge is made or whether a separate price can be identified does not determine the legal nature of the transaction and cannot alter the essential features of the transaction.
- Whether the supplies are “physically and economically dissociable” (for example, there is a supply of goods and a supply of services and the price for each supply can be identified) is not determinative.
- The individual elements in a supply including several elements do not necessarily determine the nature of an “over-arching single supply”.

See *C & E Commrs v Wellington Private Hospital* [1997] BTC 5140; *Card Protection Plan Ltd v C & E Commrs* [1999] BTC 5121 (ECJ); ([2001] 2 All ER 143 (HL)); *C & E Commrs v British Telecommunications plc* [1999] 3 All ER 961, *Dr Beynon v C & E Commrs* [2004] 4 All ER 1091; *College of Estate Management v C & E Commrs* [2005] 4 All ER 933 *Levob Verzekeringen Bv v Staatssecretaris van Financiën* [2007] BTC 5186.

50 The Commissioner considers that the requirement to consider the transaction from the perspective of a typical consumer or average

customer means no more than that the focus is on the supply actually made and not on whether a supply of goods or services could be made separately. In the *British Telecom* case whether the car could have been supplied without the delivery service was irrelevant. The supply contracted for was the supply of a delivered car. In the *Auckland Institute* case the supply that students had contracted for was the supply of tuition services. Pre-arrival services (advice on courses to be undertaken, arrangements for accommodation and other matters relating to the welfare of students, immigration formalities and the completion of documentation for enrolment purposes) could have been provided by a third party under a separate contract. However, the court considered that the pre-arrival services (arranging payment of tuition fees, completion of enrolment and application forms) were ancillary to the supply of tuition in that they facilitated the students undertaking a course of study. Therefore, whether a service could be supplied separately is irrelevant in determining whether a single supply is made. The focus is on the supply made under the contract with the customer.

51 A transaction involving the supply of a package of services or a package of goods and services has been treated as a single supply in the following circumstances:

- Where one element in a transaction is the dominant element in the transaction and the other elements are ancillary to the dominant element in the sense that they facilitate, contribute to or enable the supply of the dominant element in the transaction.
- In the *British Telecom* case there was a single supply of a delivered car. The supply contracted for was for a delivered car and the delivery of the car enabled the completion of the transaction. In the *Card Protection* case it was held that there was a single supply of insurance. The essential feature of the transaction was insurance against loss arising from the misuse of credit cards. The other features in the transaction (the maintenance of a register of credit cards, the ordering of replacement cards, a change of address service, lost key location tags and luggage stickers to ensure the quick return of lost keys and luggage) assisted in the administration of the insurance scheme. In the *Auckland Institute* case the pre-arrival services were ancillary to the supply of tuition services to overseas students in that they facilitated that supply.
- No one element in the transaction is the dominant element in the transaction and the elements in the transaction are so closely linked that, considered objectively, they form a single supply.
- Examples of such transactions include: the supply of distance learning courses, an essential component of which was the supply of written materials (*College of Estate Management*); the supply of medical treatment, which required both the exercise of medical skill and the use of drugs (*Beynon*), the supply of repair services, which required the repair of a vehicle by the replacement of defective parts (*CIR v Motorcorp Holdings Ltd* (2005) 22 NZTC 19,126 (CA); (2004) 21 NZTC 18,437 (HC)) and restaurant transactions, which include the provision of food and a cluster of features and acts (*Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] BTC 5391).

- The transaction includes the provision of minor or peripheral benefits that are optional extras and that are not in any real or substantial sense part of the consideration for which a payment is made.
- In the *Card Protection* case the House of Lords considered that to the extent that the services supplied could not be categorised as insurance, they were ancillary or minor features of the insurance scheme that were not sufficiently coherent to be treated as a separate supply. In *Tumble Tots (UK) Ltd v R & C Commrs* [2007] BTC 5210 it was held that there was a single supply of membership of a club that conferred on a child the right to attendance at classes involving structured physical play and that other benefits received on admission to membership (a DVD, CD, gym bag, membership card, T-shirt, personal accident insurance for a child while attending a class and a subscription for a magazine) did not alter the nature of the supply.

52 Section 5(14) is relevant if (applying the principles outlined above) it is determined that only part of a supply is subject to GST at the standard rate: "Interpretation Statement on GST: Role of section 5(14) of the Goods and Services Tax Act 1985" *Tax Information Bulletin* Volume 20 No 5 (June 2008).

### ***Essential features of the transaction***

53 To determine whether the supply made by a retirement village is the supply of accommodation, it is necessary to identify the essential features of the transaction. This requires consideration of the contract entered into between retirement villages and their residents.

54 Contracts may vary from village to village and not all residents within a particular village receive the same services under their contracts. However, a broad outline of contracts entered into between retirement villages and their residents is possible.

55 Generally under leases or licences in respect of a unit in a retirement village:

- Residents have the right to occupy a particular unit and the right in common with other residents and other persons authorised by the operator to use the common areas and facilities of the village.
- Retirement village operators are obliged to manage the village, to repair and maintain the village and to provide a security system for the village.
- An emergency alarm system is installed in units and an emergency response service is available to all residents.
- Residents must pay a loan or deposit which is repayable on termination of occupation.
- Residents must also pay periodic fees which are calculated by reference to the costs of operating the village. If residents purchase a package of care services, the periodic fee payable is a higher amount.
- A "facilities fee" or "amenities contribution" is payable either up-front or on termination of a resident's occupation. If the facilities fee or

amenities contribution is an up-front payment, the retirement village may be entitled to take the payment immediately or it may accrue to the retirement village over a period. If the facilities fee or amenities contribution is payable on termination, it is set off against the loan or deposit repayable to the resident.

- Residents may also be required to pay the cost of refurbishing their units on termination of occupation and other termination charges.

56 In some cases, a resident's contract obliges retirement village operators to supply a package of care services in addition to accommodation. The lowest level care package will typically include daily or weekly visits by a nurse, emergency call monitoring, removal of rubbish from the apartment, weekly cleaning of the apartment, provision of communal transport, organised activities and outings, weekly change of towels and bed linen, weekly personal laundry, morning and afternoon teas and the main meal each day. The highest level care package will typically equate to full rest home care. Generally a higher periodic fee is required where a care package is provided. If optional care or other services not included in a care package are supplied to residents at the request of residents, an additional charge is payable.

57 Where a unit is sold to a resident, residents have the right to similar services to those outlined above, including the right to use the common areas and facilities of the village. Generally the retirement village has either an obligation to re-purchase the unit or an option to purchase the unit.

#### Debt security

58 The definition of "financial services" includes the issue, allotment, drawing, acceptance or transfer of ownership of a debt security: section 3(1)(c).

59 In *Case S54* (1996) 17 NZTC 7,354 it was held that a "debt security" for GST purposes meant a loan. Therefore, even if a narrow interpretation of "debt security" is adopted, a loan or refundable deposit is a debt security. Most retirement village contracts involve a loan or deposit.

60 However, the definition of "debt security" is not limited to loans or deposits. The essence of the definition of "debt security" in the Securities Act 1978 is that money is deposited with, lent to a person or otherwise owing by that person so that the investor retains an interest in the money or a right to be repaid: *Francken v Ministry of Economic Development* (High Court, Dunedin; CRI 2008-412-000025; 1 December 2008) para 34. As under the GST Act, for Securities Act 1978 purposes the definition of debt security will be satisfied if under the transaction an investor has an interest in or right to be paid money, regardless of the form of the transaction. In *Culverden Retirement Village Ltd v Registrar of Companies* [1997] 1 NZLR 257, the Privy Council considered that an arrangement under which a unit was sold on the basis that a retirement village would re-purchase the unit at a specified price was a debt security under the Securities Act.

61 As the definition of "debt security" includes an interest in or right to be paid money that is to be owing, a debt security includes a right to be paid money in the future.



- 62 For the purpose of the Securities Act 1978 an allotment of a security is made by a person who offers securities to the public or who confers a right under a security (the issuer). Generally an allotment is made when the contract for the issue of the security is formed. This occurs when the issuer accepts a subscriber's offer to purchase the security offered by the issuer. In exceptional cases, an allotment could take the form of dispositions of rights or interests. See *DFC Financial Services Ltd (in statutory management) v Abel* (1991) 2 NZLR 619 and *Re Loan and Finance (Dunedin) Ltd (in rec)* (1990) 5 NZCLC 66,367; *Owers v Braemar Lodge 2004 Ltd (in receivership)* (2010) NZCLC 264,677.
- 63 The issue of a security generally involves the delivery of a document or some act (such as the entry of the holder's name on the register) that perfects the title of the holder of the security: *Agricultural Mortgage Corporation Ltd v Inland Revenue Commrs* [1978] 1 All ER 248; *Trustees Executors and Agency Company of New Zealand Ltd v Deutsche Hypothekbank Frankfurt-Hamburg Aktiengesellschaft* (2008) NZCLC 262,208.
- 64 Before the Retirement Villages Act 2003 was enacted, offers of securities by retirement villages (being offers of securities to the public) were subject to the Securities Act: *Culverden Retirement Village v Registrar of Companies* [1997] 1 NZLR 257; *Fenton v Pakuranga Park Village Trust* Baragwanath J, HC Auckland CP 269/96, (1998) 3 NZConvC 192,681 (CA); *Covenant Trustee Co v Ohope Lodge Ltd* (Penlington J, 28 April 1993, HC Rotorua M70/90). Therefore, the contractual analysis that applies to public offers applies to retirement village schemes. A contract for the issue of a debt security is formed by a retirement village's acceptance of a prospective resident's offer. A debt security is allotted by the retirement village when it accepts the offer.
- 65 The Commissioner considers that the activities of a retirement village in allotting a debt security to a resident are a service to the resident. "Services" means some action that helps or benefits the recipient: *Case S65* (1996) 17 NZTC 7,408; *F B Duvall Ltd v CIR* (1997) 18 NZTC 13,470. When a retirement village allots a debt security to a resident, the retirement village undertakes a contractual obligation to pay money to the resident on termination of occupation. As a result, the resident receives a service (an action that is for the benefit of the residents), being the acceptance of an obligation to pay money. That service is a financial service (the allotment of a debt security under which the residents have a right to be paid money).
- 66 The Commissioner considers that a retirement village supplies a financial service (the allotment of a debt security) under any arrangement under which residents of a retirement village are entitled to receive repayment of all or part of the lump sum payment paid on entry to the retirement village. This is so whether or not the arrangement is a loan in form.
- 67 However, the Commissioner considers that a sale with an option to purchase in favour of the retirement village would not be a debt security as any right to receive money would be conditional on the option being exercised when occupation terminates. The most commonly accepted theory in relation to the nature of an option is that it is an offer to sell coupled with a contract not to revoke the offer: *Alexander v Tse* [1988] 1 NZLR 318. The purchase price becomes payable only if a contract for the sale and purchase of a unit is formed when the option is exercised. The

Commissioner accepts that in practice a retirement village that holds an option to purchase a unit will invariably exercise the option. However, where an option is granted in favour of a retirement village, the obligation on the part of the retirement village to pay the purchase price and the right of the resident to payment of the purchase price do not arise unless and until the option is exercised. Under an arrangement where a retirement village has an obligation to re-purchase a unit, residents have an absolute right to be paid the purchase price on termination of occupation.

