Vol 27 No 11 December 2015

TAX INFORMATION Bulletin

CONTENTS

1 In summary

2 Revenue alert

RA 15/01: Employee Share Purchase Agreements – arrangements that have the effect of reducing the taxable benefit to employees under a share purchase agreement

6 Interpretation statements

IS 15/02: Goods and services tax – GST and retirement villages

51 New legislation

Order in Council

FIF deemed rate of return set for 2014–15

Inland Revenue
Te Tari Taake

Classified Inland Revenue – Public
ISSN 0114–7161 (Print)
ISSN 1177–620X (Online)

YOUR OPPORTUNITY TO COMMENT

Inland Revenue regularly produces a number of statements and rulings aimed at explaining how taxation law affects taxpayers and their agents. Because we are keen to produce items that accurately and fairly reflect taxation legislation and are useful in practical situations, your input into the process, as a user of that legislation, is highly valued.

A list of the items we are currently inviting submissions on can be found at **www.ird.govt.nz**. On the homepage, click on "Public consultation" in the right-hand navigation. Here you will find drafts we are currently consulting on as well as a list of expired items. You can email your submissions to us at **public.consultation@ird.govt.nz** or post them to:

Public Consultation
Office of the Chief Tax Counsel
Inland Revenue
PO Box 2198
Wellington 6140

You can also subscribe to receive regular email updates when we publish new draft items for comment.

Tax Information Bulletin available online only

If you've been receiving the *Tax Information Bulletin* in printed form, subscribe now to the email to ensure you continue to receive it now it's no longer printed.

Simply go to our website **www.ird.govt.nz/aboutir/newsletters/tib** and complete the subscription form, and/or read the *Tax Information Bulletin* online at the same link.

IN SUMMARY

Revenue alert

RA 15/01: Employee Share Purchase Agreements – arrangements that have the effect of reducing the taxable benefit to employees under a share purchase agreement

2

Inland Revenue has been examining a number of employee share purchase arrangements and identified several that could be seen as altering the tax treatment Parliament intended to apply to a share purchase agreement. We have concerns under both the specific provisions relating to share purchase agreements and section BG 1 (Tax avoidance), and wish to alert taxpayers to these.

Interpretation statements

IS 15/02: Goods and services tax – GST and retirement villages

6

This interpretation statement updates IS 10/08 "Retirement villages – GST treatment" to reflect legislative changes made since 2010 to the Goods and Services Tax Act 1985. The analysis has been updated to reflect the new definitions of "dwelling" and "commercial dwelling", the new apportionment rules (which replaced the principal purpose test and related provisions) and the zero-rating of land rules, as they relate to retirement villages.

New legislation

Order in Council

51

FIF deemed rate of return set for 2014–15

The deemed rate of return for taxing foreign investment fund (FIF) interests is 7.71% for the 2014–15 income year, down from 7.99% for the previous income year.

REVENUE ALERT

Revenue alerts inform taxpayers and tax agents about significant and/or emerging tax planning issues or arrangements where Inland Revenue has concerns and is undertaking further risk assessment and investigative activities.

RA 15/01: EMPLOYEE SHARE PURCHASE AGREEMENTS – ARRANGEMENTS THAT HAVE THE EFFECT OF REDUCING THE TAXABLE BENEFIT TO EMPLOYEES UNDER A SHARE PURCHASE AGREEMENT

Explanation

A Revenue Alert is issued by the Commissioner of Inland Revenue and provides information about a significant and/or emerging tax planning issue that is of concern to Inland Revenue. At the time an alert is issued, risk assessments will already be underway to determine the level of risk and to consider appropriate responses.

A Revenue Alert will identify:

- the issue (which may be a scheme, arrangement, or particular transaction) that the Commissioner believes may be contrary to the law or is inconsistent with policy;
- the common features of the issue;
- our current view; and
- our current approach.

An alert should not be interpreted as being Inland Revenue's final position. Rather, an alert outlines the Commissioner's current view on how the law should be applied. For any alert we issue, it is likely that some investigatory work has already been carried out.

If people have entered into, or are thinking about entering into, an arrangement similar to the one described, they should talk to their tax advisor and/or to Inland Revenue for advice about tax implications.

Employee share purchase agreements

1. Employee share purchase agreements are arrangements to sell or issue shares in a company to an employee in connection with the employee's employment or service. New Zealand tax law requires employees to return the benefits obtained under a share purchase agreement as employment income. The benefits are measured in most cases as the difference between the amount payable to purchase the shares and the value of the shares purchased at that time. Such arrangements are commonly used to attract and retain staff. They are often made subject to conditions, such as length of service, or the level of performance of the employee or the company over a period. Often shares are allotted to trustees for the employee during any such qualifying period. Different tax outcomes arise depending upon whether the shares are subject to an option to purchase or have been acquired at the outset (with or without any constraints or conditions).
2. For example, Mr Smith is employed by Company Limited. Company Limited enters into a share purchase agreement to issue Mr Smith 100 of its shares at $2, at the option of Mr Smith, if he remains employed with Company Limited for three years. After three years, Mr Smith exercises the option in the share purchase agreement and subscribes for 100 shares at $2 (ie, pays Company Limited $200 for 100 shares). At the date Mr Smith acquires the shares, Company Limited's shares have a market value of $3 a share. Mr Smith is required to return $100 as income, being the difference between what he had to pay Company Limited to subscribe for the 100 shares (ie, $200) and the value of the shares when acquired (ie, $300).
3. The policy behind taxing the benefit to an employee under a share purchase agreement is that any discounted price of the shares offered to employees relates to their employment relationship. The difference between this discounted price and the market price on the date of acquisition, which will be the date of exercise in the case of an option, is therefore income to the employee. Effectively, it is a payment to the employee by the employer company for the provision of the employee's services.

Arrangements

4. We have recently been examining a number of employee share purchase arrangements. We have identified several that could be seen as altering the tax treatment Parliament intended to apply to a share purchase agreement. We have concerns under both the specific provisions relating to share purchase agreements and section BG 1 (Tax avoidance), and wish to alert taxpayers to these.

Acquisition date arrangements

5. The point of focus in a section BG 1 context is identifying the time at which the shares should be treated as being acquired. Parliament intended that employee shares be valued (to see if there is a taxable gain) at the time they are acquired. For example, mere options do not give rise to liability unless they are exercised and shares consequently acquired. We have focussed recently on arrangements that raise concerns as to the point in time at which the acquisition takes place. For instance, some arrangements seek to change (usually to bring forward) the time at which the employee acquires the shares, compared to when this really occurs from a commercial or economic point of view. The tax effect is to reduce or eliminate the tax liability on any subsequent increase in value of the shares.
6. Generally, this involves creating arrangements, between the employer and employee, that take the legal form of acquisitions but that are not, at the time, actually acquisitions as a matter of commercial and economic reality. Parliament appears to have contemplated that the value of the benefit is determined at the time that a share is actually acquired, not earlier.
7. Arrangements of this sort vary a good deal, and we will look at a number of criteria in combination when deciding whether to investigate a case. These include, for example:
   a) The level of control the employee has over the shares while they are part of the share purchase agreement. (It is accepted that restrictive covenants over disposition of the shares are a very common element of employee share plans.)
   b) Whether during any restrictive covenant period the employee can exercise rights attaching to the shares (such as voting rights), and whether the benefit of dividends, if any, is passed to the employee in commercial and economic reality.
   c) Whether the employee has any direct or indirect rights to dispose of the shares in a way that negates the original acquisition or otherwise means the employee is not exposed to real commercial risk on ownership of the shares.
   d) Whether the nature of the arrangements put in place (which often include the shares being held by trustees for an interim period) means that benefits attaching to the shares during the restrictive period are enjoyed more by the employer (or someone else) than the employee.
   e) Whether, as a matter of commercial and economic reality, the arrangement is more likely to be categorised as an option rather than a full acquisition of the shares.
8. The following example is an arrangement that is structured legally as a share acquisition, but that has features and attributes that indicate it is not, commercially and economically, a real acquisition of the shares.

Example 1: An in-substance option

Corp Limited enters into a share purchase agreement with its employee, Mr Wright. Under the share purchase agreement Mr Wright acquires 100 shares in Corp Limited that are held for his benefit by Hold Trust (this occurs in Year 1). Hold Trust is a trust established for the benefit of employees of Corp Limited. Mr Wright does not receive any voting, dividend or other participation rights in the shares while they are held by Hold Trust; these rights are instead held on trust for Corp Limited. Subject to certain performance criteria being satisfied, the shares will vest in Mr Wright after 3 years. However, Mr Wright has a right to reject the transfer of the shares on vesting. The shares are acquired for $2 per share (ie, $200), which is funded by way of a loan from Corp Limited to Mr Wright. If the performance criteria are not satisfied, or Mr Wright exercises his right to reject the transfer of shares on vesting, Mr Wright must transfer his beneficial ownership in the shares to Corp Limited in full satisfaction of the loan amount outstanding. If the shares vest and are transferred to Mr Wright, he must repay the loan in cash.

The shares have a value of $2 per share when acquired, so Mr Wright does not return any income. This is on the basis he paid market value for the shares and therefore there is no benefit to him under the share purchase agreement.

Three years later the shares vest and are transferred to Mr Wright. At this time the shares have a value of $4 per share. The shares are sold for $400 by Mr Wright and the $200 loan from Corp Limited (for the purchase of the shares) is repaid, resulting in a gain of $200 to Mr Wright. Mr Wright does not return this $200 gain as income on the basis that the shares were acquired from Corp Limited when they were legally acquired by Hold Trust (for Mr Wright's benefit) and had a value of $2 per share. Thus, Mr Wright had already acquired the shares when the trust subsequently transferred legal title in the shares to him, when the shares had a value of $4 per share. Accordingly, Mr Wright treats the $200 gain as a capital gain that accrued while he owned the shares.

Inland Revenue's current view on Example 1

9. Parliament intended that the benefit under a share purchase agreement is the difference between the value of the shares at the time they are acquired by an employee and the price the employee has to pay for those shares. For the value of the benefit to be determined at the time of an up-front acquisition, Parliament would expect the employee to assume the benefits and risks normally associated with ownership of shares from that time, and would not expect the employee to have a choice as to whether to retain the shares at a later date.

10. In Example 1, while the shares are acquired by Hold Trust (in Year 1) for the benefit of Mr Wright, Mr Wright does not possess the rights associated with ownership of the shares (eg, voting and dividend rights) until legal ownership is transferred to him (in Year 3). The arrangement has features and attributes more like an option than ownership. Normally, where an option exists for shares, the option holder is not able to exercise the rights associated with those shares prior to exercising the option. In addition, Mr Wright has the ability to reject the transfer of shares on vesting at no economic cost to him. This means the arrangement's commercial and economic reality falls short of being an acquisition, as Mr Wright will only accept transfer of the shares if they have gone up in value.

11. Given the facts, features and attributes of Example 1, considered in aggregate, the arrangement appears to have the legal form of share ownership but, in economic and commercial reality, falls short of being an acquisition. A possible tax benefit of such an arrangement is illustrated by Example 1. If the shares do subsequently vest in the employee (ie, when they enjoy the rights normally associated with ownership of the shares), the increase in the value of the shares from when they were legally acquired (in Year 1) to when they subsequently vest in the employee (in Year 3) is not assessable income to the employee.

12. In Example 1, the real economic and commercial acquisition of the shares occurs in Year 3. This is when legal title passes to Mr Wright and Mr Wright no longer has the right to reject the transfer of the shares. He also becomes entitled to exercise the rights associated with the shares (eg, voting and dividend rights). At this time (ie, Year 3), the shares had a value of $4 per share, compared with the $2 per share Mr Wright paid for them.

13. Therefore, we consider it is strongly arguable that Example 1 does not make use of the legislation in a manner that is consistent with Parliament's purpose and could be a tax avoidance arrangement. Accordingly the Commissioner is likely to apply section BG 1 to the arrangement. This is unless the taxpayer can show that the arrangement did not have a more than merely incidental purpose of tax avoidance (which would be difficult to do based on the facts above). In reconstructing the arrangement, the $200 gain in value of the shares from Year 1 to Year 3 would be treated as assessable income by the Commissioner.

14. There are many different employee share purchase scheme arrangements. Some arrangements will exhibit some, but not all, of the features found in Example 1. For example, an arrangement may allow the employee to exercise the rights associated with shares (eg, voting and dividend) pending vesting of the shares and transfer of legal title to the employee. Alternatively, an arrangement may not allow the employee an option as to whether the shares vest at the end of a vesting period. Such arrangements may still be tax avoidance. Each case will need to be considered on its own facts, and the various attributes weighed against Parliament's intention for the employee share purchase scheme provisions.

Reclassification arrangement

15. Another area of concern is arrangements that rely on the reclassification of shares to artificially reduce the value of the shares acquired. While such cases may also involve issues relating to the valuation of the original class of shares acquired by the employee, we believe that the general anti-avoidance rule should apply to such arrangements.

    An example of such an arrangement is set out below.

Example 2: Reclassification of shares

Liability Limited enters into a share purchase agreement with its employee, Mrs Jones, for her to purchase 100 Class B shares that are non-transferrable and have no voting or dividend rights in Liability Limited. The only right the Class B shares have is to reclassify to ordinary shares in two years if certain qualifying criteria (eg, increased sales of Liability Limited) are met. The Class B shares were valued by the Company at $1 per share and Mrs Jones paid $100 to purchase them, although at the time the market value of ordinary shares in Liability Limited was much higher.

Mrs Jones does not return any income on the acquisition of the Class B shares on the basis she paid market value for their purchase and therefore there is no benefit to her under the share purchase agreement (ie, she paid $100 to buy $100 worth of Class B shares).

The criteria for reclassification is met two years later and the 100 Class B shares held by Mrs Jones are reclassified as ordinary shares of Liability Limited, which have a market value of $9 per share at that time.

Under the arrangement Mrs Jones has received ordinary shares worth $900 (100 ordinary shares with a value of $9 per share) and has only had to pay $100 (paid $1 per share for 100 Class B shares). Despite an $800 gain, Mrs Jones returns no income. This is on the basis she purchased the shares (ie, the Class B shares) at their value and that the reclassification of the Class B shares to ordinary shares is not taxable.

Inland Revenue's current view on Example 2

16. Parliament contemplated that the benefit to an employee under a share purchase arrangement would be the value of the shares acquired less the price paid by the employee for those shares. In determining this benefit, Parliament would expect that the shares from which the employee derives the benefit are the same shares that are valued, and that they carry materially the same rights as when they were valued. In Example 2, the real benefit Mrs Jones derives under the share purchase agreement occurs when the Class B shares reclassify to ordinary shares. In economic and commercial reality, the Class B shares are a right to receive ordinary shares on the satisfaction of certain criteria.

17. In Example 2, what is valued as the benefit under the share purchase arrangement is not the actual shares that Mrs Jones benefits from (ie, the ordinary shares). Instead, what is valued is the highly contingent right to those ordinary shares based on the right to reclassify the Class B shares if the qualifying criteria are met. The value of this right is significantly reduced due to the high degree of uncertainty that the qualifying criteria will be met and the Class B shares will reclassify to ordinary shares.