- 68 Therefore, the Commissioner considers that a retirement village supplies a financial service (the allotment of a debt security) under any transaction where the retirement village accepts an obligation to re-purchase a unit from a resident or to repay a loan or deposit.

*Consideration for debt security*

- 69 The value of a supply is the consideration for the supply: section 10(2). The definition of "consideration" refers to "any payment... in respect of, in response to or for the inducement of a supply". For the payments to be consideration for a supply, there must be a sufficient relationship between payments and a supply: *CIR v NZ Refining Co Ltd* (1997) 18 NZTC 13,187; *Chatham Islands Enterprise Trust v CIR*; *Suzuki NZ Ltd v CIR* (2001) 20 NZTC 17,096; *The Trustee, Executors & Agency Co Ltd v CIR* (1997) 18 NZTC 13,076. The consideration for a supply may comprise a number of payments. In the *Trustees Executors* case a lease of land provided that in addition to rent, the tenant was required to pay the rates in respect of the land. Chisholm J considered that the payment of rates by the tenant was part of the "consideration" for the supply of the land.
- 70 If a payment is consideration under contract law, the necessary element of reciprocity in the relationship between payer and payee would be present and there would be a sufficient relationship between the payment made by the payer and a supply by the payee. Consideration under contract law has been defined as "the price for which the promise of the other is bought": *Dunlop v Selfridge* [1915] AC 847. Therefore, if a payment is consideration for contract law purposes, the payment is consideration for GST purposes.
- 71 The *Culverden* case supports the view that under contract law an entry payment is consideration for a debt security (being the price paid for the promise by the retirement village to repay a loan or deposit to residents). In that case, the entry payment was in the form of the purchase price for a unit in the retirement village. In the High Court Morris J considered that the consideration for a debt security (the right to be paid money under the buy-back arrangement) was either the purchaser entering into the restrictive covenant or the original purchase price for the unit, or both. The Court of Appeal considered that the purchase price paid by residents was consideration for the unit and for other rights conferred on residents under their contracts (including the right to be paid money under the buy-back arrangement). That view is consistent with the judgment of the Privy Council which considered that a purchaser acquired two rights for the lump sum payment (the right to occupy a unit and the right, on termination of occupation, to be repaid the purchase price, subject to adjustment).
- 72 However, the Commissioner accepts that payments received in respect of the supply of financial services do not reflect the true value of the financial

services supplied and that for that reason, the principal under a debt security is not to be treated as the consideration for the supply of a debt security.

- 73 Therefore, the entry payment (the purchase price for a unit, loan or deposit) is not consideration for a debt security.

*Whether single supply of debt security*

- 74 The Commissioner accepts that the *Gulf Harbour* case establishes that under the New Zealand legislation the focus is on what in legal terms is supplied and whether the supply satisfies the statutory definition of "financial services". The *Gulf Harbour* case involved a sale of shares, which is a bundle of rights and is a single item of property: *Re Alex Russell* (1968) VR 285. The supply of a share carries with it all the rights that make up the share and results in the shareholder becoming entitled to those rights but the subject of the supply is the share rather than the rights that make up ownership of the share. The rights attached to the share did not determine the nature of the supply made. Therefore, the transfer of a share involved a single supply which was a financial service (being the transfer of an equity security).
- 75 The amendments made following *Gulf Harbour* override the *Marac* principle so far as transactions involving equity securities and participatory securities are concerned. However, the amendments do not apply to debt securities. Therefore, the analysis in *Gulf Harbour* remains applicable to debt securities.
- 76 The subject of the supply of a debt security is a debt security. Ownership of a debt security confers only one right on the recipient, the right to be paid money. The right to accommodation and other services are not rights that make up ownership of a debt security. The supply of a debt security does not result in the recipient having the right to accommodation and other services. In *Gulf Harbour* there was only one element in the transaction (the supply of the share, ownership of which conferred the right to membership of the golf club), which fell within the definition of "financial services". Therefore, the *Gulf Harbour* case is distinguishable.
- 77 In the *Culverden Retirement Village* case the Privy Council held that a debt security was issued where an agreement for the sale and purchase of a unit in a retirement village required the retirement village to repurchase the unit. The Privy Council did not accept that the debt security was ancillary to the sale of the unit and considered that the purchaser acquired two rights: the right to occupy the unit and the right to be repaid the price paid for the unit (adjusted upwards or downwards according to the length of occupation, the condition of the unit and the movement of the market). In the context of considering whether the transaction involved an "investment of money", the Privy Council considered that the return received by purchasers for the original purchase price was in the form of the use of the unit (together with necessary services) and in the form of the repayment of all or most of the initial payment. In other words, the true and substantial nature of the consideration provided for the original purchase price (the essential features of the transaction) was both the right to occupy the unit (and associated services) and the right to payment of the repurchase price (the debt security).

78 Therefore, the Commissioner considers that the supply of a debt security is a separate supply from the supply of accommodation.

### **Accommodation**

79 "Accommodation" is defined in the *Concise Oxford Dictionary* (11th ed) as meaning:

a room, building or space in which someone may live or stay.

80 "Accommodation" means lodgings; living premises; a place to live; somewhere where someone resides: *Byrne v Glasgow Corporation* (1955) SLT 9; *Butter v Bennett* [1963] Ch 185; *Pulhofer v Hillington* [1986] AC 484; *Owen v Elliott* (1990) STC 469; *Urdd Gobaith Cymru v C & E Comms* (1997) V & DR 273.

### **Care services**

81 Care services are medical and nursing services and assistance with daily living and include the services provided as part of a care package. These services are described in paragraph 56.

### **Whether single supply of accommodation**

82 The supply of accommodation in the sense of a place to live is central to the concept of retirement villages and is an essential feature of the transaction between retirement villages and their residents.

83 For the reasons outlined in paragraphs 117 to 134, the Commissioner considers that the right to use the common areas and facilities is part of the dwellings in a retirement village (being an appurtenance belonging to and enjoyed with the dwellings).

84 However, if that conclusion is incorrect, the Commissioner considers that the right to use common areas and facilities is part of the supply of accommodation.

85 Without access to the dwellings over the common areas, it would not be possible to exercise the right to occupy the dwellings.

86 The availability of the recreational facilities in a retirement village may make a retirement village more attractive to prospective residents. However, the motives of the recipient and the way in which a retirement village is marketed are not relevant in determining the nature of a supply: see *Gulf Harbour*. It is also irrelevant that a retirement village may supply the right to use a Community Centre to non-residents (that is, separately from the supply of accommodation). In *Gulf Harbour* the Court of Appeal did not accept that the fact that in some cases, membership of a golf club was supplied separately from the supply of shares did not mean that in all cases two separate supplies were made.

87 In *Hidden Valley Golf Resort Association v The Queen* (2000) GTC 4104 (which concerned a lease under which the tenants were granted exclusive right to a lot on which a vacation cottage could be built and the right to use a golf course, club house, artificial lake and tennis court on the lessor's property) it was held that the essence of the transaction was a long-term residential lease and that the taxpayer had not made a separate supply of

the right to use the recreational facilities and the right to compel the lessor to provide certain services. An analogy can be drawn with the transaction considered in *British Airways plc v C & E Commrs* [1990] STC 124 where the issue was whether in-flight catering was a separate supply from the supply of air transport. It was held that the supply made by British Airways was the supply of air transport of a particular standard and that the supply of food and beverages was an incidental part of the supply of air transport. The right to use the facilities in a Community Centre is ancillary or incidental to the supply of accommodation in the sense that the right contributes to the supply of accommodation of a particular quality.

- 88 In *Norfolk Apartments Ltd v CIR* (1995) 17 NZTC 17,212 the Court of Appeal noted that rights and services going with accommodation are part of the supply of accommodation (p. 12,216).
- 89 The amount of the periodic fees is calculated by reference to the costs incurred in operating a retirement village (including administration cost, rates, insurance, maintenance, depreciation, salaries, statutory costs, the costs of providing security, cleaning, gardening in respect of common areas and facilities). Generally the periodic fees include the cost of providing the emergency call response service. The periodic fees may also include an amount to cover the cost of transport services. Alternatively, a separate charge may be made for transport services on each occasion such services are supplied. However, the way in which a payment is calculated does not determine the nature of the supply made for the payment: *Motorcorp*.
- 90 The maintenance of the unit and of village facilities is part of the supply of accommodation, being services that make possible the supply of accommodation by keeping the unit and the village facilities in good repair.
- 91 The Commissioner considers that the supply of care services as part of a care package is not part of the supply of accommodation. Care services do not facilitate, enable or contribute to the supply of accommodation and are not a minor or incidental feature of the transaction.
- 92 The care services provided under a care package include an emergency response service. An emergency response service is also supplied to residents who do not purchase a care package. The Commissioner considers that where an emergency response service is the only care service provided, that service is a minor or incidental feature of the transaction and is not in any real or substantial sense part of the consideration supplied for the payments made by residents. Therefore, the Commissioner considers that the emergency response service is part of the supply of accommodation.
- 93 This view is supported by *Wairakei Court Ltd v CIR* (1999) 19 NZTC 15,202 where it was held that:
- the consideration payable by residents of the serviced apartments whose contracts provided for the supply of either full care or partial care was paid for the supply of both care and accommodation; and
  - the supply of the care component to residents of the villas (which could only be the emergency response service) was at best ancillary or incidental to the supply of accommodation.

- 94 The Commissioner also considers that the provision of transport services as part of a package of services is a minor or peripheral feature of the supply of accommodation and that the supply of transport services does not alter the nature of the supply made.
- 95 The Commissioner also considers that any additional optional care or other services supplied at the request of the resident for an additional charge are separate supplies made under separate transactions.
- 96 Therefore, the Commissioner considers that:
- The supply of accommodation is an essential feature of a retirement village contract.
  - The supply of maintenance services are part of the supply of accommodation, being services that contribute to the supply of accommodation by keeping the unit and the village facilities in good repair.
  - The right to use the common areas and facilities is also part of the supply of accommodation. It would not be possible to use the units without access through the common areas. The right to use the facilities in a Community Centre are ancillary or incidental to the supply of accommodation in the sense that the right contributes to the supply of accommodation of a particular quality.
  - Care services supplied as part of a care package are not part of the supply of accommodation. Care services do not facilitate, enable or contribute to the supply of accommodation and are not a minor or incidental feature of the transaction. Where an emergency call response service is the only care service supplied, that service is a minor or peripheral benefit that does not alter the character of the supply.
  - Transport services supplied as part of a package of services is also incidental to the supply of accommodation. Transport services are peripheral or minor benefits that do not constitute a supply separate from the supply of accommodation.
  - Any additional optional care or other services supplied at the request of residents for an additional payment are separate supplies made under separate transactions.