18. The arrangement therefore gives a contingent right to acquire ordinary shares the legal form of a share (ie, the Class B shares). Further, it greatly reduces the taxable benefit derived from those ordinary shares because of how contingent the right to them is. We consider that Example 2, viewed in a commercially and economically realistic way, does not make use of the legislation in a manner that is consistent with Parliament's purpose and is therefore a tax avoidance arrangement.

19. In Example 2, the real economic benefit to Mrs Jones of the share purchase agreement is the 100 ordinary shares she acquired (which had a value of $900) through the reclassification of the Class B shares (which only cost her $100). Parliament's purpose for share purchase agreements was to tax this benefit (ie, the $800 gain). Therefore, we consider that the employee would be taxable on that benefit (ie, $800).

Current status

20. We may ask for information from some taxpayers who have implemented employee share purchase schemes. Being asked for information does not necessarily mean that a taxpayer has done anything incorrect and in many cases no adjustment is subsequently made to a taxpayer's assessments. The purpose of this Revenue Alert is to indicate, however, that there are certain attributes of employee share purchase arrangements that are more likely to give rise to an investigation.

21. Where the Commissioner becomes aware of arrangements (through either disclosure by taxpayers or the audit activity of the Commissioner's staff), if possible, discussion will be had with the company and its tax advisors before formal commencement of an investigation. If, following those discussions, the Commissioner forms the opinion that the arrangement results in more tax being payable by the employees (or former employees) of the company, the taxpayers will be contacted with details of the Commissioner's concerns and given the opportunity to make a pre-notification voluntary disclosure. The Commissioner will take into account individual circumstances.

22. If you consider that our concerns may apply to your situation, we recommend you discuss the matter with your tax advisor or with us, and depending on the outcome of those discussions, consider making a voluntary disclosure.

Guidelines for making a voluntary disclosure are contained in our booklet *Putting your tax returns right (IR280)* and *Standard Practice Statement 09/02 Voluntary disclosures (May 2009)*.

Graham Tubb
Group Tax Counsel, Legal & Technical Services

Legislative references
Income Tax Act 2007 – sections CE 1, CE 2, CE 6 and BG 1

INTERPRETATION STATEMENTS

This section of the *TIB* contains interpretation statements issued by the Commissioner of Inland Revenue.

These statements set out the Commissioner's view on how the law applies to a particular set of circumstances when it is either not possible or not appropriate to issue a binding public ruling.

In most cases Inland Revenue will assess taxpayers in line with the following interpretation statements. However, our statutory duty is to make correct assessments, so we may not necessarily assess taxpayers on the basis of earlier advice if at the time of the assessment we consider that the earlier advice is not consistent with the law.

IS 15/02: GOODS AND SERVICES TAX – GST AND RETIREMENT VILLAGES

All legislative references are to the Goods and Services Tax Act 1985 (the GSTA) unless otherwise stated. Relevant legislative provisions are reproduced in Appendix 2 to this Interpretation Statement.

Scope of this statement

1. This Interpretation Statement addresses the GST treatment of supplies made and received by retirement villages. It follows the publication of Interpretation Statement IS 10/08 "Retirement villages – GST treatment" in *Tax Information Bulletin* Vol 22, No 11 (December 2010). IS 10/08 considers the GST treatment of retirement villages as it was before the Taxation (GST and Remedial Matters) Act 2010 and other subsequent amendments took effect. When IS 10/08 was published it was known retirement villages would be affected by amendments to the GSTA and that a further public item would be required. Therefore, this Interpretation Statement considers the GST treatment of retirement villages, taking into account the current definitions of "dwelling" and "commercial dwelling" in s 2, the current GST apportionment provisions and the zero-rating of land rules as they apply to land acquired for the development of retirement villages.

Summary

2. This Interpretation Statement addresses the GST treatment of supplies made by retirement villages to their residents, the entitlement of retirement village operators to claim input tax deductions for goods or services used in establishing and operating a retirement village, and the GST treatment of land acquired for the development of retirement villages.
3. Some examples illustrating the GST treatment of retirement villages are provided at [222]–[236].

Supplies made by retirement villages

4. To determine whether GST is chargeable on supplies made by a retirement village to its residents it is necessary to consider the nature of the supplies being made. This is done by considering the rights and obligations created under the contracts entered into between retirement villages and their residents. In turn, the nature of the supplies made by a retirement village will determine a retirement village's entitlement to claim input tax deductions for goods or services used in establishing or operating a retirement village.
5. Retirement villages essentially supply accommodation and care services to their residents. The main legal structures used to provide residents with occupation rights in a retirement village are sales, leases or licences of accommodation units, although the precise details of arrangements vary from village to village, and from resident to resident. For example, under some schemes a retirement village may be obliged to repurchase an accommodation unit or alternatively a village may only have an option to repurchase the unit. Sometimes a retirement village will provide care services to residents along with occupation rights, or in other situations care services may be provided separately to residents, in addition to accommodation. The nature of the different supplies made by a retirement village and the consideration received for those supplies are considered at [32]–[99].
6. Usually, supplies by a retirement village of accommodation in a "commercial dwelling" (as opposed to a "dwelling") and supplies of care services will be taxable supplies made by retirement villages to residents.
7. Common exempt supplies made by a retirement village are:
   - The supply of financial services (the allotment or issue of a debt security): ss 3(1)(c) and 14(1)(a). The meaning of "debt security" is considered at [47]–[56].
   - The supply of accommodation in a dwelling by way of hire, service occupancy agreement or

licence to occupy: s 14(1)(c). The meaning of "accommodation" is considered at [69]–[71] and the meaning of "dwelling" is discussed at [106]–[123].

8. The Commissioner considers that a retirement village makes a supply of a financial service (the allotment of a debt security) under any transaction (eg, under the sale, lease or licence of a unit) where the retirement village accepts an obligation to repurchase that unit or agrees to repay a loan or deposit. That financial service is supplied for no consideration. The provision of financial services is considered at [101]–[103].

9. Where a resident's right to occupy a unit in a retirement village is supplied under a lease or licence then that supply of accommodation by the retirement village may be an exempt supply under s 14(1)(c). For s 14(1)(c) to apply, accommodation must be supplied in a dwelling (but not in a commercial dwelling). Paragraph (b)(iii) of the definition of "dwelling" in s 2 includes a residential unit in a retirement village or rest home when the consideration paid or payable for the supply of accommodation in the unit is for the right to occupy the unit. To determine if para (b)(iii) applies to a supply of accommodation by a retirement village in a residential unit, it is necessary to:

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

10. The Commissioner considers that para (b)(iii) does not apply to units whose residents are required to purchase a package of care services. In those circumstances the units will form part of a commercial dwelling, so that the supply of accommodation in the units under a lease or licence is a taxable supply. The issue of whether s 14(1)(c) applies to exempt the supply of accommodation in a retirement village is considered at [104]–[105].

11. Some retirement villages may also supply a participatory security under which residents have a right to use the common areas and facilities in the village. On its own, the supply of such a participatory security would be an exempt supply under s 14(1)(a). However, where a retirement village scheme includes a participatory security under which an associated supply is made (eg, 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 will be subject to GST. In those situations, the taxable supply of accommodation is an "associated supply" and s 14(1)(a) does not exempt the associated supply: s 14(1B). The associated supply is treated as a separate taxable supply: s 5(14B). This issue is considered at [142]–[154].

12. A table summarising the GST treatment of the key supplies made by retirement villages is provided as Appendix 1.

Claims for input tax deductions by retirement villages

13. Whether an input tax deduction can be claimed on goods and services acquired by a retirement village depends on the extent to which the goods or services are used for, or are available for use in, making taxable supplies. To determine the extent to which goods or services are used for making taxable supplies, a person must estimate at the time the goods or services are acquired how they intend to use them, choosing a determination method that provides a fair and reasonable result.

14. A full input tax deduction is allowed for a good or service that is used solely for making taxable supplies (ie, that is used for making supplies of accommodation in a commercial dwelling or other taxable supplies). In contrast, no input tax deduction is allowed for a good or service that is solely used for making exempt supplies (ie, in this context typically a good or service used for making supplies of accommodation in a dwelling or a financial service).

15. Where goods or services are used for making both taxable supplies and exempt supplies, then the retirement village operator must estimate at the time of acquisition how they intend to use the goods or services, choosing a determination method that provides a fair and reasonable result. The intention of the operator can include their overall plan or aim (where that provides a fair and reasonable result). This issue is discussed at [175]–[177]. The determination is expressed as a percentage of the total use. There must be objective evidence of the intended use of the good or service (eg, resource consent applications, feasibility studies and preliminary designs to support the intended use of land). An adjustment may be needed if the use of a good or service changes in an adjustment period from what was originally estimated when the good or service was acquired. The rules relating to adjustments are discussed at [185]–[207].

16. The above rules do not apply to supplies where GST has been charged at the rate of 0% (zero-rated). Input tax deductions will not be available where a good or service has been acquired as a zero-rated supply, and sometimes an amount of output tax may be payable

where the zero-rated good or service will be used for making non-taxable supplies. The most important zero-rated supply in the context of retirement villages is the zero-rated supply of land for development.

Land purchased or sold by retirement villages

17. There are special GST rules for the supply of land: the zero-rating of land rules. These rules may apply to land acquired for the development of a retirement village. The rules require the supply of land to be zero-rated when (at the time of settlement):
    - the supply wholly or partly consists of land;
    - the vendor and purchaser are registered for GST;
    - the purchaser intends to use the supplied goods (ie, the land and the other components of the supply) wholly or partly for making taxable supplies; and
    - the purchaser does not intend to use the land as a principal place of residence for themselves or for a person associated with them under s 2A(1)(c).
18. The zero-rating of land rules are considered at [208]–[221].

Background

Features of retirement villages

19. 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.
20. 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 for particular retirement villages. These indicate that the main legal structures used for the provision of occupation rights in retirement villages are:
    - sales of units to residents;
    - leases of units or accommodation to residents; or
    - licences of units or accommodation to residents.
21. The latter two legal structures are typically labelled Occupational Rights Agreements or ORAs. This Interpretation Statement focuses on the GST treatment of these two legal structures, although some analysis on the GST treatment of supplies made to residents who purchase their unit in a retirement village is included.
22. The financial structures commonly entered into between retirement villages and their residents are broadly as follows:
    - Generally, residents are required to pay a lump sum payment on entry to the retirement village (referred to in this Interpretation Statement as "the entry payment"), which, in legal terms, is either the purchase price for a unit or an interest-free loan or refundable deposit paid by the resident to the retirement village.
    - 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 management services. A retirement village may be entitled to take the facilities fee or amenities contribution up front or the fee may accrue to the retirement village over a period of years. If the entry payment does not include a facilities fee or amenities contribution, then usually 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 periodic fee may be chargeable where residents receive other additional 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 charge or the legal costs incurred by the retirement village in granting the occupation right.
    - The amount that is repaid to the resident when they leave the village will often be less than the amount originally paid by the resident, when the amounts owed by the resident up to departure are set off against the original amount paid. 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.

23. 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 as indicated at [20] are the main legal structures used in retirement villages) and the financial structures outlined above. The principles outlined in this Interpretation Statement are intended to be relevant in the majority of cases.

Key issues considered in this Interpretation Statement

24. This Interpretation Statement considers three key GST issues relevant to retirement villages:
    - the GST treatment of supplies made by retirement villages to their residents (discussed at [26]–[154]);
    - the entitlement of retirement villages to claim input tax deductions for goods or services used in establishing and operating a retirement village (discussed at [156]–[207]; and
    - the GST treatment of land purchased or sold by retirement villages (discussed at [208]–[221]).
25. Each of these key issues is considered in turn.

GST treatment of supplies made by retirement villages

26. GST is chargeable on the supply of goods and services in the course or furtherance 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: s 8(1).
27. The value of a supply is the consideration paid for the supply: s 10(2). 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: s 10(18).
28. To understand the GST treatment of the supply of goods and services by retirement villages and to determine whether GST is chargeable on supplies made by a retirement village to its residents, it is first necessary to understand the supplies being made by a retirement village and the consideration relating to those supplies. Next, it is necessary to consider whether any of the supplies being made by the village are taxable or exempt supplies in terms of the GSTA. As a result, the approach taken in this Interpretation Statement is to first consider:
    - the nature of a supply generally for GST purposes;
    - the nature of the supplies made by retirement villages, taking into account the common legal structures (including payment arrangements) used by retirement villages; and
    - how those supplies are described in GST terms.
29. The second step is to determine whether those identified supplies are taxable supplies or exempt supplies for the purposes of the GSTA. Section 14 sets out those supplies that are exempt supplies. Therefore, the next step in the Interpretation Statement is to consider the application of s 14 to the supplies made by a retirement village, in particular:
    - s 14(1)(a): the provision of financial services; and
    - s 14(1)(c): the supply of accommodation in a "dwelling".
30. In looking at s 14(1)(c) the meaning of "dwelling" will be considered, and in particular:
    - what is consideration paid or payable for the right to occupy a unit;
    - whether a dwelling includes appurtenances; and
    - the meaning of "commercial dwelling".
31. The Interpretation Statement then briefly considers supplies associated with the issue of a participatory security and whether an associated supply is a taxable supply.

Nature of a supply

32. The nature of a supply for GST purposes is determined by considering the legal rights and obligations between the parties in the light of the surrounding circumstances.
33. The Court of Appeal in *CIR v Gulf Harbour Development Ltd* (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 (CA) 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 (at 5,098):

> 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.

34. 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. The courts have developed a number of principles to help determine the relevant "supply" (or supplies) made pursuant to a transaction. The leading New Zealand case on whether a component is a separate supply or part of a larger supply is *Auckland Institute of Studies Ltd v CIR* (2002) 20 NZTC 17,685 (HC). This case concerned a taxpayer, the Auckland Institute of Studies (AIS), that specialised in providing educational services to overseas students. A subsidiary was incorporated to carry out AIS's overseas activities. The subsidiary was entitled to charge the students an "overseas assistance fee" for assistance provided to the students prior to their arrival in New Zealand. The students were not charged separately for the overseas assistance fee. Instead, it was part of the fee that was charged for tuition and other services. The issue was whether the overseas assistance fee was for a separate supply from the supply of tuition services such that the overseas assistance fee would be zero-rated.

35. Hansen J reviewed the case law on the principles of apportionment and considered that the cases in the United Kingdom under the Value Added Tax Act 1983 (UK) were of assistance. He observed that the approach of the United Kingdom courts had been to sever zero-rated or exempt supplies where it was "practicable and realistic" to do so (*Rayner & Keeler Ltd v C & E Commrs* [1991] VATTR 532 at 538). He stated that, for this purpose, an enquiry is made into "the true and substantial nature" of the consideration given for the payment (*Bophuthatswana National Commercial Corp Ltd v C & E Commrs* [1993] STC 702 (CA) at 708). In particular, Hansen J considered the following four cases:

    - *British Airways plc v C & E Commrs* [1990] BTC 5124 (CA);
    - *C & E Commrs v United Biscuits (UK) Ltd* [1992] BTC 5045 (CSIH);
    - *C & E Commrs v Wellington Private Hospital Ltd* [1997] BTC 5140 (EWCA CIV); and
    - *Card Protection Plan Ltd v C & E Commrs* [2001] 2 All ER 143 (HL).