***Consideration for the supply of accommodation***

- 97 The Commissioner considers that the consideration for the supply of accommodation includes:
- the “facilities fee” or “amenities contribution”;
  - the periodic fees; and
  - the refurbishment charge and other termination charges.
- 98 There is a clear relationship between the “facilities fee” or “amenities contribution”, the periodic charges and the refurbishment and termination

charges and the supply of accommodation. These charges are “in respect of, in response to or for the inducement of” the supply of accommodation.

*“Facilities fee” or “amenities contribution”*

99 The facilities fee is either:

- An upfront payment that the retirement village is entitled to take immediately or that accrues to the retirement village over a specified period; or
- A payment that becomes due on termination and that is deducted from the loan or deposit refundable to the resident. A payment may be made by way of set off: *Re Harmony & Montague Tin & Copper Mining Co Ltd (Spargo's Case)* [1873] 8 Ch App 407. The principle in *Spargo's* case applies where there are mutual liabilities and an agreement that these liabilities would be set off: *FCT v Steeves Agnew & Co (Victoria) Pty Ltd* 9 ATD 259; *Lend Lease Corporation Ltd v FCT* 90 ATC 4401. The Commissioner considers that the obligation of a resident to pay the facilities fee is a separate obligation from the obligation of the retirement village to make payment under a debt security; therefore, there are mutual debts between a retirement village and the resident. It is also agreed that the facilities fee is to be deducted from the amount repayable to the resident. Therefore, the Commissioner considers that the “facilities fee” or “amenities contribution” payable on termination is paid when the obligation of residents to pay the “facilities fee” or “amenities contribution” is set off against the obligation of the retirement village to repay the loan or deposit.

100 Under section 9(3)(a), if goods are supplied under an agreement for hire or services are supplied under any agreement that provides for periodic payments, the time of supply in respect of the goods or services is the earlier of the time when a payment becomes due or is received, whichever is the earlier. Leases or licences of units provide for periodic payments (periodic fees). The “facilities fee” or “amenities contribution” is not consideration for a separate supply.

101 The Commissioner considers that in terms of section 9(3)(a):

- Where an agreement requires the payment of an up-front facilities fee, a supply is made when the facilities fee becomes payable (generally at the same time as the loan or deposit). If the incorrect amount of output tax on the facilities fee has been paid as a result of early termination, section 25 would apply. Section 25 applies if the previously agreed consideration for a supply has been altered: section 25(1)(b). Section 25(2) would allow the retirement village to make an adjustment in the period during which it has become apparent that the output tax is incorrect.
- Where the facilities fee is payable on termination, a supply is made when the facilities fee is set off against the loan or deposit repaid to the resident. On that date (the repayment date), the facilities fee becomes due for payment and payment is received by the retirement village by way of set off.

### *Periodic fees*

- 102 Generally residents who have purchased a package of care services are required to pay a higher amount as periodic fees. In such circumstances the periodic fees are attributable to both the supply of accommodation and to the supply of care services.
- 103 Under section 10(6) a reduced rate of GST applies to the supply of "domestic goods and services" (being the supply of accommodation including, where they are supplied as part of the supply of accommodation, the services described in paragraphs (a) to (c) of the definition of "domestic goods and services") in a commercial dwelling. Therefore, where the periodic fees are paid both for the supply of accommodation and for the supply of care services, it would be necessary to determine what proportion of the periodic fees is consideration for "domestic goods and services" for the purpose of section 10(6).

### *Refurbishment costs and other termination charges*

- 104 The Commissioner accepts that if residents have an obligation to refurbish their units on termination of occupation and that obligation is carried out by the retirement village, the refurbishment costs would be consideration for the carrying out of refurbishment work. In *Suzuki NZ Ltd v CIR* (2001) 20 NZTC 17,096 and in *Motorcorp* (where an overseas manufacturer had an obligation under the warranty given to the New Zealand importer to repair defective vehicles and the repairs were carried out by the New Zealand importer or its agents at the cost of the overseas manufacturer) the Court of Appeal considered that the reimbursement payment was consideration for the supply of repair services by the New Zealand importer. However, the Commissioner understands that generally residents have an obligation to pay for the costs incurred by the retirement village in refurbishing their units rather than an obligation to carry out the refurbishment of their units.
- 105 Residents are not a party to any contract for the sale, lease or licence of their units to a new resident. In marketing a unit and obtaining a replacement resident, retirement villages are acting for their own benefit.
- 106 Whether a lessee has an obligation to pay the lessor's legal costs in connection with the preparation of a lease depends on the agreement between them. A lessor cannot recover such costs unless the lessor is liable for them: *Metcalfe v Venables* [1921] NZLR 576. Therefore, legal costs in relation to the preparation of a lease or licence (or the termination of a lease or licence) are costs for which the retirement village is primarily liable. A payment to a third party could be consideration. The crucial factor in determining whether a payment is consideration is whether there is a sufficient connection between the payment and the supply: *Trustees Executors* case.

### *Use of the refundable payment*

- 107 The provision of a loan or deposit interest-free or low interest results in an economic benefit to the retirement village in the form of use of money. However, the definition of "consideration" refers to a payment, act or forbearance. The use of money is not a payment, act or forbearance.



*Exeter Golf and Country Club Ltd v C & E Commissioners* [1981] STC 211 supports the view that a loan made at no interest or low interest could give rise to consideration (being consideration otherwise than in money) for the supply of accommodation. The Commissioner accepts that *Exeter* is not authority in New Zealand. The *Exeter* case was decided under legislation that did not define financial services and that did not contain a statutory definition of "consideration". In *Gulf Harbour* it was considered that as financial services are not defined in the value added tax (VAT) legislation, the approach in *Exeter* and other United Kingdom cases relating to financial services is not applicable.

- 108 There are practical difficulties in applying the legislation to value the use of a loan and the time of supply rules in respect of consideration in the form of the use of a loan. Such difficulties may also lead a court to conclude that for GST purposes the use of a loan is not intended to be treated as consideration for a supply.
- 109 Financial services were exempted because of the difficulty of determining the consideration for financial services. A loan was considered to be an exchange of an asset (the principal) and income from the use of the asset (interest), that is, payments under a loan were considered to be a supply of money (not a supply of goods or services): Advisory Panel on Goods and Services Tax, *Proposed Application of Goods and Services Tax to Financial Services* (The Treasury, 1985); Carl Bakker and Phil Chronican, *Financial Services and the GST: A discussion paper* (Victoria University Press, 1985); Alan A Tait, *Value Added Tax: International practice and problems* (International Monetary Fund, 1988); *Discussion Document on GST & Financial Services* (2002).
- 110 Whether the facilities fee, the periodic fees and the refurbishment and other termination charges are subject to GST depends on whether they relate to the supply of accommodation in a dwelling or commercial dwelling. If the charges are paid for the supply of accommodation in a commercial dwelling (a taxable supply), they are subject to GST. This issue is considered in paragraphs 114 to 145.

#### **Section 14(1)(a) - issue or allotment of a debt security**

- 111 The supply of financial services is an exempt supply under section 14(1)(a). The definition of "financial services" includes the issue or allotment of a debt security: section 3(1)(c). If one of the activities in section 3(1)(c) is carried out by a taxpayer, a service (being a financial service) would be supplied by the taxpayer. This is supported by *Case T27* (1997) 18 NZTC 8,188 and *Gulf Harbour Development Ltd v CIR* (2003) 21 NZTC 18,192 (HC); (2004) 22 NZTC 18,915 (CA). In those cases the court held that the transfer of a security was a financial service. For the reasons outlined in paragraphs 58 to 78, the Commissioner considers that a retirement village makes an allotment of a debt security under any transaction where a retirement village accepts an obligation to re-purchase a unit or to repay a loan or deposit.
- 112 Section 14(1)(a) also applies to services that are reasonably incidental or necessary to the supply of financial services. The Commissioner does not accept that the supply of accommodation or other services is reasonably incidental or necessary to the supply of financial services. The reasons are as follows:

- “Incidental” means something that is incidental to or is usually associated with another activity or that occurs or is liable to occur in fortuitous or subordinate conjunction with another activity: *Canadian National Railway v Harris* [1946] 2 DLR 545; *C & E Commrs v C H Beazer (Holdings) plc* (1989) 4 BVC 121. The core activities of a retirement village are the supply of accommodation and care services. Debt securities are supplied to provide funding for the development of a retirement village where accommodation and other services are supplied. Accommodation and care are not generally supplied by financial institutions who supply debt securities. The supply of accommodation and care is not usually associated with, does not arise out of the supply of a debt security and is not liable to occur in conjunction with the supply of a debt security.
- “Necessary” means indispensable, expedient or really needed: *Shorter Oxford Dictionary*; *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] 1 All ER 203. The supply of accommodation and care services is not indispensable, useful, expedient or really needed for the supply of a debt security, which are frequently supplied without such services.

113 Therefore, the Commissioner considers that a retirement village supplies a financial service under any transaction where the retirement village allots a debt security by accepting an obligation to pay the purchase price on the re-purchase of a unit or to repay a loan or deposit. Such a supply is an exempt supply under section 14(1)(a), being the allotment of a debt security. Section 14(1)(a) does not apply to the supply of accommodation and other services. Such services are not reasonably incidental or necessary to the supply of a debt security.

### **Section 14(1)(c) - supply of accommodation in a dwelling**

114 The sale of a unit in a retirement village is a taxable supply. As section 14(1)(c) applies to the supply of accommodation by way of hire, service occupancy agreement or licence to occupy, section 14(1)(c) cannot apply where a unit in a retirement village is sold to a resident.

115 Potentially, section 14(1)(c) applies to the lease or licence of a unit in a retirement village as a lease or licence is a supply by way of hire or licence to occupy. However, for section 14(1)(c) to apply, the supply must be the supply of accommodation in a dwelling.

### ***Meaning of dwelling***

116 The definition of “dwelling” refers to “any building, premises, structure, or other place, or any part thereof”. Therefore, part of a building may be a dwelling. To be a dwelling, a place must be used predominantly as a place of residence or abode of any individual.

### ***Appurtenances***

117 A dwelling includes “appurtenances belonging to [the dwelling] and enjoyed with it”.

118 The *Shorter Oxford Dictionary* (6<sup>th</sup> ed) defines “appurtenance” as follows:

1. A minor property, right, or privilege, subsidiary or incidental to a more important one; an appendage.
2. A contributory adjunct, an accessory.
3. The fact or state of appertaining.

The *Shorter Oxford Dictionary* definition indicates that an appurtenance is a “minor property, right, or privilege” that is subsidiary or incidental to a more important one.

- 119 Historically, it was considered that only rights in respect of land (incorporeal hereditaments) could be appurtenances and that land could not be appurtenant to other land: *Lister v Pickford* (1865) 34 Beav 576. An incorporeal hereditament is a right over land that does not entitle the owner to possession of the land: *Halsbury's Laws of England Real Property* Vol 39(2) para 74.
- 120 An easement is an incorporeal hereditament and may be an appurtenance. An easement is an interest in land and not merely a personal right: *Auckland City Council v Man O'War Station Ltd* [1996] 3 NZLR 460; *Kawau Copper and Sulphur Developments Ltd v District Land Registrar* [1980] 2 NZLR 529.
- 121 Later case law established that land can be an “appurtenance”: *Trim v Sturminster Urban District Council* [1938] 2 All ER 168; *Methuen-Campbell v Walters* [1979] 1 All ER 606. In *Trim v Sturminster* Slesser LJ considered that the word “appurtenance” included nothing that would not pass under a transfer of a house without being specifically mentioned and that this limited “appurtenances” to land within the curtilage and incorporeal hereditaments (p. 516). In *Case M64* (1990) 12 NZTC 2,363 Judge Bathgate considered that “appurtenance” will pass with the house, the rights, privileges and accessories to the house.
- 122 Whether the above interpretation of “appurtenance” is applied depends on the context in which the word is used. If a word or phrase has received a judicial interpretation, that interpretation will be applied to the word or phrase in the same context in subsequent legislation. In the context of legislation that applied to flats that may not have their own curtilage, to be an appurtenance, land need not pass with the transfer or assignment of the flat without being specifically mentioned. It was sufficient if the land is within the building of which the flat forms part or within the curtilage of the building: see *Cadogan v McGirk* [1996] 4 All ER 643.
- 123 The meaning of “appurtenances” in the context of retirement villages was considered in *Norfolk and Wairakei*.
- 124 *Norfolk* concerned a retirement village consisting of a four-storey building containing 22 apartments with garages underneath. The building took up one-third of the land area and was surrounded by gardens and landscaped grounds, paths and driveways. Access to the apartments was through common areas (corridors, stairwells, driveways, parking areas and the like). Other common areas included community and reception lounges, a library, an activities room, a consulting room, visitors' car parking spaces, and the gardens and the grounds. Residents were granted occupation licences of the apartments and garages for terms of 99 years. The rights granted under the licence included a right to the use and enjoyment of common areas.

125 The Court of Appeal in *Norfolk* distinguished *Trim v Sturminster* and *Methuen-Campbell v Walter* on the basis that all of the land was within the curtilage of the building in which the apartments were situated. The court also considered that shared rights could be appurtenances and that given that the definition of dwelling refers to appurtenances “belonging thereto and enjoyed with” the building or premises, Parliament must have intended appurtenances to include a non-exclusive right to use areas and facilities situated outside four walls of the apartment and garage in respect of which residents had exclusive use. The Court of Appeal said (at page 12,215):

In our view the common areas and the facilities upon them, the use and enjoyment of which is promised to the residents of the dwellings in the occupation licences, are appurtenances to the dwellings.

On the subject of “appurtenances” Mr Martin referred us to *Trim v Sturminster Urban District Council* [1938] 2 All ER 168 in which it was held that the word “appurtenances” in the definition of “house” in a statute had to be given its natural meaning and could not be extended to cover land outside the curtilage of the house. In that case the land consisted of a house with 10 acres of grassland and cow-stalls capable of accommodating 10 or 12 cows. It is unsurprising that the part of the land which was being farmed was not regarded as an appurtenance. But significantly the Court observed that in the early case of *Bryan v Wetherhead* (1625) Cro Car 17 “appurtenances” of a house had been held to include its orchard, yard, curtilage and gardens. In another authority referred to by Mr Martin, *Methuen-Campbell v Walters* [1979] 1 All ER 606, it was held that whether land fell within the curtilage of other land was a question of fact and that a paddock physically separated from a house was not within the curtilage of the house and was therefore not an appurtenance for the purposes of the Leasehold Reform Act 1967. That case is also clearly distinguishable. In the present case **the whole of the land in question is laid out in driveway, paths, gardens and landscaped grounds for the use and enjoyment of occupants of residences in the building and all of it is accordingly integral to and within the curtilage of the building.**

Mr Martin also argued that the rights of the residents relating to the common areas were not “accommodation in any dwelling by way of ... a licence to occupy” because those rights were not in themselves accommodation and because a “licence to occupy” means a “right to exclusive personal occupancy” and therefore cannot extend to shared areas and facilities. However, **we think that rights and services going with accommodation are properly to be regarded as part of the accommodation provided to residents and that the element of exclusivity and occupation need not extend to those rights and services. Rights appurtenant to a title to land are very often shared with others.** When it included within the term “dwelling” the appurtenances “belonging thereto and enjoyed with” the building or premises we do not think that the Legislature would have had in mind only those amenities which were exclusively contained within the walls of a dwelling or garage. [Emphasis added.]

126 *Norfolk* is consistent with *Cadogan v McGirk* [1996] 4 All ER 643, which confirms that appurtenances may include land within the building in which the apartments are situated or within the curtilage of the building in which the apartments are situated. However, *Wairakei*, which concerned detached buildings that had their own curtilage, cannot be explained on that basis. *Wairakei* concerned a retirement village that consisted of a rest home complex with 37 beds, six villas (stand-alone units) and 17 studio units that were contained in one building. Occupants of the villas were entitled to use community facilities. Chisholm J considered that (on the basis of the authority of *Norfolk*) the common areas and facilities were appurtenances to the villas. Chisholm J did not consider whether the common areas and facilities were within the curtilage of the villas.

127 Both *Wairakei* and *Norfolk* concerned non-exclusive rights to use land. The Commissioner considers that the basis for the decisions in *Norfolk* and

*Wairakei* is that the right to use the common areas and facilities was an appurtenance, rather than the land or building comprising the common areas and facilities being an appurtenance. Areas within a Community Centre to which residents do not have access are not within the meaning of "common areas and facilities".

- 128 The Commissioner considers that the right to use the common areas and facilities is an easement and is an appurtenance of dwellings in a retirement village, including dwellings occupied by residents under an arrangement described as a licence. The reasons are as follows:
- In *Norfolk* and *Wairakei* the court considered that a right to use common areas and facilities was appurtenant to dwellings occupied by residents under an arrangement that was described as a licence.
  - As the definition of "dwelling" is relevant to the interpretation of section 14(1)(c) and section 14(1)(c) does not apply to the sale of a dwelling, the legislation contemplates that for land or a right to use land to be an appurtenance, the recipient of the supply of accommodation need not be the legal owner of a dwelling to which the appurtenance belongs.
  - For the right to use the common areas and facilities to be an easement and, therefore, an appurtenance of dwellings in a retirement village, residents need not hold legal title to their units. A lessee may acquire an easement: *Halsburys Laws of England Easements and Profits à prendre* para 17. In *Trim v Sturminster, Methuen-Campbell v Walters and William Hill v (Southern) Ltd v Cabras Ltd* (1987) 54 P & CR 42 the meaning of "appurtenance" was considered in relation to property that was subject to a lease. The test of whether an arrangement is a lease or a licence is whether the right of exclusive possession is conferred: *Fatac Ltd (in liq) v CIR* (2002) 20 NZTC 17,903. As residents in a retirement village invariably have the right to exclusive possession of their dwellings, they are lessees even if the transaction is described as a licence. In *Cashmere Capital Ltd v Crossdale Properties Ltd* (2008) NZCPR 766 (HC); 2010] 1 NZLR 577 the court held that as residents in a retirement village had the right to exclusive possession of their units, an occupation loan agreement relating to the units was a lease.
  - The right to use the common areas and facilities has the other essential characteristics of an easement. It would not be possible to use and enjoy the dwellings in a retirement village without means of access to the dwellings over the common areas. A right to use the gardens and the recreation facilities in a Community Centre may be the subject of an easement, being a right that is reasonably necessary for and that is sufficiently connected to the normal enjoyment of the dwellings as a place to live. *Re Ellenborough Park* [1955] 3 All ER 667; *Ryan v Penttila* VR 547. For a right to be the subject of an easement, the right conferred must be sufficiently defined and must not amount to joint occupation: *Re Ellenborough Park*. A right to use a garden, park or recreation facilities satisfies that requirement.
  - The land subject to the easement and the land having the benefit of the easement need not be contiguous but they must be sufficiently close that the easement benefits the land having the benefit of the easement: *Todrick v Western National Omnibus Co Ltd* [1934] Ch 564. The Commissioner considers that a Community Centre in a retirement

village that is on the same site and that is part of the same complex is sufficiently close to benefit the dwellings.

- The right of residents to use a Community Centre may be limited to certain times or to certain areas but this does not mean that the right to use a Community Centre cannot be a right affecting land. A right granted under an easement may be for limited purposes or limited as to the time when the right may be exercised: *Hart v Timmins* (High Court, Palmerston North; CIV-2006-454-353; 4 October 2006); *Leon Asper Amusements Ltd v Northmain Carwash Enterprises Ltd* (1966) 56 DLR (2d) 173; *Coleman v Shand* (2004) 5 NZ ConvC 194,019. The fact that a retirement village has the right to vary the hours of access to a Community Centre does not mean that the right to use a Community Centre is a licence rather than an easement. The owner of the land subject to the easement may reserve the right under the easement to vary the terms of the easement: *Greenwich Healthcare National Health Service Trust v London and Quadrant Housing Trust* [1998] 3 All ER 437.
- An equitable easement will be recognised and enforced if the right has the essential characteristics of an easement, consideration is provided and there is sufficient memorandum in writing or part performance: *Read v Read* (1999) 4 NZ ConvC 139,077. Residents provide consideration for the right to use the common areas and facilities. In all cases, there would be sufficient memorandum in writing of the grant of the right to use the common areas and facilities as there is normally a written agreement between a retirement village and its residents.

129 In *Re Ellenborough Park* the court considered that a mere right of recreation “possessing no quality of utility or benefit” would not be an easement; therefore, a right granted to residents to use the zoo or the right to attend Lords cricket ground without charge could not be an easement because these rights were wholly extraneous to and independent of the use of the house as a place to live. Therefore, the right to receive services such as nursing, meals and transport cannot be an appurtenance. The right to use facilities outside the boundary of a retirement village (such as a right to membership of a golf club) is not an appurtenance.

130 In some contexts, the phrase “belonging to” indicates ownership: *Myerson v Collard v the Commonwealth* (1918) 25 CLR 154. However, the words “belonging to” in the context of the definition of “dwelling” relate to a “building, premises, structure or other place”, which cannot own or possess something. The Commissioner considers that:

- Whether a building belongs to a principal building depends on whether the use of the building is associated with and is part of the use of the principal building; and
- A degree of physical separation between two buildings does not mean that one does not belong to the other. An ancillary building belongs to the principal building if the two buildings are on the same site, are adjacent to (next or adjoining: Concise Oxford Dictionary) each other or sufficiently close to each other so that the use or occupation of the ancillary building is for all practical purposes part of the use or

occupation of the principal building. To belong to the principal building, the ancillary building need not be contiguous with (neighbouring or connected with) the principal building.