    Ultimately Hansen J found that the pre-arrival services were ancillary to the supply of tuition services to overseas students in that they helped to facilitate that supply.

36. The relevant principles taken from the above cases can be summarised as follows:

    - To determine the nature of a supply it is necessary to identify the essential features of the transaction, by considering the legal arrangements actually entered into and carried out by the parties. All the circumstances in which the transaction takes place must be considered.
    - There needs to be an objective examination of the true and substantial nature of the consideration given to determine whether a sufficient distinction can be made between the allegedly different parts of the consideration given to make it reasonable to sever and apportion them. If, on an objective examination, it is not reasonable to sever and apportion the consideration given then there will be only one supply.
    - The examination of the true and substantial nature of the consideration given involves determining whether one element of the transaction or consideration given is a necessary or integral part of another element or whether one element is merely ancillary to or incidental to another element. If an element of a transaction is merely ancillary to a principal/dominant element, there will be only one supply (including both the dominant and the ancillary elements).
    - A service will be ancillary to a principal service when it is not an aim in itself for customers, but is a means of better enjoying the principal service supplied.

37. More specifically, and relevant to this context, the Commissioner considers that the principles that determine whether there is a single supply or multiple supplies include:

    - The examination of the true and substantial nature of the consideration given to 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).
    - A transaction involving the supply of a package of services, or a package of goods and services, is treated as a single supply in the following circumstances:

- 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 v C & E Commrs* [2005] 4 All ER 933 (HL)); the supply of medical treatment, which required both the exercise of medical skill and the use of drugs (*Dr Beynon v C & E Commrs* [2004] 4 All ER 1091 (HL)); 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)); and restaurant transactions, which include the provision of food and a cluster of features and acts (C-231/94 *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] BTC 5391 (ECJ)).
- 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 (Ch), 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. 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.

- The requirement to consider the transaction from the perspective of a typical 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 *C & E Commrs v British Telecommunications plc* [1999] 3 All ER 961 (HL), 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.
- Viewed in isolation, an ancillary feature of a transaction can 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.
- 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.

38. 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 IS 08/01: "GST—Role of section 5(14) of the Goods and Services Tax Act 1985 in regard to the zero-rating of part of a supply" *Tax Information Bulletin* Vol 20, No 5 (June 2008): 8.

Nature of supplies made by retirement villages

39. To determine the nature of the supplies made by retirement villages, it is necessary to identify the essential features of the transaction between the retirement village and the resident. This effectively requires consideration of the contract entered into between a retirement village and its resident. Contracts may vary from village to village and not all residents within a particular village will receive the same services under their contracts. However, a broad outline of contracts entered into between retirement villages and their residents is possible.

40. Generally, when a resident occupies a unit in a retirement village under a lease or licence, the

relationship between the retirement village and the resident includes these typical features:

- 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 the retirement village a loan or deposit that is repayable on termination of occupation.
- Residents must also pay periodic fees that are calculated by reference to the costs of operating the village (ie, a proportionate share of village overheads such as rates, insurance, security, management expenses and maintenance). If residents purchase a package of care services, additional payments or higher periodic fees are payable.
- 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 the amount 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 and other charges on termination of occupation.

41. In some cases, a resident's contract obliges a retirement village operator to supply a package of care services in addition to the right to occupy the unit. 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 outgoings, 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 charged 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.

42. 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, under the terms of the sale agreement, the retirement village accepts an obligation to repurchase the unit or is granted an option to purchase the unit at the end of the arrangement.

43. When the nature of the supplies made by retirement villages to their residents are considered in the context of the governing contracts, the consideration payable and the surrounding circumstances of those supplies may include (in GST terms):
    - the provision of financial services (in relation to deposits, loans or repurchase obligations) (discussed at [45]– [65]); and
    - the supply of accommodation by way of a lease or licence (discussed at [66]–[99]), including:
        - the supply of common areas and shared facilities (discussed at [72]–[75]);
        - the provision of operating and upkeep services and other additional services (discussed at [76]–[77]); and
        - the supply of care services (discussed at [78]–[82]).

44. This Interpretation Statement addresses each of these possible supplies.

GST supplies made by retirement villages

Provision of debt security

45. The supply of a financial service is an exempt supply for GST purposes. For GST purposes a retirement village supplies a financial service to a resident in the form of a debt security when a retirement village agrees under the contract with the resident to repay a loan or deposit or accepts an obligation to repurchase a unit from a resident. A "debt security" includes any right to be paid money in the future. It is a separate supply from the supply of accommodation to a resident.

46. The following paragraphs discuss:
    - the meaning of "debt security" in the GSTA;
    - the consideration payable for the supply of a debt security; and
    - whether the supply of a debt security is separate from the supply of accommodation.

Meaning of debt security

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

48. In *Case S54* (1996) 17 NZTC 7,354 at 7,357 Judge Willy said "it is a precondition to the existence of a debt security that funds be invested in the form of a loan to the borrower". Therefore, even if a narrow interpretation of "debt security" is adopted, a debt security may arise under a loan or refundable deposit. Most retirement village contracts involve a loan or deposit.

49. However, the definition of "debt security" is not limited to loans or deposits. Judge Willy, in *Case S54*, said that "it is appropriate to have regard to [the Securities Act 1978] in construing" the definition of debt security in the GSTA. The essence of the definition of "debt security" in the Securities Act 1978 was that money is deposited with or lent to a person, or is 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* (HC Dunedin CRI 2008-412-000025, 1 December 2008 at [34]). As under the GSTA, for Securities Act 1978 purposes the definition of debt security is 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 repurchase the unit at a specified price, was a debt security under the Securities Act 1978.

50. The definition of "debt security" includes any interest in or right to be paid money that is, or is to be, owing by any person (excluding a cheque). As a result, a debt security includes a right to be paid money in the future.

51. As noted above at [47], the definition of "financial services" includes the allotment of a debt security. 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: *DFC Financial Services Ltd (in statutory management) v Abel* [1991] 2 NZLR 619 (HC); *Re Loan and Finance (Dunedin) Ltd (in rec)* (1990) 5 NZCLC 66,367 (HC); *Owers v Braemar Lodge 2004 Ltd (in rec)* (2010) 10 NZCLC 264,677.

52. The definition of "financial services" also includes the issue of a debt security (above at [47]). 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 (CA); *Trustees Executors and Agency Company of New Zealand Ltd v Deutsche Hypothekenbank Frankfurt-Hamburg Aktiengesellschaft* (2000) 8 NZCLC 262,208 (HC).

53. 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 1978: *Culverden; Fenton v Pakuranga Park Village Trust* (1998) 3 NZConvC 192,681 (CA); *Covenant Trustee Co v Ohope Lodge Ltd* (HC Rotorua M69/90, 28 April 1993). Given there is no definition of "debt security" in the Retirement Villages Act 2003, the Commissioner considers it remains appropriate to have regard to the Securities Act 1978 (or its replacement the Financial Markets Conduct Act 2013) in construing the definition of debt security in the GSTA. 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.

54. The Commissioner considers that a retirement village supplies a financial service (the allotment of a debt security) under any arrangement in which a resident of a retirement village is 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. 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 financial service, being the acceptance of an obligation to pay money (the allotment of a debt security under which the resident has a right to be paid money).

55. However, the Commissioner considers that a sale with an option to purchase in favour of the retirement village will not be a debt security, as any right to receive money will 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 (CA). 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. By comparison, under an arrangement where a retirement village has an obligation to repurchase a unit, residents have an absolute right to be paid the purchase price on termination of occupation.

56. 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 repurchase a unit from a resident (not being simply an option to repurchase) or to repay a loan or deposit.

Consideration for debt security

57. The value of a supply is the consideration for the supply: s 10(2). The definition of "consideration" in s 2(1) refers to "any payment … in respect of, in response to or for the inducement of a supply". The term "consideration" is defined widely and extends beyond the ordinary meaning of the term and its meaning under general contract law: *Trustee, Executors and Agency Co New Zealand Ltd v CIR* (1997) 18 NZTC 13,076 (HC); *Turakina Maori Girls College Board of Trustees v CIR* (1993) 15 NZTC 10,032 (CA) at 10,036; *CIR v NZ Refining Co Ltd* (1997) 18 NZTC 13,187 (CA) at 13,191; and *Case M40* (1990) 12 NZTC 2,247. For the payments to be consideration for a supply, there must be a sufficient relationship between the payments and a supply: *NZ Refining Co; Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075 (CA); *Suzuki NZ Ltd v CIR* (2001) 20 NZTC 17,096 (CA); and *Trustee Executors*. The consideration for a supply may comprise a number of payments. In the *Trustee Executors* case, a lease of land provided that, in addition to rent, the tenant was required to pay the rates on the land. Chisholm J considered that the payment of rates by the tenant was part of the "consideration" for the supply of the land.

58. If a payment is consideration under contract law, the necessary element of reciprocity in the relationship between payer and payee will be present and there will 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 Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL). Therefore, if a payment is consideration for contract law purposes, the payment is consideration for GST purposes.

59. 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 ((1995) 7 NZCLC 260,850), 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 ((1996) 1 BCSLR 162) 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 entry payment (the right to occupy a unit and the right, on termination of occupation, to be repaid the purchase price, subject to adjustment).

60. 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, for that reason, the principal under a debt security is not to be treated as the consideration for the supply of a debt security. Therefore, in the context of retirement villages this means that the entry payment (being either the purchase price paid by the resident for a unit, the loan or deposit paid) is not consideration for a debt security.

Debt security is a separate supply

61. It could be argued that a retirement village operator supplies a single supply of a debt security and that the right to accommodation is a right that attaches to that supply. Such an argument would be similar to the finding in *Gulf Harbour* that what was supplied in that case was an equity security and the right to membership of the golf club attached to that share. However, for the reasons set out below, the Commissioner considers that the *Gulf Harbour* case

is distinguishable from the current situation on this aspect.

62. 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 (SC). 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 do 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).

63. The amendments made following *Gulf Harbour* override the *Marac* principle in 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.

64. 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 rights 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) that fell within the definition of "financial services". Therefore, on this aspect, the *Gulf Harbour* case is distinguishable.

65. In the *Culverden* 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 feature 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). Therefore, the Commissioner considers that the supply of a debt security is a separate supply from the supply of accommodation.

Supply of accommodation

66. For GST purposes, sometimes the supply of accommodation made when a retirement unit is leased or licenced to a resident will be an exempt supply. For this reason it is important to understand the nature of the accommodation being supplied by a retirement village when a retirement unit is leased or licenced to a resident and whether the payments typically made by residents of retirement villages are consideration for the supply of accommodation.

67. Accordingly, the Interpretation Statement now addresses:

- The scope of the term "accommodation", in particular:
  - the meaning of "accommodation";
  - whether the right to use common areas and facilities forms part of the supply of accommodation;
  - whether the types of services provided in return for the payment of periodic fees form part of the supply of accommodation; and
  - whether care services provided to residents form part of the supply of accommodation;
- Whether the amounts typically paid by residents are consideration for the supply of accommodation, in particular:
  - entry payments;
  - "facilities fees" or "amenities contributions";
  - periodic fees; and
  - refurbishment costs and other termination charges.

Scope of term "accommodation"

68. Understanding the scope of the term "accommodation" in the context of retirement villages is important, as sometimes (as indicated above at [66]) the supply of accommodation is an exempt supply.

Meaning of "accommodation"

69. 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.

70. "Accommodation" is defined in the *Concise Oxford English Dictionary* (12th ed, Oxford University Press, New York, 2011) as meaning:

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

71. "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 (CA); *Puhlhofer v Hillingdon London BC* [1986] AC 484 (HL); *Owen v Elliott* (1990) STC 469 (CA); *Urdd Gobaith Cymru v C & E Commrs* [1997] V & DR 273.

Right to use common areas and facilities is part of a supply of accommodation

72. For the reasons outlined at [124]–[136], the Commissioner considers that the right to use the common areas and facilities is part of the dwelling in a retirement village (being an appurtenance belonging to or used with the dwellings: para (b)(ii) of the definition of "dwelling").

73. However, if that conclusion is incorrect, the Commissioner still considers that the right to use common areas and facilities forms part of the supply of accommodation. Without access to the common areas, it would not be possible to exercise the right to occupy the dwellings.

74. 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 held that the fact that in some cases membership of the golf club was supplied separately from the supply of shares did not mean that in all cases two separate supplies were made.

75. *Hidden Valley Golf Resort Association v R* [2000] GTC 4104 (FCA) concerned a lease under which the tenants were granted an exclusive right to a lot on which a vacation cottage could be built along with the right to use a golf course, club house, artificial lake and tennis court on the lessor's property. It was held in that case 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*, 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.

Periodic fees to cover operating costs and upkeep

76. Periodic fees payable when a retirement unit is leased or licenced are calculated by reference to the costs incurred in operating a retirement village, including the administration costs (such as rates, insurance, maintenance, depreciation, salaries and statutory costs) and the costs of providing security, cleaning, gardening for 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*.

77. The maintenance of the unit and of village facilities is part of the supply of accommodation when the retirement unit is leased or licenced, being services that make possible the supply of accommodation by keeping the unit and the village facilities in good repair.

Supply of care services

78. 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 at [41].

79. 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 an ancillary or incidental feature of the transaction.

80. The care services provided under a care package include an emergency response service. An emergency response service is also typically 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 an ancillary 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 such an emergency response service is part of the supply of accommodation.

81. This view is supported by *Wairakei Court Ltd v CIR* (1999) 19 NZTC 15,202 (HC) where it was held that:

- the consideration payable by residents of the studio units 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.

82. The Commissioner also considers that:

- The provision of transport services as part of a package of services is an ancillary or incidental feature of the supply of accommodation and the supply of transport services does not alter the nature of the supply made.
- 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.

Summary of scope of "accommodation"

83. Therefore, the Commissioner considers that when a retirement unit is leased or licenced:

- The supply of accommodation is an essential feature of a retirement village contract.
- The supply of maintenance services is 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 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.
- 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 an ancillary or incidental feature of the transaction. Where an emergency call response service is the only care service supplied, that service is an ancillary or incidental benefit that does not alter the character of the supply of accommodation.
- Transport services supplied as part of a package of services are also ancillary or incidental benefits to the supply of accommodation. As a result, transport services supplied as part of a package of services 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.

Payments which are consideration for the supply of accommodation

84. Of the payments typically made to retirement villages by residents who lease or licence their retirement units, the Commissioner considers that the consideration for the supply of accommodation includes:

- the "facilities fee" or "amenities contribution";
- the periodic fees; and
- the refurbishment costs and other termination charges.