See *English Clays Lovering Pochin & Co Ltd v Plymouth Corporation* [1974] 2 All ER 239; *Re Red Lion Inn Ltd* [1979] 2 NZLR 668 and *Re Angus Hotels Ltd* (1986) 6 NZAR 148.

- 131 “Enjoyed” means “having had the amenity or advantage of using” and is nearly equivalent to “having had the use of”: *Cooper v Straker* (1888) 40 Ch D 21.
- 132 An appurtenance belongs to and is enjoyed with a dwelling if the use of an appurtenance is part of the use and occupation of a dwelling and the resident of the dwelling has the right to use the appurtenance together with the dwelling. The Commissioner accepts that there must a reasonable degree of proximity between the dwellings in a retirement village and a Community Centre before the right to use the Community Centre could be said to be associated with and part of the use of the dwellings. However, it is unlikely that a Community Centre would be so geographically distant from the dwellings that the use of the Community Centre could not, in practical terms, be associated with and used with the dwellings. The Commissioner considers that the right to use the common areas and facilities in a retirement village is an appurtenance that belongs to the dwellings in a retirement village, being a right that is connected with and that is part of the use of the dwellings in the retirement village as a place to live.
- 133 Residential rentals were exempted because of the practical difficulty of collecting GST on residential rentals and to place owner–occupiers and tenants on the same footing: *White Paper on Goods and Services Tax: Proposals for the administration of the goods and services tax* (New Zealand Government, 1985). The extension of the definition of “dwelling” to include appurtenances belonging to or enjoyed with a dwelling means that the entire amount of the consideration paid for the supply of accommodation in a dwelling, including rights going with the supply of accommodation, is exempt.
- 134 Therefore, the Commissioner considers that the right to use the common areas and facilities for access or for recreation purposes is an appurtenance of dwellings in a retirement village, including dwellings occupied under an arrangement described as a licence.

#### *Commercial dwelling or dwelling?*

- 135 A commercial dwelling is not a dwelling. The definition of “commercial dwelling” includes convalescent homes, nursing homes, rest homes and hospices, and establishments that are similar to convalescent homes, nursing homes, rest homes and hospices: paragraphs (c) and (d) of the definition of “commercial dwelling” in section 2. However, a dwelling situated within a retirement village is not a commercial dwelling, if the consideration paid or payable for the supply of accommodation in that dwelling is for the right to occupy the dwelling: paragraph (f) of the definition of “commercial dwelling” in section 2.
- 136 A rest home is a residential institution where old or frail people are cared for: *Concise Oxford Dictionary* (11th ed). In *Wairakei Court Ltd v CIR*

(1999) 19 NZTC 15,202, it was considered that the studio units situated in a retirement village fell within paragraph (c) of the definition of "commercial dwelling". The court considered that in substance the studio units were no different from the rest home in the retirement village as both accommodation and care were provided there.

- 137 To be similar to a convalescent home, nursing home, rest home or hospice, an establishment need not be exactly the same as a convalescent home, nursing home, rest home or hospice. "Similar" does not mean identical or exactly the same: *Mays v Roberts* [1928] SASR 217; *NZ Central Region etc Local Government Officers' Union v Lower Hutt City Council* (1992) 1 ERNZ 558; *Adelaide Caravan Park Pty Ltd v Department of Industry, Technology and Commerce* (1985) ALD 75. In *Case L75* (1989) 11 NZTC 1,435, 1, 440, Judge Keane considered that the premises in question, although not exactly the same as a hotel, a motel, an inn, a hostel or a boarding house, shared some significant defining features of such establishments, so were a commercial dwelling. The Commissioner considers that the significant defining features of convalescent homes, nursing homes, rest homes and hospices are the provision of accommodation and care and that to be similar to a convalescent home, nursing home, rest home or hospice, an establishment must have those features.
- 138 The units in a retirement village will generally be predominantly used as a place of residence or abode of the residents and may, therefore, be dwellings. In a Canadian GST case it was held that the rooms in a "nursing home and senior care centre" were occupied by the patients as their "place of residence", *North Shore Health Region v R* (2006) GSTC 134.
- 139 Therefore, potentially units in a retirement village could be regarded either as a collection of dwellings (each of the units being a place that is used predominantly as a place of residence or abode of a resident) or as a commercial dwelling (being a rest home or an establishment that is similar to a rest home). However, if paragraph (f) of the definition of "commercial dwelling" applies to a unit situated in a retirement village, the unit is a dwelling (rather than part of a commercial dwelling) for the purpose of section 14(1)(c). In *Wairakei* Chisholm J made the following comments on paragraph (f) (at pages 15,209–15,210):

In 1990 the definition of "commercial dwelling" was amended (by inserting para (f)) to ensure that dwellings situated within a retirement village or a rest home complex would be governed by the same rules as other dwellings ie the supply of accommodation would be exempt. **Notwithstanding the close links between such a dwelling and the remainder of the retirement village or rest home complex Parliament had seen fit to notionally sever the dwelling from the remainder of the complex so that the dwelling would qualify as an exempt supply.** [Emphasis added.]

The effect of paragraph (f) is that if a retirement village contains dwellings (being units to which paragraph (f) applies), the retirement village as a whole will not be a commercial dwelling, although parts of the retirement village may be a commercial dwelling.

*Paragraph (f) of the definition of "commercial dwelling"*

- 140 Paragraph (f) of the definition of "commercial dwelling" applies to a dwelling within a retirement village or rest home, if the consideration paid or payable for the supply of accommodation in the dwelling is for the right



to occupy the dwelling. The distinction between rest homes and retirement villages may be blurred, both being places where care and accommodation are provided for senior citizens. The inclusion of "rest home" in paragraph (f) means that it is unnecessary to decide where the boundary between rest homes and retirement villages should be drawn.

- 141 In *Wairakei* it was considered that paragraph (f) applied to some units situated in a retirement village (the villas) but that paragraph (f) did not apply to other units (the studio units). Residents of the studio units were required under their licence to pay a weekly rest home fee for full or partial care, in addition to the licence fee and occupation loan. Chisholm J noted that if a resident breached his or her obligations under the licence, the licence could be terminated on one month's notice. The court did not distinguish between the two levels of care provided to residents of the serviced apartments. The essential difference between the serviced apartments and the villas was that in order to be entitled to occupy the studio units, residents were required to also pay for (and were entitled to receive) care services. Residents of the villas were not required to receive and pay for care services in order to be entitled to the supply of accommodation. The consideration that villa residents were required to pay in order to be entitled to the supply of accommodation related solely to the supply of accommodation.
- 142 The Commissioner considers that to decide whether paragraph (f) applies it is necessary to:
- identify the consideration that residents are contractually obliged to pay in order to be entitled to the supply of accommodation. The consideration that residents are contractually obliged to pay in order to be entitled to the supply of accommodation will normally include the entry payment, the "facilities fee" or "amenities contribution", the periodic charges, and exit payments. Optional payments that residents make if they require additional services are not part of the consideration that residents are contractually required to pay in order to be entitled to the supply of accommodation.  
  
This does not mean that the total amount of the consideration that would be payable by residents over the period of their occupation must be determined. It requires consideration of the terms of the agreement under which residents obtain a right to occupy a unit in a retirement village (generally a lease or the licence).
  - determine whether such consideration is for the supply of accommodation is for the right to occupy the dwelling (that is, for the supply of accommodation). Where residents have a right to occupy a dwelling in a retirement village, there is a corresponding obligation on the part of the retirement village to supply accommodation.
- 143 Paragraph (f) applies to a unit in a retirement village, if the consideration that residents are contractually obliged to pay to be entitled to the supply of accommodation is for the supply of accommodation (including appurtenances to a dwelling and including goods or services that are ancillary or incidental to the supply of accommodation). Paragraph (f) does not apply where the consideration that residents are contractually obliged to pay to be entitled to accommodation relates to the supply of services other than accommodation. Where residents have purchased a care package, the consideration that they are contractually obliged to pay to be entitled to accommodation is for the supply of accommodation and

care services. The fact that a contractual obligation to pay for care services is suspended during any period of temporary absence when care services are not provided does not mean that the consideration that residents are obliged to pay to be entitled to occupy a unit does not include consideration for care services.

144 This view is consistent with the scheme and purpose of the legislation. The purpose of paragraph (f) is to determine whether a unit in a retirement village is to be classified as a dwelling for the purpose of section 14(1)(c), which applies only to the supply of accommodation. The legislation contemplates that both taxable and exempt supplies of accommodation (including the right to use the common areas and facilities) will be made in a retirement village. The policy underlying paragraph (f) is that the supply of accommodation in a retirement village is intended to be exempt from GST where the contract under which accommodation is provided is for the supply of no more than accommodation.

145 Therefore, the Commissioner considers that:

- Paragraph (f) would not apply to units whose residents have purchased care packages. Therefore, such units are part of a commercial dwelling so that the supply of accommodation in such units is a taxable supply.
- On the basis of contractual arrangements that are currently entered into between retirement villages and their residents, paragraph (f) would apply to other units. Therefore, such units are dwellings. The supply of accommodation in such units is an exempt supply.

### ***Participatory security***

146 A right under a participatory security to receive a taxable supply for no consideration (other than the consideration for the participatory security) or a below-market consideration is an associated supply: see definition of “associated supply”. If an associated supply is supplied under a participatory security, the exemption for financial services does not apply to the associated supply: section 14(1B). An associated supply is treated as a separate taxable supply: section 5(14B).

147 A “participatory security” for GST purposes:

- is an interest in or right to participate in any capital, assets, earnings, royalties or other property;
- is an interest or right that forms part of a contributory scheme (as defined in the Securities Act 1978);
- includes an interest in a unit trust; and
- does not include an equity security, a debt security, money or a cheque.

148 In *R v Smith* [1991] 3 NZLR 740, 748, Wylie J accepted that the concept of participation involves some form of sharing with others even if only with the promoter of the scheme.