85. There is a clear relationship between the "facilities fee" or "amenities contribution", the periodic fees 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. However, before going on to discuss these charges in more detail, the Interpretation Statement will discuss whether entry payments are consideration for the supply of accommodation.

Entry payments

86. In most cases an entry payment is not consideration for the supply of a debt security. This is because the entry payment is effectively just a supply of money. As indicated previously (at [61]–[65]) the Commissioner also considers that the use of the entry payment by the retirement village operator over the period of occupation is generally not consideration for the supply of accommodation.

87. The definition of "consideration" refers to a payment, act or forbearance. The Commissioner considers the provision of money lent (irrespective of terms)

is an "act", being something that is done. The Commissioner also considers that the fact that the giving of a loan is not consideration for issuing a debt security does not prevent it being capable of being consideration for some other supply. Where the money lent is provided on, for example, low or interest-free terms, a borrower may enjoy the benefit of the money at a reduced cost during the period of the loan. Accordingly, it is not unreasonable to expect the parties to enter into a bargain whereby the borrower supplies goods and services as the *quid pro quo* for the provision of the money on such terms.

88. Where a service is being provided in relation to the provision of a loan, that supply must be valued. Section 10(2) provides in this situation that the value of the supply is the open market value of the consideration. Section 4 sets out the rules for determining the "open market value" of any supply. In *Newman v CIR* (2000) 19 NZTC 15,666 (HC), Smellie J stated at 15,688:

> The definition of "open market value" in s 4 appears to me to cover every contingency. Thus "similar supply" is addressed in subs (1) while subs (2) ties the value to "the consideration in money which the supply of those goods would generally fetch" on the open market between persons who are not associated persons. Sub-section (3) covers the situation where the value cannot be determined pursuant to subs (2). And where neither subss (2) nor (3) are capable of providing an answer, subs (4) allows the Commissioner to adopt a method "which provides a sufficiently objective approximation". Then subs (5) provides a means whereby the value of consideration other than money can be ascertained. In short, there is virtually no room for technical arguments seeking to place a case outside the definition.

89. In all circumstances where this matter arises, the Commissioner considers it is important to take care in identifying the true nature of the transaction. For example, under the law of contract, a loan does not automatically bear interest. In other words, the lender is not entitled to interest unless there is an agreement that the borrower will pay interest. Accordingly, the law of contract confirms that where a loan is made at no interest, then, without more, no inference can be made as to the GST treatment on the basis of some perceived provision of a concessional use of money. To establish a different transactional form involving, for example, the supply of "non-monetary consideration" would require an agreement on those terms—an agreement clearly showing the real or true intention of the parties. The essence of the approach is to discover the legal rights and duties that are actually created by the transaction into which the parties entered. From a practical perspective, it is fundamental that the focus remain on the legal arrangements actually entered into and not on the economic or other consequences of the arrangements.

90. The Commissioner considers that a retirement village entry payment does not provide any rights to occupy the relevant accommodation unless the legal arrangements establish that the entry payment, or any part of it, is consideration for the supply of accommodation.

"Facilities fee" or "amenities contribution"

91. 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 (CA). The principle in *Spargo's* case applies where there are mutual liabilities and an agreement that these liabilities will be set off: *FCT v Steeves Agnew & Co (Victoria) Pty Ltd* (1951) 9 ATD 259, 82 CLR 408 (HCA); *Lend Lease Corporation Ltd v FCT* 90 ATC 4401 (FCA). 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 usually agreed between the parties 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.

92. Under s 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 for the goods or services is the earlier of the time when a payment becomes due or is received. Leases or licences of units provide for periodic payments (periodic fees). The "facilities fee" or "amenities contribution" is also consideration for the supply of accommodation.

93. The Commissioner considers that in terms of s 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, s 25 will apply. Section 25 applies if the previously agreed consideration for a supply has been altered: s 25(1)(b). Section 25(2) will 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

94. Generally residents who purchase a package of care services are required to pay a higher amount (than other residents) in terms of periodic fees. In such circumstances, the periodic fees are attributable to both the supply of accommodation and the supply of care services. In these cases it is necessary to determine what proportion of the periodic fees attributable to the supply of accommodation in a commercial dwelling is consideration for "domestic goods and services" for the purpose of s 10(6).

95. Under s 10(6), the value attributed to the supply of "domestic goods and services" in a commercial dwelling is reduced. "Domestic goods and services" are defined in s 2 as:

> **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

Refurbishment costs and other termination charges

96. 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 will be consideration for the carrying out of refurbishment work. In both *Suzuki NZ* and *Motorcorp*, an overseas manufacturer had an obligation under the warranty given to the New Zealand importer to repair defective vehicles. 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.

97. Residents who lease or licence their units are not a party to any contract for the 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.

98. 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 lessee is liable for them: *Metcalfe v Venables* [1921] NZLR 576 (SC). 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: *Trustee Executors* case.

99. 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 a 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 at [106]–[141].

GST supplies made by retirement villages that are exempt supplies

100. Section 14 provides that certain supplies are exempt supplies for GST purposes. In the case of retirement villages, given the nature of the supplies made by villages, the supplies that are most likely to be exempt supplies for GST purposes are:

- the supply of financial services (issue or allotment of a debt security): s 14(1)(a); and
- the supply of accommodation by way of hire, service occupancy agreement or licence to occupy in a dwelling: s 14(1)(c).

Section 14(1)(a) – issue or allotment of a debt security

101. The supply of financial services is an exempt supply under s 14(1)(a). The definition of "financial services"

includes the issue or allotment of a debt security: s 3(1)(c). If one of the activities in s 3(1)(c) is carried out by a taxpayer, a service (being a financial service) will be supplied by the taxpayer. This is supported by Case T27 (1997) 18 NZTC 8,188 and *Gulf Harbour*. In those cases the court held that the transfer of a security was a financial service. For the reasons outlined at [47]–[65], 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 repurchase a unit or to repay a loan or deposit.

102. Section 14(1)(a) also applies to services that are reasonably incidental and necessary to the supply of financial services. The Commissioner does not accept that the supply of accommodation or other services is reasonably incidental and 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 (SCC); *C & E Commrs v C H Beazer (Holdings) plc* (1989) 4 BVC 121 (QB). 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, and 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 English Dictionary on Historical Principles* (5th ed, Oxford University Press, New York, 2002); *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] 1 All ER 203 (HL). The supply of accommodation and care services is not indispensable, useful, expedient or really needed for the supply of a debt security.

103. Given this, s 14(1)(a) does not apply to the supply of accommodation and other services by a retirement village. Such services are not reasonably incidental and necessary to the supply of a debt security and therefore cannot be exempt supplies on that basis.

Section 14(1)(c) – supply of accommodation in a dwelling

104. Section 14(1)(c) only applies to the supply of accommodation by way of hire, service occupancy agreement or licence to occupy. Therefore s 14(1)(c) cannot apply to exempt the supply when a unit in a retirement village is sold to a resident. The sale of a unit in a retirement village is a taxable supply (if it is made in the course or furtherance of a taxable activity).

105. Section 14(1)(c) potentially 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 s 14(1)(c) to apply, the supply must be the supply of accommodation in a "dwelling".

Meaning of "dwelling"

106. For retirement villages that lease or license units to residents, it is important to understand the scope of the term "dwelling". This is because any supply of accommodation made by a retirement village to a resident in a "dwelling" is an exempt supply for GST purposes. The term "dwelling" is defined in s 2(1). It includes any appurtenances used along with the occupied premises but specifically excludes a "commercial dwelling".

107. Section 2(1) defines "dwelling" as follows:

> **dwelling**, for a person,—
>
> (a) means premises, as defined in section 2 of the Residential Tenancies Act 1986,—
>
> (i) that the person occupies, or that it can reasonably be foreseen that the person will occupy, as their principal place of residence; and
>
> (ii) in relation to which the person has quiet enjoyment, as that term is used in section 38 of the Residential Tenancies Act 1986; and
>
> (b) includes—
>
> (i) accommodation provided to a person who is occupying the same premises, or part of the same premises, as the supplier of the accommodation and who meets the requirements of paragraph (a)(i):
>
> (ii) any appurtenances belonging to or used with the premises:
>
> (iii) despite paragraph (a)(ii), a residential unit in a retirement village or rest home when the consideration paid or payable for the supply of accommodation in the unit is for the right to occupy the unit; and
>
> (c) excludes a commercial dwelling:

108. Section 2(1) defines "commercial dwelling" as follows:

> **commercial dwelling**—
>
> (a) means—
>
> (i) a hotel, motel, homestay, farmstay, bed and breakfast establishment, inn, hostel, or boardinghouse:
>
> (ii) a serviced apartment managed or operated by a third party for which services in addition to the supply of accommodation are provided and in relation to which a resident does not have quiet enjoyment, as that term is used in section 38 of the Residential Tenancies Act 1986:
>
> (iii) a convalescent home, nursing home, rest home, or hospice:
>
> (iv) a camping ground:
>
> (v) premises of a similar kind to those referred to in subparagraphs (i) to (iv); and
>
> (b) excludes—
>
> (i) a hospital except to the extent to which the hospital is a residential establishment:
>
> (ii) a dwelling referred to in paragraph (b)(iii) of the definition of **dwelling**:

109. Paragraph (b)(iii) of the definition of "dwelling" specifically includes "a residential unit in a retirement village or rest home when the consideration paid or payable for the supply of accommodation in the unit is for the right to occupy the unit". Paragraph (c) of the definition of "dwelling" excludes a "commercial dwelling". Paragraph (b)(ii) of the definition of "commercial dwelling" provides that a dwelling that is referred to in para (b)(iii) of the definition of "dwelling" is excluded from the definition of "commercial dwelling". The Commissioner considers, therefore, that a unit in a retirement village is a "dwelling" if it satisfies para (b)(iii) of the definition of "dwelling".

Consideration is for right to occupy

110. To determine if para (b)(iii) of the definition of "dwelling" applies to a supply of accommodation, it is necessary to decide whether the consideration paid or payable by the resident is for the right to occupy the unit. As noted above at [57]:

- The term "consideration" is defined widely in s 2(1) and extends beyond the ordinary meaning of the term and its meaning under general contract law.
- The term "consideration" requires a sufficient nexus between the payment and the supply.

As a result, an amount will be consideration for the supply of accommodation when it has a sufficient nexus with the supply.

111. The ordinary meaning of para (b)(iii) suggests that the consideration must be solely for the right to occupy the unit. This is because of the use of the words "is for the right to occupy the unit" and the absence of any qualifying words (such as "in whole or in part"). In determining the meaning of para (b)(iii), it is also relevant to examine the context and purpose of the relevant provisions to see what Parliament intended: s 5 of the Interpretation Act 1999 and *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36. The commentary to the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill 2013 (176-1) (which enacted para (b)(iii)) suggests the policy intent was to maintain the pre-April 2011 GST treatment of retirement village accommodation.

112. The pre-April 2011 GST treatment of retirement village accommodation under para (f) of the previous definition of "commercial dwelling" was discussed in *Wairakei*. Paragraph (b)(iii) of the current definition of "dwelling" is very similar to the previous para (f) of the old definition of "commercial dwelling".

113. *Wairakei* involved a rest home operator who had expanded its village by constructing studio units and villas. The operator claimed a full input tax deduction for the costs of the studio units and the villas on the basis they were commercial dwellings. The High Court held that the studio units were commercial dwellings, but the villas were dwellings because they fell within the exception in para (f). Chisholm J discussed the distinction between the studio units (commercial dwellings) and the villas (dwellings) in the circumstances (at 15,204):

> The studio units, which could be described as "bed sits", are expanded versions of the original rest home bedrooms. The objector believed that these studio units would appeal to elderly people seeking more space and a higher degree of independence than was offered by the rest home bedrooms. **Occupants of the studio units are contractually bound to receive and pay for either full care**, which equates with the care received by the occupants of the rest home bedrooms, **or partial care**, which is available to those residents who enjoy greater independence and require slightly less individual care. **Partial care includes the provision of all meals, morning and afternoon tea, electricity, clean towels daily, clean linen weekly, cleaning of the unit weekly, laundering of linen and personal clothes, all activities and outings as arranged, as well as constant monitoring of the resident's health needs by registered nursing staff.** The occupier of a studio unit pays a weekly rest home care fee for his or her full or partial care.
>
> ...

> While a nurse call button is located in each room of a villa and villa residents are entitled to utilise community facilities and rest home services available to other residents, they are not under any obligation to do so. Their gardens and lawns are kept and outside windows cleaned, but the resident is responsible for the interior of the villa unless assistance is sought. The level of care and assistance to be provided by the objector is determined by the occupier of the villa.
>
> Although licences to occupy villas are similar to licences to occupy studio units, there are two principal differences. First, the licence fee and occupation loan for villas are higher. Secondly, **there is no requirement for villa residents to pay a weekly rest home care fee**. Instead they pay a weekly service fee to cover such items as community security, rates, insurance, the provision of a nurse emergency call service and the use of communal facilities. The weekly service fee is, of course, considerably less than the weekly rest home care fee. **Extra services for such things as nursing, meals and assistance within the villa are paid for by the occupier on top of the weekly service fee.**
>
> [Emphasis added]

114. Chisholm J went on to conclude that the differences meant that para (f) did not apply to the studio units (at 15,208):

> ...the exclusion in paragraph (f) does not apply because the studio unit licences to occupy require the occupier to "pay to the [objector] a weekly Rest Home fee in respect of the Unit". As explained earlier, the weekly rest home fees are for full or partial care. Either way those fees represent a substantial payment which could not by any stretch of the imagination be construed as part of the consideration for the right to occupy the studio units in terms of paragraph (f). The consideration relating to the care component is not only distinct from the accommodation component, it is also substantial. In substance the situation is no different from the rest home proper where there is both a care component and an accommodation component.

115. On the other hand, Chisholm J held (at 15,208–15,209) that para (f) did apply to the villas because:

> [The villas] are effectively stand alone cottages within the rest home complex. Their occupants pay a weekly service fee to cover such items as community security, rates, insurance, an emergency call service and use of community facilities. On the other hand, unlike the studio units, there is no requirement for the occupants of villas to take care. **Indeed, the villa occupiers are perfectly entitled to occupy their villas without purchasing any care at all.**
>
> [Emphasis added]

116. 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. The court did not distinguish between the two levels of care provided to residents of the studio units. The essential difference between the studio units 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.

117. The Commissioner considers that to decide whether para (b)(iii) of the definition of "dwelling" 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 fees 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.

118. This does not mean that the total amount of the consideration that will 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 a licence) to determine whether such consideration 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.

119. Paragraph (b)(iii) 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 (b)(iii) 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 are required to purchase 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.

120. This view is consistent with the scheme and purpose of the legislation. The purpose of para (b)(iii) of the definition of "dwelling" is to determine whether a unit in a retirement village is to be classified as a dwelling for the purpose of s 14(1)(c) (which provides for the supply of accommodation in a dwelling to be an exempt supply). 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 para (b)(iii) 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.

121. Therefore, the Commissioner considers that para (b)(iii) will not apply to units whose residents are required to purchase care packages. In the Commissioner's view, such units form part of a commercial dwelling so that the supply of accommodation in such units is a taxable supply.

122. On the basis of contractual arrangements that are typically entered into between retirement villages and their residents, para (b)(iii) will apply to units whose residents are not required to purchase care packages and where the consideration paid by the residents is for the right to occupy the dwelling. Such units are dwellings and therefore, the supply of accommodation in such units is an exempt supply.

123. Paragraph (b)(iii) of the definition of "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 para (b)(iii) means that it is unnecessary to decide where the boundary between rest homes and retirement villages should be drawn.

Appurtenances

124. The definition of "dwelling" in s 2(1) includes in para (b)(ii) "any appurtenances belonging to or used with the premises". Therefore, to understand the scope of the term "dwelling" it is also necessary to understand what appurtenances are and what might be included in the context of a retirement village.

Ordinary meaning

125. The *Shorter Oxford English Dictionary on Historical Principles* 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.

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

Meaning of "appurtenances"

127. The meaning of "appurtenances" in the context of the GSTA was considered in *Norfolk* and *Wairakei*.

128. *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.

129. The Court of Appeal in *Norfolk* considered that shared rights could be appurtenances and, 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 the four walls of the apartment and garage for which residents had exclusive use. The Court of Appeal said (at 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]

130. *Norfolk* is consistent with *Cadogan v McGirk* [1996] 4 All ER 643 (CA), 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.

131. 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" (eg, the kitchen and the food storage areas).

Belonging to or used with the premises

132. As noted above at [124], only those appurtenances belonging to or used with the premises are part of the dwelling.

133. In some contexts, the phrase "belonging to" indicates ownership: *Myerson v Collard* (1918) 25 CLR 154 (HCA). However, the words "belonging to" in the context of the definition of "dwelling" relate to "premises", which cannot own or possess something. The Commissioner considers:

- 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.
- 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 English 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 (CA); *Re Red Lion Inn Ltd* [1979] 2 NZLR 668 (SC) and *Re Angus Hotels Ltd* (1986) 6 NZAR 148.

134. An appurtenance belongs to, or is used 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 be 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.

135. Residential rentals were exempted from GST 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, March 1985). The extension of the definition of "dwelling" to include appurtenances belonging to, or used 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 the accommodation, is exempt.

136. 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 a lease or a licence. This means the supply of the right to use the common areas and facilities for access or for recreation purposes in a retirement village will be an exempt supply where it forms part of the supply of accommodation in a dwelling.

"Commercial dwelling" excluded from "dwelling"

137. As noted above at [109], the definition of "dwelling" specifically excludes a "commercial dwelling". The definition of "commercial dwelling" includes convalescent homes, nursing homes, rest homes and hospices, and establishments of a similar kind: paras (a)(iii) and (v) of the definition of "commercial dwelling" in s 2(1). Further, the definition of "commercial dwelling" also includes a serviced apartment managed or operated by a third party for which services in addition to the supply of accommodation are provided and in relation to which a resident does not have quiet enjoyment: para (a)(ii). Therefore, all these types of dwelling are excluded from the definition of "dwelling". 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: para (b)(ii) of the definition of "commercial dwelling" in s 2.

Convalescent home, nursing home, rest home or hospice

138. A rest home is a residential institution where old or frail people are cared for: *Concise Oxford English Dictionary*. In *Wairakei*, it was considered that the studio units situated in a retirement village fell within para (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.

139. To be similar to a convalescent home, nursing home, rest home or hospice, an establishment need not be exactly the same. "Similar" does not mean identical or exactly the same: *Mays v Roberts* [1928] SASR 217 (SASC); *NZ Central Region etc Local Government Officers' Union v Lower Hutt City Council* (1992) 1 ERNZ 558 (EmpC); *Adelaide Caravan Park Pty Ltd v Department of Industry, Technology and Commerce* (1985) 7 ALD 756. In *Case L75* (1989) 11 NZTC 1,435 at 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 (para (a)(i) of the definition of "commercial dwelling"), 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 an establishment must have those features.

140. 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 para (b)(ii) 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 s 14(1)(c). In *Wairakei*, Chisholm J made the following comments on para (f) (at 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.

The effect of para (b)(ii) is that if a retirement village contains dwellings (being units to which para (b)(iii) of the definition of "dwelling" applies), the retirement village as a whole will not be a commercial dwelling. Instead, the dwellings will be severed from the remainder of the village and will qualify as an exempt supply.

Serviced apartments

141. The reference to a serviced apartment in the definition of "commercial dwelling" requires that it be "managed or operated by a third party for which services in addition to the supply of accommodation are provided and in relation to which a resident does not have quiet enjoyment, as that term is used in section 38 of the Residential Tenancies Act 1986". The Commissioner considers that accommodation in a retirement village can, on the face of it (depending on the specific facts), satisfy both the requirements to be a "serviced apartment" (ie, a commercial dwelling) and the requirements to be a "dwelling". This will depend on whether the consideration required to be paid by the resident includes care services. Where the services provided are optional, then the accommodation could arguably satisfy both definitions (ie, "services in addition to the accommodation are provided" and "the consideration paid or payable for the supply of accommodation in the unit is for the right to occupy the unit"). However, a serviced apartment in a retirement village that satisfies para (b)(iii) of "dwelling" is deemed to be a "dwelling" (whatever it is called). Where the accommodation does not satisfy the requirements to be a "dwelling", then it may be a "serviced apartment" or some other form of "commercial dwelling".

Participatory security

142. Sometimes a retirement village, as part of its contractual arrangements with residents, may issue a participatory security as well as a debt security. For example, a resident might be entitled to participate with other residents in the enjoyment of the village facilities. The issuance of a participatory security is the provision of a financial service and is an exempt supply for GST purposes.

143. If an associated supply is supplied under a participatory security, the exemption for financial services does not apply to the associated supply: s 14(1B). 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" in s 2. An associated supply is treated as a separate taxable supply: s 5(14B).

144. The associated supply rules clarified the application of GST to supplies of financial services following the decision in *Gulf Harbour*: Commentary on the Taxation (Depreciation, Payment Dates Alignment, FBT and Miscellaneous Provisions) Bill 2005 (268-1) (Policy Advice Division, Inland Revenue, May 2005): 119.

145. A "participatory security" for GST purposes:

- is an interest in or right to participate in any capital, assets, earnings 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.

146. In *R v Smith* [1991] 3 NZLR 740 (HC) at 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.

147. A "contributory scheme" is defined in the Securities Act 1978 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

148. In *Culverden*, the Privy Council considered (in an obiter comment) 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] 1 Qd R 151 (QSC) at 155–156,

which concerned a similar concept ("investment contract") in the Australian companies legislation. 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.

149. 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 (QSC); *Jones v Acfold Investments Ltd* (1985) 6 FCR 512 (FCA), *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149 (FCA).

150. A scheme with five or fewer investors is not a contributory scheme. This exception would apply to a retirement village scheme if the scheme involved five or fewer residents.

151. A contract may include separate and quite different securities: *Culverden*. In the High Court in *Fenton*, 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 for an apartment in a retirement village was a participatory security. In *Covenant Trustee*, 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.

152. The issue in *Fenton* was whether a proposal to sell land occupied by a bowling green and to re-site the bowling green would be 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* did not consider whether the scheme involved a "participatory security". However, the court 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 also considered that NZ Guardian Trust (which was both the trustee for the residents for the deposits and the statutory supervisor under the deed of participation) had separate obligations for 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 to the common areas and facilities were not individual rights, but rights enjoyed in common with other residents.

153. In a situation where a retirement village involves a debt security and a participatory security, residents have separate rights under the different securities. 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.

154. 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 will be subject to GST. That being the case, if accommodation is supplied in a commercial dwelling, the supply of accommodation will 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 apportionment rules (discussed below from [156]).

155. A table summarising the GST treatment of supplies made by retirement villages to residents is provided as Appendix 1.

Claims for input tax deductions by retirement villages

156. Retirement village operators will purchase various goods and services when constructing a retirement village or in the on-going operation of a village. Operators will need to determine the extent to which they can claim input tax deductions for those goods or services.

157. Input tax means tax charged on a supply of goods or services acquired by a person (s 3A(1)(a)). Input tax also arises where a registered person pays GST on imported goods (s 3A(1)(b)) and on certain purchases of secondhand goods (s 3A(1)(c), (2) and (3)).

158. In calculating the tax payable for any taxable period, input tax may be deducted to the extent to which the goods or services are used for, or are available for use in, making taxable supplies: s 20(3C); definition of "input tax" in s 3A. An adjustment may need to be made if the extent to which a good or service is used for making taxable supplies changes. An input tax deduction might also be available on disposal of a good or service.

159. A retirement village operator will need to calculate the amount of input tax that may be deducted on acquisition of a good or service (under ss 20(3C) to (3J)). An input tax deduction is allowed on the acquisition to the extent the goods or services are used for, or are available for use in, making taxable supplies: s 20(3C). A retirement village operator may also need to calculate any subsequent adjustments under ss 21 to 21H where the actual use of the goods or services differs from the intended use (or previous actual use).

160. Input tax deductions will not be available where a good or service has been acquired under a zero-rated supply. The most important zero-rated supply in the current context is the zero-rated supply of land (which is discussed below from [208]).

161. This Interpretation Statement addresses:

- how a retirement village operator calculates the amount of input tax that may be deducted on acquisition of a good or service;
- how a retirement village operator makes adjustments in later periods for changes in intended use of a good or service; and
- the possible input tax deduction when a retirement village operator disposes of a good or service.

162. Further detailed discussion on the input tax deduction rules can be found in *Tax Information Bulletin* Vol 23, No 1 (February 2011): 33–42.

Claiming an input tax deduction on acquisition of goods or services

163. The general rule for determining how much input tax is deductible on acquisition of goods or services is set out in s 20(3C)(a):

> (3C) For the purposes of subsection (3), and if subsections (3D) or (3L) do not apply,—
>
> (a) input tax as defined in section 3A(1)(a) or (c) may be deducted to the extent to which the goods or services are used for, or are available for use in, making taxable supplies:

164. The Commissioner considers that the inclusion of "available for use" in s 20(3C)(a) means input tax deductions can be claimed on the acquisition of a good or service when the good or service is able to be used for making taxable supplies or is not otherwise occupied in or held for making non-taxable supplies. This is consistent with the ordinary meaning of "available" (*Concise Oxford English Dictionary*):

> **available adj. 1** able to be used or obtained. 2 not otherwise occupied; free.

165. The reference to "available for use" is discussed in *Mixed-use assets – An officials' issues paper* (Policy Advice Division of the Inland Revenue and NZ Treasury, August 2011) at [7.9] and [7.16]:

> 7.9 In some cases, the goods or services may be available for use in, rather than being actively used for, making taxable supplies. For example, a commercial property developer may purchase raw materials that they intend to use in construction of a property at some time in the future. Although for a period of time the raw materials are not actively used for making taxable supplies, the property developer is still able to claim the related input tax deductions because the materials are "available for use" in making taxable supplies and will be actively used for that purpose at some time in the future.
>
> …
>
> 7.16 The GST apportionment rules, as mentioned earlier, allow input tax deductions for goods and services that are not used for, but are available for use in, making taxable supplies. This treatment of non-use periods recognises that most goods or services are purchased by a GST-registered person for business reasons and will, at some point, be used for making taxable supplies. …

166. A person does not need to apportion costs used for both taxable and exempt purposes if they believe on reasonable grounds that the total value of their exempt supplies will be no more than the lesser of $90,000 or 5% of total consideration for all their exempt and taxable supplies: s 20(3D). A non-resident person does not need to apportion in certain circumstances: s 20(3L). The Commissioner does not consider that those provisions are likely to be relevant in the current context.

Calculation method for determining input tax on acquisition

167. The method used to calculate the amount that may be deducted as input tax under the general rule in s 20(3C) is set out in s 20(3G) as follows:

(3G) In determining the extent to which goods or services are used for making taxable supplies, a person must estimate at the time of acquisition how they intend to use the goods or services, choosing a determination method that provides a fair and reasonable result. The determination is expressed as a percentage of the total use.

168. Under s 20(3G), a person must: (1) estimate at the time of acquisition how they intend to use the goods or services; and (2) choose a determination method that provides a fair and reasonable result (with the determination expressed as a percentage of the total use).

Estimating intended use of the goods or services

169. A full input tax deduction is allowed for a good or service that is intended to be used solely for making taxable supplies (eg, that is used for the supply of accommodation in a commercial dwelling or other taxable supplies). In contrast, no input tax deduction is allowed for a good or service that is intended to be used solely for making exempt supplies (ie, in this context typically a good or service that is used for making supplies of accommodation in a dwelling or of a financial service).

170. Where the relevant goods or services are to be used for making both taxable and exempt supplies, then a person must estimate at the time of acquisition how they intend to use the goods or services, choosing a determination method that provides a fair and reasonable result. For example, a retirement village operator can be using a common area or facility for making taxable supplies (to residents of commercial dwellings) and exempt supplies (to residents of dwellings) at the same time. When goods or services relating to the common area or facility are acquired, the retirement village operator must apportion the amount of input tax deducted based on their estimate of the extent to which those goods or services are used for making taxable supplies under s 20(3G).

171. *Tax Information Bulletin* Vol 23, No 1 (February 2011): 34 states that the estimate could be made on the basis of any records that are available, previous experience, business plans or other suitable methods. The method of working out the extent of intended taxable use will largely depend on the nature of the goods and services in question. For example, if the asset is a car which is intended to replace an existing car used in the business, the logbook for the previous car could be a reasonable method of stipulating the intended use of the purchased car provided patterns of use were largely unchanged. Consistently with IS 10/08, the Commissioner also considers that 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.

172. Both subjective and objective factors are relevant in determining the intention: *Wairakei*. However, there must be objective factors to support the taxpayer's stated intention (such as resource consent applications, feasibility studies and preliminary designs). 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. The nature of the accommodation supplied will normally determine whether land acquired and construction contracts entered into for the development of a retirement village were for the intention of making taxable supplies. 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 solely for the making of taxable supplies.

173. The Commissioner also does not accept that the dwellings in a retirement village are used for 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 will 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 used solely for making exempt supplies.

174. The Commissioner considers that land, buildings and other assets in a retirement village are not used for 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. Therefore, in the Commissioner's view, the provision of debt securities by a retirement village is not relevant when determining if the intended use of a building (or any other asset) is to make exempt or taxable supplies.