149 A “contributory scheme” is defined in the Securities Act as meaning:

any scheme or arrangement that, in substance and irrespective of the form thereof, involves the investment of money in such circumstances that—

- (a) The investor acquires or may acquire an interest in or right in respect of property; and
- (b) Pursuant to the terms of investment that interest or right will or may be used or exercised in conjunction with any other interest in or right in respect of property acquired in like circumstances, whether at the same time or not;—

but does not include such a scheme or arrangement if the number of investors therein does not exceed 5, and neither a manager of the scheme nor any associated person is a manager of any other such scheme or arrangement:

- 150 In *Culverden* the Privy Council considered (obiter) that the expression “investment of money” includes schemes under which the return is received in the form of capital (the initial investment) or in the form of income in cash or in kind (or both). A similar view was expressed in *Munna Beach Apartments Pty Ltd v Kennedy* (1983) Qd R 151, 155–156, which concerned a similar concept in the Australian companies legislation (“investment contract”), where the court considered that an investment implied the payment of money in the expectation of some form of return, whether in the form of money or otherwise.
- 151 Case law on the interpretation of “investment contract” under the Australian companies legislation indicates the following:
- For an interest or right in respect of property to be used or employed in common with the interest or right of other investors, there must be a sharing in the return from the investment. The main factor that must be considered is whether the purchaser is able to exercise individual control over the property.
  - Where the right obtained is the ownership of a specific apartment together with a share of the common area, each owner will merely be exercising their individual rights as co-owner of land to use the common area.
- See Munna Beach; Brisbane Unit Development Corp Pty Ltd v Deming No 456 Pty Ltd (No 2)* (1983) 2 Qd R 92; *Jones v Acfold Investments Ltd* FCR 512, *Amadio Pty Ltd v Henderson* 81 FCR 149; *Butterworth v Lezem Pty Ltd* (1983) 1 ACLC 821.
- 152 A scheme with five or fewer investors is not a contributory scheme. This exception would apply in respect of a retirement village scheme if the scheme involved five or fewer residents.
- 153 A contract may include separate and quite different securities: *Culverden*. In the High Court in *Fenton v Pakuranga Park Village Trust* (HC Auckland CP 269/96) Baragwanath J considered that a retirement village scheme involved both a debt security and a participatory security conferring on residents a right to occupy a unit in the village and to receive repayment of a deposit on termination of occupation. In the High Court in *Norfolk*, Robertson J considered that a licence in respect of an apartment in a retirement village was a participatory security. In *Covenant Trustee Co v Ohope Lodge Ltd* Penlington J, 28 April 1993, HC Rotorua M70/90, a retirement village scheme was referred to as a participatory security for Securities Act 1978 purposes. Therefore, the Commissioner considers that

although a debt security cannot be a participatory security (being excluded from the definition of “participatory security”) a retirement village scheme could include more than one security and could include both a participatory security and a debt security.

- 154 The issue in *Fenton* was whether a proposal to sell land occupied by a bowling green and to re-site the bowling green would constitute a breach of the retirement village’s obligation under the licence not to alter the basic scope and nature of the facilities provided as part of the village. The Court of Appeal in *Fenton* [(1998) 3 NZConvC 192,681] did not consider whether the scheme involved a “participatory security”. However, the Court of Appeal considered that the obligation under the licence not to alter the basic scope and nature of the facilities was indivisible (that is, a right owed to residents as a group). The Court of Appeal also considered that NZ Guardian Trust (which was both the trustee for the residents in respect of the deposits and the statutory supervisor under the deed of participation) had separate obligations in respect of the debt security and the participatory security. The obligations under the participatory security related to the protection of the residents under their licences, including the right to preservation of the basic nature and scope of the facilities provided as part of the village for the use of residents. This suggests that the rights of residents in respect of the common areas and facilities were not individual rights but rights enjoyed in common with other residents.
- 155 Residents have separate rights under a debt security and a participatory security that form part of a retirement village scheme. Under the debt security residents have a right to be paid money (the repurchase price, loan or deposit). Under the participatory security residents have a right to the use and enjoyment of the village facilities.
- 156 Therefore, if a retirement village scheme includes a participatory security under which an associated supply is made (the right to receive the supply of accommodation in a commercial dwelling for no consideration or for a consideration that is below the open market value), the consideration attributable to the supply of accommodation would be subject to GST. That being the case, if accommodation is supplied in a commercial dwelling, the supply of accommodation would be a taxable supply, whether or not a participatory security is also supplied. If an associated supply is supplied under a participatory security, the right is treated as a taxable supply for all purposes, including when applying the principal purpose test.

## **INPUT TAX**

- 157 An input tax credit is allowable on goods and services acquired for the principal purpose of making taxable supplies.

### ***Principal purpose test***

- 158 In *Wairakei*, Chisholm J summarised the principles relating to the application of the principal purpose test as follows (at page 15,206):

The key issue is whether the goods and services for which input credits are claimed were acquired for the principal purpose of making taxable supplies or of making exempt supplies. Thus the test known as the “principal purpose” test is of considerable importance.

Within a GST context the following features of the principal purpose test seem to be relatively well settled:

- (1) Purpose is a reference to the object that the taxpayer had in mind or in view. This is not synonymous with intention or motive. Moreover, care must be taken to avoid confusing the means by which the taxpayer achieves its purpose with the purpose itself: *C of IR v BNZ Investment Advisory Services Limited* (1994) 16 NZTC 11,111; *Norfolk Apartments Limited v C of IR* (1995) 17 NZTC 12,003 (HC) and (1995) 17 NZTC 12,212 (CA).
- (2) The principal purpose is the main, primary or fundamental purpose. This does not equate with a more than 50% test: *BNZ Investment Advisory Services Limited; Norfolk Apartments*.
- (3) Where the taxpayer is a company its purpose is to be determined by examining the collective purpose of those in control: *C of IR v National Distributors Limited* (1989) 11 NZTC 6,346.
- (4) The principal purpose is to be ascertained as at the time the goods and services were acquired: *National Distributors Limited* and *Case M53* (1990) 12 NZTC 2,312.
- (5) The focus should be on individual supplies: *Norfolk* at p 12,006.

159 Therefore, the application of the principal purpose test requires the relevant supply to be identified and the principal purpose for which the supply was acquired to be determined.

#### *Identifying the supply*

- 160 In *Wairakei*, Chisholm J applied the principal purpose test separately in respect of the studio units, which were part of a single building, and detached villas (including the land on which these buildings stood). The supply of the villas (which were separate capital assets from the building containing the studio units) was a separate supply from the studio units.
- 161 In *Norfolk*, the court did not accept that the principal purpose test should be applied separately to the common areas and facilities in the village. The retirement village in *Norfolk* included an apartment building surrounded by landscaped grounds. The common areas and facilities were leased to a related company, which supplied the right to use and enjoy the common areas to residents. Rental was paid to *Norfolk* by the related company for the common areas and facilities. It was accepted that the apartments in the village were dwellings. *Norfolk* argued that two-thirds of the land (the common areas and facilities) was not used for the construction of the apartment building and that the supply of the common areas and facilities was a taxable supply; therefore, on an area basis the principal purpose was for making taxable supplies. The court rejected this argument.
- 162 In the High Court in *Norfolk*, Robertson J considered that as the ratios of density and development were dictated by resource management requirements, the percentages of actual use did not provide helpful evidence as to the principal purpose for acquisition of the land and construction of the development. The principal purpose of the development was the accommodation (an exempt supply). The use of the common areas was essential to the enjoyment of the apartments. Access to the apartments could be obtained only through part of the common areas. The right to use the common areas and facilities was an appurtenance of the apartments (and, therefore, part of the dwellings in the village). Therefore, the common areas and facilities were acquired for the principal purpose of making exempt supplies.

163 The Court of Appeal in *Norfolk* noted that the supply of accommodation was central to the concept of a retirement village and, as the common areas and facilities were ancillary to the apartment building, the only conclusion that could be reached was that Norfolk's principal purpose in acquiring the land and entering into the construction contract was to provide accommodation in dwellings. The court considered that even if the taxpayer had made two supplies (the supply of the dwellings and the supply of the common areas and facilities under the lease to the related company), as the rights of residents relating to the common areas were appurtenances to the dwellings, the right to use the common areas and facilities was part of the supply of accommodation. The Court of Appeal said (at page 12,215):

It is unconvincing for Norfolk to assert that its principal purpose can be seen from the fact that about two-thirds of the land was not required to be utilised for the erection of the apartment building itself. (It points out also that some of the space within the building is common area.) A glance at the site plan showing the substantial apartment building centrally positioned on the land and the balance of the property depicted as developed for gardens, driveway, paths and other facilities which are obviously ancillary to the building is sufficient to dispose of the argument. Norfolk may now wish to say that its principal purpose was to provide a package for the residents of the retirement village but common sense suggests that what must have been uppermost in the minds of the Tuke family was the supply of the apartments (the dwellings), for without them the project would simply not exist. They are obviously central to the concept of a retirement village. The only conclusion which can sensibly be reached is that Norfolk's principal purpose in acquiring the land and entering into the construction contract was to be able to provide accommodation in dwellings situated within a retirement village by way of licences to occupy. That is an exempt supply. It follows that the goods and services acquired by Norfolk were not acquired for the principal purpose of making taxable supplies and that no input tax deduction is available.

Even if the conclusion had been that there were two proposed supplies, one of the dwellings and the other, under the lease, of the common areas and the facilities upon them, *Norfolk* still faced another insuperable difficulty in its argument that the purpose relating to the common areas was the principal purpose. That is because the definition of "dwelling" means not only the building or premises but also "any appurtenances belonging thereto and enjoyed with it". In our view the common areas and the facilities upon them, the use and enjoyment of which is promised to the residents of the dwellings in the occupation licences, are appurtenances to the dwellings.

164 If the principal purpose test is satisfied in respect of a supply of goods and services, a full input tax credit is allowed: *CIR v Coveney* (1994) 16 NZTC 11,329 (HC); (1995) 17 NZTC 12,193 (CA). In *Coveney* the court rejected the Commissioner's argument that the legislation contemplates apportionment of the input tax credit on a supply of goods and services. In *Case S56* (1996) 17 NZTC 7,361 Judge Barber commented that *Coveney* made it clear that if the principal purpose test is satisfied, a full input tax credit is allowed on goods and services. *Case Z12* (2009) 24 NZTC 14,142 confirms that under the principal purpose test an input tax credit is allowed on an all or nothing basis.

165 Generally the development of a retirement village involves the purchase of bare land and the construction of a retirement village complex on the land. Land acquired for the purpose of a retirement village development under a single transaction is a single supply of a single property. The individual goods and services that go into the construction and development of a retirement village acquired under separate transactions are separate supplies. However, if the principal purpose test is satisfied in respect of the asset or assets produced using these individual supplies, the principal purpose test would be satisfied in respect of the individual supplies that go into a retirement village development. Areas of a Community Centre such

as a kitchen or dining room that are used exclusively for the purpose of making taxable supplies are not a supply that is separate from the supply of the Community Centre as a whole. The principal purpose test is to be applied to the Community Centre as a whole.

166 The Commissioner considers that:

- Where a retirement village includes both dwellings and a commercial dwelling, the dwellings and the commercial dwelling are treated as separate supplies. The villas and the studio apartments are treated as separate supplies because the effect of paragraph (f) is that dwellings within a retirement village are notionally severed from the remainder of a retirement village complex: *Wairakei*.
- The principal purpose test is not applied separately in respect of the common areas and facilities, roading, landscaping, lighting and other similar infrastructure costs or separately to areas within a community centre. As the supply of the right to use the common areas and facilities is part of the supply of units in a retirement village, whether the principal purpose test is satisfied in respect of the common areas and facilities depends on whether the retirement village principally supplies exempt supplies of accommodation or taxable supplies of accommodation and other services. The right to use the common areas and facilities is granted to residents of both dwellings and a commercial dwelling within a retirement village complex. Therefore, it is not possible to argue that the parts of the common areas and facilities that are immediately adjacent to the commercial dwelling part of a retirement village were acquired for the principal purpose of making taxable supplies in a commercial dwelling in the village. Areas within a community centre such as the kitchen, dining room and nursing station that are used exclusively for the purpose of making taxable supplies are not a separate supply. The principal purpose test is to be applied to a supply as a whole.