Relevance of a plan in developing a retirement village

175. A retirement village operator may have established a plan for the development and operation of the village that extends beyond the first adjustment period. The Commissioner considers that an operator's estimate of how they "intend to use" the goods or services can include such a plan (if it provides a fair and reasonable result). The Commissioner also considers that the intended "use" can be to hold the relevant good or service available for making taxable supplies (where that provides a fair and reasonable result). Where a retirement village operator has a well-developed business plan to develop a retirement village in stages, then the Commissioner considers that it will provide a fair and reasonable result to take into account the overall plan (when estimating intended use). For example, a retirement village operator may have a well-developed business plan to build a retirement village where 30% of the units meet the definition of "dwelling" and 70% of the units meet the definition of "commercial dwelling". Under the plan the operator first builds the units that meet the definition of "dwelling" and at a later stage builds the units that meet the definition of "commercial dwelling". In this case, no input tax deduction will be allowed for any goods or services that are acquired solely for the building of the dwellings. A full input tax deduction is allowed on any goods or services that are acquired solely for the building of the commercial dwellings. The operator could apportion the input tax deduction claimed on acquisition on the basis of a 30% exempt/70% taxable split on any goods or services acquired for both taxable and exempt purposes. If the situation was reversed and the commercial dwellings were built first, the same 30% exempt/70% taxable apportionment would apply to the mixed use goods and services. This approach is consistent with the ordinary meaning of the terms "intend" and "use". The *Concise Oxford English Dictionary* defines "intend" and "use" as follows:

> **intend** > v. 1 have as one's aim or plan
>
> **use** > v. 1. take, hold, or deploy as a means of achieving something

176. The ordinary meaning of "intend" relates to an aim or plan. The ordinary meaning is broad enough to include an immediate or overall plan or aim. The word "use" also arguably incorporates a broad concept. It includes the idea of deploying something to achieve a purpose or end. It also includes holding that thing as a means of achieving something.

177. While the matter is not without some doubt, the Commissioner also considers (on balance) that the legislative purpose supports "intend to use" including the overall plan or aim (where that provides a fair and reasonable result). The key contextual elements supporting that conclusion are:

- *Overall purpose and scheme of the GSTA*: The overall scheme of the GSTA is that input tax is not generally subject to timing rules: *Options for strengthening GST neutrality in business-to-business transactions – An officials' issues paper* (Policy Advice Division of the Inland Revenue and NZ Treasury, June 2008) at [2.8]. Instead, where a person has a taxable activity, the overall scheme suggests that input tax deductions are only disallowed where the relevant good or service is being used for making exempt or non-taxable supplies. This suggests that input tax should be able to be deducted for an established plan (which spans more than one adjustment period) to make taxable supplies.
- *Requirement to make an accurate estimate*: The apportionment rules are aimed at getting the estimate of the intended use as accurate as possible on acquisition: see the Explanatory Note to the Taxation (GST and Remedial Matters) Bill 2010 (182-1) and *Tax Information Bulletin* Vol 23, No 1 (February 2011): 33–42. To be an accurate estimation, the apportionment would arguably need to take into account all the known facts at the time of acquisition. For example, where the operator has a well-developed business plan that spans more than one adjustment period, then the Commissioner considers it may produce a more accurate "first instance" calculation to have regard to the overall plan. The Commissioner considers that taking into account any well-developed business plan is likely to improve the accuracy of an estimate of intended use.
- *Requirement to use a method that provides a fair and reasonable result*: Section 20(3G) requires the method to provide a result that is "fair and reasonable". The Commissioner considers that where a person has a well-developed business plan that extends over more than one adjustment period, it is fair and reasonable that any apportionment for goods or services intended to be used for making mixed supplies reflects that plan.

178. At the end of the first adjustment period if the extent of the taxable use of the goods or services that are

intended to be used for making mixed supplies has changed over that period from what was estimated when those goods or services were acquired then an adjustment under s 21 may be required. This adjustment may result from the extent to which the goods or services have actually been used for making non-taxable supplies in the first adjustment period. Further adjustments may also be required in subsequent adjustment periods. The requirement to make adjustments in later periods is discussed in more detail from [185]–[206] and, specifically, in the case of business plans at [193].

Choosing a determination method that provides a fair and reasonable result

179. As noted above at [168], the determination method must produce a fair and reasonable result. The *Concise Oxford English Dictionary* defines "fair" and "reasonable" as follows:

> **fair** adj 1. Treating people equally just or appropriate in the circumstances
>
> **reasonable** adj 1. Fair and sensible

180. The word reasonable is, therefore, essentially defined as something that is fair. The ordinary meaning of the words suggests that what is fair and reasonable depends on the circumstances. The Commissioner considers that choosing the determination method will be a factual matter that recognises the circumstances of the particular taxable activity in which the apportionment is required.

Calculating the input tax deduction on acquisition

181. The calculation method for input tax is set out in s 20(3H) and (3I) as follows:

> (3H) The extent to which a deduction for input tax is allowed is calculated using the formula—
>
> full input tax deduction × percentage intended use.
>
> (3I) In the formula in subsection (3H),—
>
> (a) **full input tax deduction** is the total amount of input tax on the supply:
>
> (b) **percentage intended use** has the meaning set out in section 21G(1)(b).

182. Section 21G(1)(b) provides:

> **21G Definitions and requirements for apportioned supplies and adjustment periods**
>
> (1) For the purposes of this section and sections 8(4B)(b), 9(2)(h), 20(3H), 20G, 21 to 21F, and 21H,—
>
> …
>
> (b) **percentage intended use,** for a registered person, means the extent to which the goods or services are intended to be used by the person for making taxable supplies, estimated at the time of acquisition under section 20(3G) and expressed as a percentage of total use:

183. The estimated intended taxable use of the goods or services determines the proportion of the input tax that can be deducted on acquisition of a good or service (s 20(3H) and (3I)).

Summary on deducting input tax on acquisition of a good or service

184. In summary:

- A purchaser can deduct input tax on the acquisition of goods or services to the extent to which the goods or services are used for, or are available for use in, making taxable supplies: s 20(3C).
- In determining the extent to which goods or services are used for making taxable supplies, a person must estimate at the time of acquisition how they intend to use the goods or services, choosing a determination method that provides a fair and reasonable result: s 20(3G). The intention of the purchaser can include their overall plan or aim (where that provides a fair and reasonable result).
- The estimated intended taxable use of the goods or services determines the proportion of the input tax that can be deducted: ss 20(3H) and (3I).

Making adjustments in later periods

185. Under the current apportionment provisions, subsequent adjustments may be needed to the input tax deducted (or output tax paid under s 20(3J) in respect of zero-rated supplies—see [212] below) on acquisition of goods or services intended to be used for making mixed supplies if the extent to which the relevant goods or services are used by a retirement village operator for making taxable supplies changes. This may result because the extent to which the goods or services are used for non-taxable purposes has changed in the adjustment period. Section 21 provides (as relevant):

> **21 Adjustments for apportioned supplies**
>
> (1) A registered person must ascertain at the end of an adjustment period whether an adjustment is required to be made for any percentage difference in a supply of goods or services for the period in relation to the actual use of those goods or services for making taxable supplies.
>
> (2) Despite subsection (1), the person is not required to make an adjustment if—
>
> (a) section 20(3D) applies to them:
>
> (b) the value of the goods or services, excluding GST, is $5,000 or less:
>
> (c) the difference between the percentage

intended use on acquisition and the percentage actual use for the relevant adjustment period is less than 10 percentage points, but this paragraph does not apply if the adjustment amounts to more than $1,000:

(d) the difference between the previous actual use calculated for the most recent adjustment period in which an adjustment was made and the percentage actual use for the relevant adjustment period is less than 10 percentage points, but this paragraph does not apply if the adjustment amounts to more than $1,000.

(3) An adjustment arises on the last day of the relevant adjustment period.

186. Under s 21, a registered person has to determine whether an adjustment is required at the end of each adjustment period (unless one of the de minimis exceptions in s 21(2) applies).

Adjustment period

187. An adjustment period is a set time period whereby the actual use of a good or service is measured against the intended use of that good or service in that time period. The first adjustment period for a good or service starts on the date of acquisition of a good or service and ends on a date the person chooses that either corresponds to the person's first balance date that falls after the date of acquisition, or to the person's first balance date that falls at least 12 months after the date of acquisition: s 21G(2) and (3). All subsequent adjustment periods will be annual periods that start on the day after the end of the earlier adjustment period and end on the last day of the equivalent taxable period in which the first adjustment period ended.

When an adjustment is required

188. An adjustment to the input tax deducted on acquisition of a good or service is required if at the end of an adjustment period there is a percentage difference between the percentage actual use and the percentage intended use or previous percentage actual use:

21A When adjustments required

A registered person must, at the end of an adjustment period,—

(a) identify the percentage actual use of the goods or services in making taxable supplies in the period; and

(b) compare the percentage actual use with percentage intended use or previous actual use, as applicable; and

(c) if a percentage difference arises and section 21(2)(c) or (d) does not apply, make an adjustment for any percentage difference for the adjustment period.

189. The terms "percentage actual use", "percentage intended use" and "percentage difference" are defined in s 21G(1):

(1) For the purposes of this section and sections 8(4B)(b), 9(2)(h), 20(3H), 20G, 21 to 21F, and 21H,—

(a) **percentage actual use**, for a registered person and an adjustment period,—

(i) means the extent to which the goods or services are actually used by the person for making taxable supplies; and

(ii) is calculated for the period that starts when the goods or services are acquired and finishes at the end of the relevant adjustment period; and

(iii) is expressed as a percentage of total use:

(b) **percentage intended use**, for a registered person, means the extent to which the goods or services are intended to be used by the person for making taxable supplies, estimated at the time of acquisition under section 20(3G) and expressed as a percentage of total use:

(c) **percentage difference** means the difference between the percentage actual use determined under paragraph (a) and, as applicable,—

(i) the percentage intended use determined under paragraph (b); or

(ii) for a subsequent adjustment period following a period in which a person has made an adjustment, the previous actual use of the goods or services in the earlier period.

190. The change in use is expressed as a percentage. The percentage difference represents the difference between the "percentage actual use" and the "percentage intended use" or previous actual use. If there is a difference in the percentages, then an adjustment needs to be made for the adjustment period. If there is no difference in the percentages or if a de minimis exception in s 21(2) applies, then no adjustment is necessary.

191. If an adjustment has already been made in a previous adjustment period, then the person must compare the percentage actual use of the goods or services with the percentage actual use in the previous adjustment period (when the adjustment was made): s 21C.

Determining "actual use"

192. As noted above at [176], "use" has a broad meaning that includes deploying something to achieve a purpose or end. It also includes holding that thing as a means of achieving something. The *Concise Oxford English Dictionary* defines "actual" as follows:

> **actual** > adj. 1. existing in fact; real. 2 existing now; current

193. The word "actual", therefore, means existing in fact, real or current. The Commissioner considers, therefore, that "actual use" and "actually used" refer to the real or current way that a good or service is being deployed to achieve a purpose or being held as a means of achieving something. The Commissioner considers that where the input tax deduction on acquisition was determined according to the intended use of the goods or services in making taxable supplies, an adjustment will need to be made if the actual use of the relevant good or service differs from the intended use. For instance (as per the example at [175]) an input tax deduction on acquisition may be based on a well-developed business plan to build a retirement village made up of 30% of units that meet the definition of "dwelling" and 70% of units that meet the definition of "commercial dwelling". However, in such cases an adjustment may need to be made at the end of the first adjustment period if the extent of the non-taxable actual use of the goods or services has changed over that period from that estimated when those goods or services were acquired. This may be necessary if the only supplies made during the adjustment period were exempt supplies of accommodation in a dwelling. This is because even though it can be said that those good or services are being held for making taxable supplies of accommodation in the future, the goods or services are actually being used to make supplies of exempt accommodation in the adjustment period. Further adjustments may also be required in subsequent adjustment periods. If, however, during an adjustment period, goods and services are only being held for making future supplies, then no adjustment is required for the actual use of the goods and services for that adjustment period. This is because it is expected there will be no difference between the intended use and the actual use (assuming the intended use was based on a method that provides a fair and reasonable result, ie, in this case, a well-developed business plan). Also, if the plan changes an adjustment will be needed in subsequent adjustment periods to reflect the change in use.

Number of adjustment periods

194. The higher the value of the goods or services supplied, the more adjustments may need to be made. The rules achieve this by setting the number of adjustment periods for which a "change in use" comparison is required to be made. There is no limit to the number of adjustment periods for a supply of land: s 21G(5). Effectively this means a check needs to be made every year the land supplied is owned to ascertain if its use in making taxable supplies has changed in that period; if the use has changed an adjustment may be necessary.

195. For other goods and services, there are two methods in s 21G(4) for determining the number of adjustment periods for which "change in use" comparisons need to be made – a value-based method and an estimated-useful-life-based method.

196. Under s 21G(4)(a), the maximum number of adjustment periods is determined by certain GST-exclusive valuation bands for the relevant goods and services:

- $5,000 to $10,000 – two adjustment periods;
- $10,000 to $500,000 – five adjustment periods; and
- $500,000 or more – ten adjustment periods.

197. Alternatively, under s 21G(4)(b), registered persons are able to select the maximum number of adjustment periods by reference to the estimated useful life of the asset, as determined under the Tax Depreciation Rates Determinations set by the Commissioner under s 91AAF of the Tax Administration Act 1994.

198. Under s 21G(6), once a taxpayer has chosen to limit the number of adjustment periods, that choice cannot be subsequently changed.

Calculating the adjustment

199. The amount of the adjustment is the percentage value of the change in use: s 21D. If the adjustment is an increase in the taxable use, then the amount is an additional deduction for input tax. If the adjustment is a decrease in the taxable use, then the adjustment is an amount of output tax. If the percentage value is unchanged at the end of the adjustment period, then no adjustment is required.

Adjustment when use changes to total taxable or total non-taxable use

200. In some circumstances, a retirement village operator may decide to change the use of a good or service from being used for making both taxable and exempt supplies to being used for making only taxable or only exempt supplies. For example, a retirement village operator might change from having residents

in both dwellings (exempt) and commercial dwellings (taxable) to having residents only in commercial dwellings. In that case, a common area constructed by the retirement village operator that had been used by residents of both dwellings and commercial dwellings will be used only by residents of commercial dwellings. This would result in a total change in use adjustment in respect of any input tax deducted in relation to the construction of the previously mixed-use common area. Where there has been a total change in use, and the change persists for the remainder of the relevant adjustment period and the next adjustment period, operators must carry out a wash-up calculation under s 21FB. If the change is to a total taxable use, then an operator will be able to claim the total amount of input tax charged on the supply (s 21FB(3)(a)) less any deduction already claimed (s 21FB(3)(b)). If the change is to total non-taxable use, then output tax must be paid equal to any input tax deduction already claimed (s 21FB(3)(b)).

Apportionment for concurrent uses of land

201. As noted above at [163], under the general apportionment rules, the input tax deduction that a person is entitled to corresponds with the extent to which the asset is used, or is available for use, for taxable purposes: s 20(3C). However, a specific apportionment rule in s 21E applies where land is used for making concurrent taxable and non-taxable supplies.

202. Unlike the general apportionment rule, s 21E determines the extent to which the land is used for making taxable supplies by dividing the "consideration for taxable supply" by the "total consideration for supply": s 21E(3). The "consideration for taxable supply" is the amount paid or payable on the disposal of the land in the adjustment period or the market value of the land at the time of the adjustment. The "total consideration for supply" is the "consideration for taxable supply" and the rental income for the supply of dwellings since the land was acquired or the market value of the rental income that would be payable if no rental income is paid. Under s 21E(2) the Commissioner can agree a different calculation method with the operator.

203. The Commissioner considers that s 21E only applies to operators in limited circumstances. Specifically, the Commissioner considers that s 21E applies where the operator is in the business of developing or buying retirement villages with the intention of selling them and leases or licences the dwellings in the village pending sale. In that situation, the operator would have to determine the extent to which the land is used for making taxable supplies under the formula in s 21E(3) (or under another calculation method agreed with the Commissioner under s 21E(2)) to determine whether an adjustment is required. The calculation method in s 21E(3) is described above at [202]. In brief, under s 21E(3), the operator would have to determine the amount paid on the disposal of the land (or, if not disposed of, the market value of the land) and divide it by the rental income paid or payable for the supply of the dwellings since the land was acquired (or the market value of the rental income for the dwellings if no rent is paid or payable).

204. The Commissioner considers that s 21E does not apply where:

- the operator is supplying both taxable and exempt supplies of accommodation from different units in the same building, ie stacked vertically (as in *Norfolk*);
- a common area or shared facility (such as a community centre) is used by both residents who are supplied with taxable accommodation and residents who are supplied with exempt accommodation.

205. The Commissioner considers that s 21E does not apply in the circumstances described at [204] because:

- The use of both the terms "simultaneously" and "concurrent" suggests that the ordinary meaning of s 21E requires the relevant land to be used to the full extent for both taxable supplies and exempt supplies (and this is arguably not the case in the above situations).
- The reference to rent (and market value rent) from the supply of dwellings in the formula in s 21E(3) suggests that it was generally intended to apply in situations where the entire area was being rented out as an exempt supply (and this is not the case in the situations in [204]).
- It appears that the mischief Parliament was intending to overcome was situations where the general apportionment provision would not work: see *GST: Accounting for land and other high-value assets – A government discussion document* (Policy Advice Division of Inland Revenue, November 2009) at [7.1]–[7.34]. It is possible to apportion the supplies in the above situations, so that suggests that Parliament did not intend them to come within s 21E.
- The statutory history suggests that s 21E was only intended to apply to situations that were very similar to those in *CIR v Lundy Family Trust* (2006) 22 NZTC

19,738 (CA) and so it was not intended to extend to the situations in [204].

- The approach under s 21E was intended to be similar to the relevant Australian provision, which excludes the above situations (see GSTR 2009/4: *Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose* (ATO, 31 October 2012) at [108]–[109]).

206. In summary, where a retirement village operator is in the business of developing or buying retirement villages with the intention of selling them, and leases or licences the dwellings in the village pending sale, they will need to apportion under s 21E. Other situations involving the mixed use of land will generally be dealt with under the general apportionment sections (see above from [163]).

Claiming an input tax deduction on the disposal of goods or services

207. A retirement village operator may dispose, or be treated as disposing, of goods or services that they have used for mixed purposes (ie, they claimed a partial but not a full input tax deduction). If the disposal (or deemed disposal) is in the course or furtherance of a taxable activity under s 8(1), the operator will need to carry out a calculation under s 21F. The calculation determines whether the operator can claim an additional input tax deduction. The amount calculated under the formula in s 21F(2), when added to any deduction (taking into account any adjustments) already claimed by the operator, must not be more than the total amount of the input tax on the original supply. There are special rules for land, which are discussed below at [221].

Land acquired for retirement village development

Zero-rating of land acquired for village development

208. A retirement village operator may acquire land for the development of a retirement village. In that situation it would be expected that the acquisition of the land will be taxed at 0% (zero-rated), assuming the requirements of the zero-rating of land rules in s 11(1)(mb) are met:

> **11 Zero-rating of goods**
>
> (1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:
>
> ...
>
> (mb) the supply wholly or partly consists of land, being a supply—
>
> (i) made by a registered person to another registered person who acquires the goods with the intention of using them for making taxable supplies; and
>
> (ii) that is not a supply of land intended to be used as a principal place of residence of the recipient of the supply or a person associated with them under section 2A(1)(c); or

209. Section 11(8B) provides:

> (8B) Whether a supply of goods is zero-rated under subsection (1)(mb) is determined at the time of settlement of the transaction relating to the supply.

210. Under the zero-rating of land rules, a supply will be zero-rated if (at settlement):

- the supply wholly or partly consists of land;
- the supply is from a registered person to another registered person;
- the purchaser acquires the goods (ie, the land and any other components of the supply) with the intention of using them for making taxable supplies; and
- the supply of land is not intended to be used as a principal place of residence of the recipient of the supply or a person associated with them.

211. Therefore, land acquired by a retirement village operator to develop a retirement village will be a zero-rated supply if the vendor is GST registered, the operator intends to use the land for making taxable supplies, and the land is not intended to be used as a principal place of residence of the operator or of a person associated with the operator.

Adjusting zero-rated land for non-taxable use

212. Under s 20(3J) recipients of zero-rated supplies must on acquisition pay output tax for any intended non-taxable use of the goods or services. This means that a retirement village operator who acquires land for development that was zero-rated under s 11(1)(mb) must on acquisition account for output tax under s 20(4) for any intended non-taxable use of the land (such as providing accommodation in a dwelling).

213. The output tax is calculated by determining the nominal GST component of the zero-rated acquisition and the extent the operator intends using the zero-rated goods or services in making taxable supplies. The output tax payable is then the proportion of the nominal GST component for any intended non-taxable use of the goods or services. So, when a retirement village operator acquires land for development that was zero-rated under s 11(1)(mb) the operator should:

- identify the nominal GST component that would have been chargeable on the value of the supply of land had it not been zero-rated;

- determine the extent to which they intend using the land for making taxable supplies (using the method set out under s 20(3G) (see above at [167]–[168]); and
- account for output tax under s 20(4) for the proportion of the nominal GST component for any intended non-taxable use of that land.

214. The amount of output tax is then checked and adjusted as necessary each year under the adjustment rules in ss 21A to 21H for any change in use (see [185]–[200] above). To the extent that land acquired is held for future development and not actually used during an adjustment period, no adjustment for a change in use is required.

215. *Tax Information Bulletin* Vol 23, No 1 (February 2011): 28–33 discusses the zero-rating of land rules. A brief summary of some specific issues that might be relevant for retirement villages is set out below, in particular:

- the goods (land) need to be acquired "with the intention of using them for making taxable supplies";
- claims for input tax deductions where the land purchased is not zero-rated; and
- the disposal of zero-rated land.

Intention of using land for making taxable supplies

216. When deciding if a retirement village operator's acquisition of land for development is a zero-rated supply under s 11(1)(mb), the Commissioner considers that the third requirement (above at [210]) is particularly relevant. The third requirement is that the purchaser must acquire the goods "with the intention of using them for making taxable supplies".

217. Retirement village operators will often acquire land with the intention of putting both commercial dwellings and dwellings on the land. In other words, the operator will intend to use the land for making both taxable supplies and exempt supplies. The Commissioner considers that a supply of land can be zero-rated even if the operator only plans to use the land partly for making taxable supplies. In other words, the phrase "for making taxable supplies" is not limited to situations where the operator intends to use the land solely for making taxable supplies: the Officials' Report to the Finance and Expenditure Committee on Submissions on the Taxation (GST and Remedial Matters) Bill 2010 (182-1) (Policy Advice Division of Inland Revenue and NZ Treasury, October 2010) at 4 and *Tax Information Bulletin* Vol 23, No 1 (February 2011): 28.

Meaning of "intention"

218. The Commissioner considers that "intention" in s 11(1)(mb) should be interpreted consistently with "intend" in s 20(3G) (see above at [175]) because it is presumed that Parliament has used the relevant words consistently throughout the Act: *New Zealand Breweries Ltd v Auckland City Corporation* [1952] NZLR 144 (CA). This is especially the case in the present context because the apportionment provisions and the zero-rating of land rules were enacted in the same amendment Act. Further, the two sets of rules have a similar role in the GSTA in that they determine the amount of input tax or output tax that is receivable or payable on the acquisition of a good or service.

219. This means that an acquisition of land can be zero-rated where a retirement village operator's overall plan is to use the land for making taxable supplies (as long as the plan is well-developed). In other words, it is not necessary for the purchaser to plan to make taxable supplies in the first adjustment period for a supply of land to be zero-rated. For example, where an operator has a well-developed business plan to develop a retirement village in stages (including building commercial dwellings in a subsequent adjustment period), then the acquisition of the land can be zero-rated.

220. The Commissioner considers that a supply of land can be zero-rated where the operator's overall aim or plan is to use the land wholly or partly for making taxable supplies (where the plan is sufficiently well-developed).

Disposal of zero-rated land by retirement villages

221. As noted above, an acquisition of land by a retirement village operator for the development of a retirement village is likely to be a zero-rated supply under s 11(1)(mb). When the land was acquired the operator may have intended to use the land for making mixed supplies, so the operator may have paid an amount of output tax when the land was acquired to take account of the intended non-taxable use. In time, the operator may choose to dispose (or be treated as disposing) of the land in the course or furtherance of its taxable activity under s 8(1). In that situation, the operator needs to make a final calculation under the formula in ss 21F(4)–(7). The calculation determines whether the operator can claim an additional input tax deduction in respect of the non-taxable use portion. The amount calculated under the formula must not be more than the amount of output tax that was accounted for by the person under s 20(3J)(a)(iii) (in effect, the initial amount of the output tax paid together with any later adjustments made under the apportionment rules: s 21F(6)).

Examples

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

Example 1: Establishment of a retirement village with licensed units

223. RV Ltd is building a retirement village. RV Ltd purchased land from a GST registered vendor with the intention of building 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.

224. A licence for 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 the resident leaves the village. Residents of apartments are required to pay a weekly periodic 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 periodic fee because the fee does not include the provision of care services. If residents of the villas require any additional services such as meals or nursing services, an additional charge is payable.

225. 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 care services, the supply of accommodation in the apartments is the supply of accommodation in a commercial dwelling. The supplies of accommodation and care services are taxable supplies for which the consideration is the facilities fee and the periodic fees. GST is chargeable on the facilities fee and the periodic fees paid by residents of the apartment.

226. 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 are appurtenances 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.

227. RV Ltd is not entitled to any input tax deductions for the purchase of the land because it is a zero-rated supply. Further, RV Ltd will have to return output tax to the extent that the land is intended to be used for the villas and their share of the appurtenances. RV Ltd is entitled to an input tax deduction for goods and services used for constructing the apartments. An input tax deduction is not allowable for goods and services used for constructing the villas, as they are used for making exempt supplies of accommodation.

228. The goods and services used for the construction of the roads, landscaped gardens and the community centre can be apportioned according to the extent that they are intended to be used for making taxable supplies, choosing a determination method that provides a fair and reasonable result. An apportionment on the basis that the common areas and facilities will be used according to the proportion of the taxable and exempt accommodation in the village (20% taxable versus 80% exempt) would seem to be fair and reasonable. At the end of the first adjustment period, if the extent those goods or services used in the construction of the roads, landscaped gardens and community centre are actually used for making exempt supplies of accommodation is different from the estimate, then an adjustment under s 21 may be required. This may be the case say, if only exempt supplies of accommodation have been made in the first adjustment period. Further adjustments may also be required in subsequent adjustment periods. The kitchen, dining room and nursing station will be exclusively used for making taxable supplies so input tax deductions will be allowable for goods or services in those areas. In this example, the amount of the input tax deductions for the operating costs of the common areas and facilities 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 deduction would be acceptable if it provides a fair and reasonable result.

Example 2: Establishment of a retirement apartment complex

229. 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. ABC Ltd constructed the village. The land for the village was purchased from a vendor who was not GST registered.

230. A lease for life for 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 is repaid to residents less the following charges:

- a facilities fee of $50,000; and
- the refurbishment costs, the amount of which depends on the period of occupation.

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

231. 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 fee and the refurbishment costs) 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 fee and the refurbishment costs, as these payments are consideration for the exempt supply of accommodation in a dwelling by way of hire. Any additional payments for the optional supply of care and other services relate to a taxable supply and are subject to GST. The entry payment is not consideration for the supply of the debt security or the supply of accommodation, so it is not subject to GST.

232. The supply of land to ABC Ltd is not zero-rated because the land is acquired from a non-registered vendor. As a result, ABC Ltd is entitled to claim an input tax deduction to the extent that it intends to use the land for making taxable supplies. Specifically, ABC Ltd could claim input tax deductions to the extent that the land is to be used for providing meals and care services (ie, the land set aside for the kitchen, dining room and the nursing station).

233. An input tax deduction is not allowed for the construction costs relating to the apartment building and the common areas and facilities (ie, the library, theatre, gardens, paths and driveways). However, input tax deductions would be allowed for the construction and on-going costs of the kitchen, dining room and nursing station.

Example 3: Rest home complex expands to include villas

234. XYZ Co Ltd acquires land for the development of a rest home complex from a GST-registered vendor. The rest home beds are intended for residents who require a high level of care. The rest home is a commercial dwelling (para (a)(iii) of the definition of "commercial dwelling"). The supply of accommodation and care in the rest home is a taxable supply. XYZ Ltd is not allowed any input tax deductions for the land because the supply of the land is zero-rated. XYZ Ltd does not have to return any output tax on the supply of the land because it intends to use the land solely for making taxable supplies. Input tax deductions are allowed for the construction costs incurred in developing the rest home complex.

235. A decision is later made to expand the rest home complex by constructing 200 villas and a community centre that includes a kitchen, a dining room, administration areas and recreational facilities available to residents of the villas. A licence to occupy is granted for the villas. 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 relates solely to the right to occupy a villa, the villas are dwellings and the supply of accommodation in the villas is an exempt supply.

236. XYZ Ltd will have to make an adjustment for the change in use of the land in the relevant adjustment period and following. The adjustments will arise because the intended use was originally solely for making taxable supplies and subsequently the actual use is partly for making taxable supplies and partly for making exempt supplies. In that regard the adjustments must take into account

the completely taxable use of the land until the decision to expand is taken. This is because the actual use needs to be determined from the period that started when the land was acquired to the end of the relevant adjustment period. The extent to which the land is used for making exempt supplies may be calculated on a time and space basis if that provides a fair and reasonable result. However, the adjustment may also 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 provides a fair and reasonable result. XYZ Ltd will have to return output tax according to the difference between the intended use and the actual use.