#### *Determining the principal purpose*

167 The principal purpose is to be determined at the time of acquisition. In determining the principal purpose all relevant circumstances (including objective and subjective matters) are to be considered. Both immediate and long-term or ultimate purposes that would be fulfilled in the future may be relevant in determining the principal purpose. In *Wairakei*, Chisholm J did not accept that a long-term or ultimate objective or purpose was necessarily irrelevant and that only the immediate object or purpose should be taken into account in determining the principal purpose. The court considered that although the principal purpose for which goods or services were acquired is to be ascertained at the time of acquisition, purposes that would be fulfilled in the future may, in some cases, be relevant in determining the principal purpose.

168 The principal purpose could be satisfied although no taxable supplies have been made in the period in which goods or services were acquired. However, there must be objective factors to support the taxpayer's stated intention. In the retirement village context it would be necessary to have regard to matters such as the nature of the development permitted by the resource consent, the disclosure statement required to be provided to

prospective residents under the Retirement Villages Act 2003 and the form of the occupation right agreement intended to be entered into with residents.

- 169 *Norfolk* and *Wairakei* suggest that as the central purpose of a retirement village is the supply of accommodation, the nature of the supply of accommodation supplied will normally determine whether land acquired and construction contracts entered into for the development of a retirement village were for the principal purpose of making taxable supplies. The supply of the common areas and facilities is ancillary to the supply of accommodation, which is the fundamental purpose of a retirement village. Therefore, whether the supply of the right to use the common areas and facilities is a taxable supply depends on the nature of the supply of accommodation.
- 170 At the time that land is acquired, development plans may not be finalised. However, the principal purpose at the time of acquisition is to be ascertained. Whether the principal purpose test is satisfied in respect of land acquired for the purpose of a retirement village development depends on whether the intended use of the land is principally for the purpose of making taxable supplies (the supply of accommodation in a commercial dwelling, the supply of care or other personal services). Both subjective and objective factors are relevant in determining the principal purpose: *Wairakei*. Therefore, there must be objective evidence of the intended use of the land (such as planning applications, feasibility studies and preliminary designs).
- 171 A building could include both dwellings and commercial dwellings. In applying the principal purpose test to such a building, it is necessary to consider whether on an area basis the building is used principally for the purpose of making taxable supplies. The use or intended use to which a building is put is relevant evidence of the principal purpose in acquiring the building and may be determinative of the principal purpose: *Case S16* (1995) 17 NZTC 7,123. Overhead costs relate to goods and services that may not be directly used in making particular supplies. It is appropriate to assess the principal purpose for which overhead costs are incurred on the basis of the ratio of taxable supplies to exempt supplies (the turnover method). However, it is not necessary to use the turnover method to determine the principal purpose for acquiring a building as it is possible to identify the use or uses to which the building is put. Determining the principal purpose on the basis of the ratio of residents in the dwelling and commercial dwelling areas of a building may not give a true picture of the principal purpose for which a building was acquired. There may be more residents in the commercial dwelling part of a building but the dwellings could occupy more of the building on an area basis. It may be necessary to ascertain the principal purpose before a building is occupied. Therefore, the Commissioner considers that the principal purpose in acquiring a building is to be determined on the basis of the use or intended use of the building.

### ***Input tax adjustments***

- 172 If the principal purpose test is not satisfied in respect of a supply of goods or services, an input tax adjustment may be allowable to the extent that the goods or services are applied for the purpose of making taxable supplies if:



- the goods or services were acquired on or after 1 October 1986; and
- GST was charged on the supply of the goods or services; or
- the goods are secondhand goods that have always been situated in New Zealand and were acquired by way of sale: section 21E.

The input tax adjustment is based on the lesser of the cost of the goods and services or the open market value of the goods and services: section 21F.

- 173 If the principal purpose is not satisfied in respect of goods and services, an input tax adjustment must be allowed to the extent that such goods and services are applied in any taxable period for a purpose of making taxable supplies, based on the lesser of the:
- cost of the goods and services; or
  - open market value of the goods and services.
- 174 The term “applied” has a wider meaning than “used”. In *Case N13* (1991) 13 NZTC 3,105, 3,113 Judge Bathgate considered that “applied” meant “put to the use of” and that goods and services may be applied in an active or passive manner pending their supply. In *Case N22* (1991) 13 NZTC 3,187, 3,193-3,194 Judge Bathgate said that “use” meant “direct, physical involvement or use” while “apply” meant “put to practical use”. In *Case N31* (1991) 13 NZTC 2,377, 3,279 Judge Bathgate considered that “used” may have a physical connotation while the application of property may be a more passive concept. In practice, it may be difficult to distinguish between the use and application of a property. A property could be used in a passive way (including when an owner obtains some advantage from the property without doing anything to it): *Sloss v Sloss* (1989) 5 FRNZ 148. In *CIR v Lundy Family Trust* (2006) 22 NZTC 19,738 the Court of Appeal considered that properties acquired for the purpose of sale and rented for residential purposes pending their sale were used and applied for both taxable purposes and exempt purposes. The properties continued to be part of the taxpayer’s trading stock and remained on the market. At the same time the properties were dedicated to use (applied) for both residential rental purposes and taxable purposes: see para 41 and 43. Some act by the taxpayer would be necessary to establish that goods and services had been applied for a particular purpose.
- 175 The extent to which goods and services are applied for the purpose of exempt supplies is to be determined either according to the actual use of goods and services or by using the formula in section 21A(2), which determines the proportion of the turnover attributable to taxable supplies. Any method that is used must ensure that the allocated amounts are fair and reasonable: section 21A(1)(b) and (3). An input tax adjustment is intended to reflect the extent of the taxable use of a good or service acquired and the adoption of some measure that is a fair and reasonable approximation of the actual use is required. Measures based on distance travelled, time spent, the numbers of transactions of particular types, area used for different activities and the actual use of goods or services usually give an accurate estimate of how a good is intended to be used or is used. Indirect estimation methods may be appropriate where there are overhead expenses that are not directly referable to particular supplies. Indirect methods that may be used are based on turnover or profit.

- 176 Taxpayers have an option of making input tax adjustments on a periodic or an annual basis. Section 21G(1) says that the input tax adjustment is to be allowed in either of the following:
- In each taxable period in which the goods and services are applied for the purpose of making taxable supplies.
  - In each year in which the goods and services are applied for a purpose of making taxable supplies. (However, if an annual deduction is made, the amount of the deduction made in any subsequent period must be reduced by the amount of the deductions made in any earlier period).
- 177 A one-off adjustment is allowable in the following circumstances:
- If the goods are capital assets with a cost of less than \$18,000, a one-off deduction may be made in the taxable period during which the goods are applied for a purpose of making taxable supplies: section 21G(1A).
  - If goods and services costing more than \$18,000 are wholly applied for the purpose of making taxable supplies and the Commissioner allows a single deduction to be made, a one off deduction may be made in the taxable period in which such goods and services are wholly applied for the purpose of making taxable supplies: section 21H(1).
- 178 “Capital asset” is not defined in the legislation. The GST Act does not distinguish between capital and revenue. “Capital asset” is an income tax concept. For income tax purposes capital assets are acquired for retention and use in carrying on a business while revenue assets are assets that are acquired for sale: *Sun Newspaper Ltd and Associated Newspapers Ltd v Federal Commissioner of Taxation* (1939) 61 CLR 337; *Duff v CIR* (1982) 5 NZTC 61,131; *CIR v McKenzies New Zealand Ltd* (1988) 10 NZTC 5,233. In the GST context in *Case K55* (1988) 10 NZTC 453 Judge Bathgate accepted that a car that was used in carrying on the taxpayer’s sheepfarming activity was a capital asset. The Commissioner considers that for GST purposes, a capital asset is an asset that is acquired for retention and use in carrying on a taxable activity whereas revenue assets are acquired for sale.
- 179 In some circumstances, it may be necessary to consider whether an item is a separate asset. The Interpretation Statement on *Residential Rental Properties – depreciation of items of depreciable property* provides some guidance as to the matters to be considered in determining whether an item is a separate asset, although the Interpretation Statement considers this issue only in relation to residential rental properties.

#### *Common areas and facilities*

- 180 A retirement village may include a commercial dwelling or dwellings. Residents of both dwellings and commercial dwellings in the village have the right to use the common areas and facilities. A community centre may also include areas such as kitchens, restaurants and nurses’ workstations that are used solely for the provision of taxable services.
- 181 The Commissioner considers that to the extent that part of a community centre (such as kitchens, restaurants and nursing stations) is used for the preparation and provision of meals and the provision of nursing care, such

an area would be used and applied solely for the making of taxable supplies. Therefore, an input tax adjustment would be allowable under section 21F based on the lesser of the cost or market value attributable to that part of the community centre that is exclusively used for the making of taxable supplies (the supply of meals and nursing services).

- 182 The Commissioner also considers that, to the extent that the right to use the common areas and community facilities is made available for the use of residents of a commercial dwelling in a retirement village, the common areas and community facilities would be applied for the purpose of making taxable supplies. Such common areas and community facilities will also be applied for the purpose of making exempt supplies if residents of dwellings in the retirement village (parts of the village to which paragraph (f) of the definition of “commercial dwelling” applies) also have the right to use these areas. The Commissioner considers that an apportionment based on the proportion of commercial dwellings to dwellings (that is, the number of units that are commercial dwellings relative to the number of units that are dwellings) in the retirement village would be fair and reasonable and would reflect the use of the common areas and facilities for both taxable and exempt supplies to all residents.
- 183 If the cost of the capital assets that make up the common areas and facilities (including land, buildings, roading, landscaping and lighting) exceeds \$18,000 (as is likely), a one-off input tax adjustment would not be permitted. A building that is a separate physical structure constitutes a capital asset separate from the other assets that make up a retirement village complex. The Commissioner considers that it is unlikely that separate paths and roads within a retirement village complex constitute separate capital assets for the purpose of section 21G(1A). The fact that paths and roads may have been constructed at different times is not determinative. The roads and paths in a retirement village form a network for vehicle and pedestrian travel within a retirement village and in and out of the complex and function together as part of that network.
- 184 Therefore, the Commissioner considers that a one-off input tax adjustment would generally not be allowable in respect of a community centre (or other building) or in respect of parts of the common areas such as paths, roads and infrastructure costs that are applied for both taxable and exempt supplies.
- 185 The input tax adjustment is based on the lesser of the cost and the market value of the common areas and facilities. The cost of the goods and services means their acquisition cost: *Lundy*. In *Lundy*, the court accepted that the cost of land and buildings (which were used for both taxable and exempt supplies over more than one taxable period) in each taxable period was to be determined on the basis of the depreciation rate. The cost of the common areas and the community centre includes the cost of the land within the common areas and the land on which a community centre is constructed, the cost of constructing the community centre, roads and footpaths and landscaping. Therefore, the cost of the common areas and community centres in each taxable period would be depreciation on the land and buildings comprised in the common areas and community centre.

#### *Dwellings*

- 186 The Commissioner does not consider that dwellings in a retirement village (being parts of the village to which paragraph (f) of the definition of

“commercial dwelling” applies) would be applied for the purpose of making taxable supplies merely because taxable supplies such as nursing, meals and cleaning services are provided there. Dwellings would not be applied for the purpose of making taxable supplies merely because taxable supplies that have no relationship with the dwellings are provided to residents in the dwellings. Dwellings are not applied (used) for the provision of a cleaning service; the cleaning service is something that is done to the dwelling.

- 187 The Commissioner also does not accept that the dwellings in a retirement village are applied for the purpose of making taxable supplies where the dwellings provide a catchment for the remainder of the village. Although it is likely that residents in a retirement village will require more care as they age and a retirement village may anticipate that residents would transfer from dwellings to a serviced apartment or rest home in the same village, there is no obligation on residents to do so. While dwellings are occupied as dwellings, they are applied solely for the purpose of making exempt supplies.

### ***Output tax adjustments***

- 188 An output tax adjustment would be required in respect of goods and services acquired for the principal purpose of making taxable supplies and that are applied for another purpose. Section 21C requires output tax adjustments to be made at one of the following times:

- In the first taxable period in which goods and services are applied for a purpose other than that of making taxable supplies. If a taxpayer makes an output tax adjustment in that period, the taxpayer is required to make further output tax adjustments to reflect further changes of use of 20 percent or more.
- In each taxable period in which goods and services are applied for a purpose other than that of making taxable supplies.
- In each year in which goods and services are applied for a purpose other than that of making taxable supplies.

- 189 Goods and services would be “applied” for a particular purpose if they are allocated for a particular purpose. Therefore, land or other goods or services acquired for the principal purpose of making taxable supplies could be “applied” for a non-taxable purpose before it is actually used for a non-taxable purpose. The Commissioner considers that land acquired for the purpose of making taxable supplies would be applied (dedicated to use) for the purpose of making exempt supplies if the land has been surveyed and an identifiable area of land has been allocated for the construction of dwellings where exempt supplies of accommodation will be made. The area is also used for the purpose of making exempt supplies in the sense that an advantage is obtained from holding the land for use in making exempt supplies.

- 190 The Commissioner considers that land, buildings and other assets in a retirement village are not used or applied for the purpose of supplying debt securities. Debt securities are issued to finance the development of retirement villages. Hence, the objective of supplying debt securities is the acquisition of buildings where exempt or taxable supplies of accommodation and other services will be made.

- 191 Taxpayers have an option of making an output tax adjustment in the first taxable period, in each taxable period or in each year in which goods and services are applied for the purpose of making taxable supplies: section 21C. The Commissioner considers that land or a building would be applied for the purpose of making exempt supplies of accommodation when a particular area of the land or a building is allocated for that purpose and the land or a building would continue to be applied for the purpose of making exempt supplies while they continue to be used for that purpose.
- 192 Section 21A specifies the methods for calculating the extent of the application for a non-taxable purpose. The output tax adjustment is based on the lesser of the cost of the goods and services or the open market value of the supply: section 10(8). "Cost" means the acquisition cost: *Lundy*.

## **EXAMPLES**

- 193 It is not possible to provide examples relating to every factual situation that may arise in respect of supplies made or received by retirement villages. The following examples are intended to provide guidance on common situations.

### ***Example 1***

- 194 RV Ltd is building a retirement village. The village will include a block of 50 apartments and 200 stand-alone villas, roads, landscaped gardens and a community centre, including a lounge, kitchen, dining room, nursing station, library, theatre and bowling green. The cost of the common areas and facilities amounted to \$2 million.
- 195 A licence in respect of an apartment or villa is granted to residents. Under the licence, residents have a right to use the common areas and facilities. Residents are required to pay an up-front facilities fee of \$50,000 and are required to make an interest-free loan of \$250,000-. The facilities fee accrues to RV Ltd at the rate of \$10,000 per year over five years. The loan is repaid when residents leave the village. Residents of apartments are required to pay a weekly fee for accommodation and care services (including the provision of meals and linen, the cleaning of their room or apartment, and the provision of activities and outings and nursing services). Residents of the villas are required to pay a lower weekly fee for the right to use the common areas and facilities but are not required to pay for and receive care services. If residents of the villas require any additional services such as meals or nursing services, an additional charge is payable.
- 196 As the consideration that residents of the apartments are required to pay in order to be entitled to the supply of accommodation is for both accommodation and other services, the apartments are a commercial dwelling. The supply of accommodation and care services in the apartments is a taxable supply for which the consideration is the facilities fee and the weekly fees. GST is chargeable on the facilities fee and the weekly fees paid by residents of the apartment.
- 197 The villas are dwellings as the consideration that residents must pay in order to be entitled to the supply of accommodation relates solely to the supply of accommodation including the right to use the common areas and

facilities, which is an appurtenance of the dwellings and is, therefore, part of the dwellings. The supply of accommodation in the villas under the licence is an exempt supply. GST is not chargeable on the payments made by residents of the villas, except additional payments for the supply of meals or care services made at the request of residents.

198 RV Ltd is entitled to an input tax credit for goods and services acquired for the purpose of constructing the apartments (including the land on which they stand). An input tax credit is not allowable in respect of goods and services acquired for the purpose of constructing the villas as they are acquired for the principal purpose of making exempt supplies of accommodation.

199 The principal purpose test is not satisfied in respect of the common areas and facilities as the village largely consists of dwellings (the villas). A one-off adjustment is not allowable as the common areas and facilities are a capital asset that cost more than \$18,000. As the cost of the common areas and facilities is less than their market value, periodic input tax adjustments would be calculated on the basis of the depreciation rate relating to the land and building comprised in the common areas and facilities in the following manner:

- As the kitchen, dining room and nursing station will be exclusively applied to the making of taxable supplies (the supply of meals and nursing services), an input tax adjustment would be allowable on the basis of the depreciation rate relating to the land and building comprised in these areas. The retirement village has an option of making an input tax adjustment in the first taxable period, in each taxable period or in each year in which the kitchen, dining room and nursing station are applied for making taxable supplies. The first taxable period in which the kitchen, dining room and nursing station are applied for the purpose of making taxable supplies is the period in which it is determined that specific areas of the building will be allocated for the purpose of the kitchen, dining room and nursing station and the kitchen, dining room and nursing station will continue to be applied for the purpose of making taxable supplies while they continue to be used for that purpose.
- As the remainder of the common areas and facilities will be available for the use of residents of both the commercial dwelling part of the village and residents of dwellings in the village, they are applied both for taxable supplies and exempt supplies. The commercial dwelling part of the village represents 20 percent of the village. An input tax adjustment based on 20 percent of the depreciation rate attributable to the remainder of the common areas and facilities would be allowable in each taxable period. (In this example, the amount of the input tax adjustments has been calculated on the basis of the ratio of dwellings to commercial dwellings in the retirement village. However, another method of calculating an input tax adjustment would be acceptable provided it results in fair and reasonable amounts.)

### ***Example 2***

200 ABC Ltd owns and operates a retirement village that comprises an apartment building that includes garages, a library, theatre, kitchen, dining room and nursing station and is surrounded by gardens, paths and driveways.

- 201 A lease for life in respect of a resident's apartment and a garage in the basement of the building, together with a right to use the common areas and facilities of the village, is granted to residents. Residents are required to pay an entry payment of \$300,000. On the termination of the lease, the entry payment less the following charges is repaid to residents:
- a facilities fee of \$50,000;
  - a refurbishment charge, the amount of which depends on the period of occupation.

Residents are also required to pay a weekly fee for the management of the village. Residents have an option of receiving meals or care services on payment of an additional charge.

- 202 The apartments are dwellings as the consideration payable in order to be entitled to occupy an apartment in the village (the facilities fee, the periodic charges and the refurbishment charge) relates solely to the supply of accommodation (including the right to use the common areas and facilities, which is an appurtenance of the apartments, and including management services, which are incidental or ancillary to the supply of accommodation). GST is not chargeable on the facilities fee, the periodic charges, the refurbishment charge or the entry payment as these payments are consideration for exempt supplies (the supply of accommodation in a dwelling by way of hire and the supply of a financial service). Any additional payments for the optional supply of care and other services relate to a taxable supply and are subject to GST.
- 203 An input tax credit is not allowable in respect of land and construction costs relating to the apartment and the common areas and facilities. However, input tax adjustments would be allowable in respect of the kitchen, dining room and nursing station. The basis for calculating and the timing of such input tax adjustments is as outlined above.

### ***Example 3***

- 204 XYZ Co Ltd acquires land for the development of a rest home complex. The rest home beds are intended for residents who require a high level of care. The rest home is a commercial dwelling (para (c) of the definition of "commercial dwelling"). The supply of accommodation and care in the rest home is a taxable supply. An input tax credit is allowable on land and construction costs incurred in developing the rest home complex.
- 205 A decision is later made to expand the retirement village by the construction of 200 villas and a community centre that includes recreational facilities available to residents of the villas, a kitchen, dining room and administration areas. A licence to occupy is granted in respect of villas and serviced apartments. Residents of the villas must pay a refundable deposit of \$300,000. The deposit is refundable on termination of occupation. Residents must also pay a facilities fee of \$50,000 on termination of occupation and periodic fees. As the consideration payable by residents for the supply of accommodation relate solely to the right to occupy a villa, the villas are dwellings and the supply of accommodation in the villas is an exempt supply.
- 206 An output tax adjustment must be made as the land will be applied in part for the making of exempt supplies. As the cost of the land allocated for the purpose of the villas, the recreation facilities and other common areas

to which residents have access is less than its open market value, the output tax adjustment is based on the cost of the land. The extent to which the land is applied for the purpose of making exempt supplies may be calculated on an area basis. However, the output tax adjustment may be calculated on the basis of the proportion of the turnover from the making of taxable and exempt supplies (or another method of calculation) if the method results in a fair and reasonable output tax adjustment.

207 The retirement village elects to make the output tax adjustment in each year in which the land is applied for the making of taxable supplies. However, the retirement village would also have been permitted to make the output tax adjustment at either of the following times:

- in the first taxable period in which the land and common areas and facilities are applied for the making taxable supplies. The land would be applied for the purpose of making exempt supplies when it is determined that a particular area of the land would be allocated for the construction of the villas and community centre and the common areas serving the villas; or
- in each taxable period in which the land is applied for the making of exempt supplies.