References

Related rulings/statements
IS 10/08: "Retirement villages – GST treatment" *Tax Information Bulletin* Vol 22, No 11 (December 2010): 29
IS 08/01: "GST – Role of section 5(14) of the Goods and Services Tax Act 1985 in regard to the zero-rating of part of a supply" *Tax Information Bulletin* Vol 20, No 5 (June 2008): 8
Subject references
Accommodation; actual use; actually used; appurtenances; available for use; commercial dwelling; consideration; convalescent home, nursing home, rest home or hospice; debt security; dwelling; fair and reasonable result; financial services; incidental; input tax deduction; intend to use; intention; necessary; output tax; participatory security; serviced apartment; zero-rated
Legislative references
Goods and Services Tax Act 1985 – ss 2(1) "associated supply", "commercial dwelling", "consideration", "dwelling", "hire", "land", "licence to occupy", "principal place of residence", "service occupancy agreement", 3(1)(c), (d), (2), 3A(1)-(3), 5(14), (14B), (15), (24), 9(3)(a), 10(2), (6), (18), 11(1)(mb), (8B), 14(1)(a), (c), (ca), (d), 14(1B), 20(3C)–(3J), 21–21H, 25(1)(b), (2)
Interpretation Act 1999 – s 5
Residential Tenancies Act 1986 – s 38
Securities Act 1978 – s 2 "contributory scheme"
Case references
Adelaide Caravan Park Pty Ltd v Department of Industry, Technology and Commerce (1985) 7 ALD 756 (AATA)
Agricultural Mortgage Corporation Ltd v Inland Revenue Commrs [1978] 1 All ER 248 (CA)
Alexander v Tse [1988] 1 NZLR 318 (CA)
Amadio Pty Ltd v Henderson (1998) 81 FCR 149 (FCA)
Auckland Institute of Studies Ltd v CIR (2002) 20 NZTC 17,685 (HC)
Bophuthatswana National Commercial Corp Ltd v C & E Commrs [1993] STC 702 (CA)
Brisbane Unit Development Corp Pty Ltd v Deming No 456 Pty Ltd (No 2) [1983] 2 Qd R 92 (QSC)
British Airways plc v C & E Commrs [1990] BTC 5124 (CA)
Byrne v Glasgow Corporation [1955] SLT 9
Butter v Bennett [1963] Ch 185 (CA)
C-231/94 Faaborg-Gelting Linien A/S v Finanzamt Flensburg [1996] BTC 5391 (ECJ)
Cadogan v McGirk [1996] 4 All ER 643 (CA)
Canadian National Railway v Harris [1946] 2 DLR 545 (SCC)
Card Protection Plan Ltd v C & E Commrs [2001] 2 All ER 143 (HL)
Case L75 (1989) 11 NZTC 1,435
Case M40 (1990) 12 NZTC 2,247
Case S54 (1996) 17 NZTC 7,354
Case T27 (1997) 18 NZTC 8,188
C & E Commrs v British Telecommunications plc [1999] 3 All ER 961 (HL)
C & E Commrs v C H Beazer (Holdings) plc (1989) 4 BVC 121 (QB)
C & E Commrs v United Biscuits (UK) Ltd [1992] BTC 5045 (CSIH)
C & E Commrs v Wellington Private Hospital Ltd [1997] BTC 5140 (EWCA Civ)
Chatham Islands Enterprise Trust v CIR (1999) 19 NZTC 15,075 (CA)
CIR v Gulf Harbour Development Ltd (2004) 21 NZTC 18,915 (CA)
CIR v Lundy Family Trust (2006) 22 NZTC 19,738 (CA)
CIR v Motorcorp Holdings Ltd (2005) 22 NZTC 19,126 (CA)
CIR v NZ Refining Co Ltd (1997) 18 NZTC 13,187 (CA)
College of Estate Management v C & E Commrs [2005] 4 All ER 933 (HL)
Commerce Commission v Fonterra Co-Operative Group Ltd [2007] NZSC 36
Covenant Trustee Co v Ohope Lodge Ltd (HC Rotorua M69/90, 28 April 1993)
Culverden Retirement Village Ltd v Registrar of Companies (1995) 7 NZCLC 260,850, (1996) 1 BCSLR 162 (CA), [1997] 1 NZLR 257 (PC)

DFC Financial Services Ltd (in statutory management) v Abel [1991] 2 NZLR 619 (HC)
Dr Beynon v C & E Commrs [2004] 4 All ER 1091 (HL)
Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 (HL)
English Clays Lovering Pochin & Co Ltd v Plymouth Corporation [1974] 2 All ER 239 (CA)
FCT v Steeves Agnew & Co (Victoria) Pty Ltd (1951) 9 ATD 259, 82 CLR 408 (HCA)
Fenton v Pakuranga Park Village Trust (1998) 3 NZConvC 192,681 (CA)
Francken v Ministry of Economic Development (HC Dunedin CRI 2008-412-000025, 1 December 2008)
Hidden Valley Golf Resort Association v R [2000] GTC 4104 (FCA)
Jones v Acfold Investments Ltd (1985) 6 FCR 512 (FCA)
Lend Lease Corporation Ltd v FCT 90 ATC 4401 (FCA)
Marac Life Assurance Ltd v CIR (1986) 8 NZTC 5,086 (CA)
Mays v Roberts [1928] SASR 217 (SASC)
Metcalfe v Venables [1921] NZLR 576 (SC)
Munna Beach Apartments Pty Ltd v Kennedy [1983] 1 Qd R 151 (QSC)
Myerson v Collard (1918) 25 CLR 154 (HCA)
Newman v CIR (2000) 19 NZTC 15,666 (HC)
New Zealand Breweries Ltd v Auckland City Corporation [1952] NZLR 144 (CA)
Norfolk Apartments Ltd v CIR (1995) 17 NZTC 12,003 (HC)
Norfolk Apartments Ltd v CIR (1995) 17 NZTC 12,212 (CA)
NZ Central Region etc Local Government Officers' Union v Lower Hutt City Council (1992) 1 ERNZ 558 (EmpC)
Owen v Elliott (1990) STC 469 (CA)
Owers v Braemar Lodge 2004 Ltd (in rec) (2010) 10 NZCLC 264,677 (HC)
Puhlhofer v Hillingdon London BC [1986] AC 484 (HL)
Rayner & Keeler Ltd v C & E Commrs [1991] VATTR 532
Re Alex Russell (1968) VR 285 (SC)
Re an Inquiry under the Company Securities (Insider Dealing) Act 1985 [1988] 1 All ER 203 (HL)
Re Angus Hotels Ltd (1986) 6 NZAR 148
Re Harmony & Montague Tin & Copper Mining Co Ltd (Spargo's Case) (1873) 8 Ch App 407 (CA)
Re Loan and Finance (Dunedin) Ltd (in rec) (1990) 5 NZCLC 66,367 (HC)
Re Red Lion Inn Ltd [1979] 2 NZLR 668 (SC)
R v Smith [1991] 3 NZLR 740 (HC)
Suzuki NZ Ltd v CIR (2001) 20 NZTC 17,096 (CA)
Trustee, Executors and Agency Co New Zealand Ltd v CIR (1997) 18 NZTC 13,076 (HC)
Trustees Executors and Agency Company of New Zealand Ltd v Deutsche Hypothekenbank Frankfurt-Hamburg Aktiengesellschaft (2000) 8 NZCLC 262,208 (HC)
Tumble Tots (UK) Ltd v R & C Commrs [2007] BTC 5210 (Ch)
Turakina Maori Girls College Board of Trustees v CIR (1993) 15 NZTC 10,032 (CA)
Wairakei Court Ltd v CIR (1999) 19 NZTC 15,202 (HC)
Urdd Gobaith Cymru v C & E Commrs [1997] V & DR 273
Other references
Commentary on the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill 2013 (176-1) (Policy and Strategy, Inland Revenue, November 2013)
Commentary on the Taxation (Depreciation, Payment Dates Alignment, FBT and Miscellaneous Provisions) Bill 2005 (268-1) (Policy Advice Division, Inland Revenue, May 2005)
GST: Accounting for land and other high-value assets – A government discussion document (Policy Advice Division of Inland Revenue, November 2009)
GSTR 2009/4: *Goods and services tax: new residential premises and adjustments for changes in extent of creditable purpose* (ATO, 31 October 2012)
Mixed-use assets – An officials' issues paper (Policy Advice Division of the Inland Revenue and NZ Treasury, August 2011)
Officials' Report to the Finance and Expenditure Committee on Submissions on the Taxation (GST and Remedial Matters) Bill 2010 (182-1) (Policy Advice Division of Inland Revenue and NZ Treasury, October 2010)
Options for strengthening GST neutrality in business-to-business transactions – An officials' issues paper (Policy Advice Division of the Inland Revenue and NZ Treasury, June 2008)
"Taxation (GST and Remedial Matters) Act 2010" in *Tax Information Bulletin* Vol 23, No 1 (February 2011): 28-42
White Paper on Goods and Services Tax: Proposals for the administration of the goods and services tax (New Zealand Government, March 1985)

APPENDIX 1: GST SUPPLIES MADE BY RETIREMENT VILLAGES TO RESIDENTS

Nature of supply/payment	Paragraph reference	Dwellings (eg, independent living villas)	Commercial dwellings (eg, rest homes)
Entry payment A payment made to become a resident	[86] to [90]	Most entry payments are not consideration for a GST supply made by a retirement village. Instead entry payments are usually money supplied under an interest-free loan or a refundable deposit	Most entry payments are not consideration for a GST supply made by a retirement village. Instead entry payments are usually money supplied under an interest-free loan or a refundable deposit
Facilities fees or amenities contribution A payment for community facilities or management services, whether payable up front or accrued over a number of years	[91] to [93]	Exempt supply; forms part of the supply of accommodation in a dwelling	Taxable supply; forms part of the taxable supply of accommodation in a commercial dwelling
Periodic fees A payment for the proportionate share of village overheads	[76] to [77], and [94] to [95]	Exempt supply; forms part of the supply of accommodation in a dwelling	Taxable supply; forms part of the taxable supply of accommodation in a commercial dwelling
Payment for care services Payments for additional services such as laundry, cleaning, nursing and meals	[78] to [83]	Taxable supply; separate to the supply of accommodation in a dwelling	Taxable supply
Payment for ancillary and incidental services Payments for services that do not alter the character of the supply from being the supply of accommodation, eg, transport services or an emergency response service	[80] to [83]	Exempt supply; forms part of the supply of accommodation in a dwelling	Taxable supply; forms part of the taxable supply of accommodation in a commercial dwelling
Payment for domestic goods and services Domestic goods and services, as defined in s 2, supplied in relation to a commercial dwelling	[94] to [95]	Not applicable	Taxable supply; but value attributed to supply may be reduced under s 10(6)
Refurbishment payment Payments made by residents for refurbishing their units on **termination of occupation**	[96] to [99]	Exempt supply; forms part of the supply of accommodation in a dwelling	Taxable supply; forms part of the taxable supply of accommodation in a commercial dwelling
Right to use common areas and facilities	[72] to [75] Appurtenances forming part of dwelling, see [124] to [136]	Exempt supply; forms part of the supply of accommodation in a dwelling	Taxable supply; forms part of the taxable supply of accommodation in a commercial dwelling

APPENDIX 2: LEGISLATION

Goods and Services Tax Act 1985

1. Section 2 includes the following definitions:

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—

(a) means—

(i) a hotel, motel, homestay, farmstay, bed and breakfast establishment, inn, hostel, or boardinghouse:

(ii) a serviced apartment managed or operated by a third party for which services in addition to the supply of accommodation are provided and in relation to which a resident does not have quiet enjoyment, as that term is used in section 38 of the Residential Tenancies Act 1986:

(iii) a convalescent home, nursing home, rest home, or hospice:

(iv) a camping ground:

(v) premises of a similar kind to those referred to in subparagraphs (i) to (iv); and

(b) excludes—

(i) a hospital except to the extent to which the hospital is a residential establishment:

(ii) a dwelling referred to in paragraph (b)(iii) of the definition of **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

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, for a person,—

(a) means premises, as defined in section 2 of the Residential Tenancies Act 1986,—

(i) that the person occupies, or that it can reasonably be foreseen that the person will occupy, as their principal place of residence; and

(ii) in relation to which the person has quiet enjoyment, as that term is used in section 38 of the Residential Tenancies Act 1986; and

(b) includes—

(i) accommodation provided to a person who is occupying the same premises, or part of the same premises, as the supplier of the accommodation and who meets the requirements of paragraph (a)(i):

(ii) any appurtenances belonging to or used with the premises:

(iii) despite paragraph (a)(ii), a residential unit in a retirement village or rest home when the consideration paid or payable for the supply of accommodation in the unit is for the right to occupy the unit; and

(c) excludes a commercial dwelling

hire, in relation to goods, includes a letting on any terms, including a lease

land, in the zero-rating of land rules,—

(a) includes—

(i) an estate or interest in land:

(ii) a right that gives rise to an interest in land:

(iii) an option to acquire land or an estate or interest in land:

(iv) a share in the share capital of a flat-owning or office-owning company, as defined in section 121A of the Land Transfer Act 1952:

(b) does not include—

(i) a mortgage:

(ii) a lease of a dwelling:

licence to occupy means the right to exclusive personal occupancy

principal place of residence, in the definition of **dwelling** means a place that a person occupies as their main residence for the period to which the agreement for the supply of accommodation relates

service occupancy agreement means a licence whereby a person occupies a dwelling for no consideration

2. Section 3(1)(c) provides:

(1) For the purposes of this Act, the term **financial services** means any 1 or more of the following activities:

...

(c) the issue, allotment, drawing, acceptance, endorsement, or transfer of ownership of a debt security:

3. Section 3(2) provides:

(2) For the purposes of this section—

...

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

4. Section 3A provides:

3A Meaning of input tax

(1) **Input tax**, in relation to a registered person, means—

(a) tax charged under section 8(1) on a supply of goods or services acquired by the person:

(b) tax levied under section 12(1) on goods entered for home consumption under the Customs and Excise Act 1996 by the person:

(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 supply is not—

(i) a supply of goods previously supplied to a registered person who has entered them for home consumption under the Customs and Excise Act 1996, whether the person is registered at the time they enter the goods for home consumption or later; and

(ii) a supply of goods made by a non-resident, whether or not they made the earlier supply referred to in subparagraph (i); and

(c) the goods acquired by the person for making taxable supplies are either—

(i) not charged with tax at the rate of 0% under section 11A(1)(q) or (r); or

(ii) charged with tax at the rate of 0% under section 11A(1)(q) or (r) and, before the acquisition, have never been owned or used by the person or an associated person.

(3) The amount of input tax is—

(a) if the supplier and the recipient are associated persons, the lesser of—

(i) the tax included in the original cost of the goods to the supplier; and

(ii) the tax fraction of the purchase price; and

(iii) the tax fraction of the open market value of the supply; or

(b) if the supplier and the recipient are associated persons and the supplier is deemed to have made a supply of the goods under section 5(3) that has been valued under section 10(7A), the lesser of—

(i) the tax fraction of the open market value of the deemed supply under section 5(3); and

(ii) the tax fraction of the purchase price; and

(iii) the tax fraction of the open market value of the supply; or

(c) if the supplier and the recipient are associated persons and the supplier is deemed to have made a supply of the goods under section 5(3) that has been valued under section 10(8), the lesser of—

(i) the tax fraction of the valuation under section 10(8) of the deemed supply under section 5(3); and

(ii) the tax fraction of the purchase price; and

(iii) the tax fraction of the open market value of the supply; or

(d) if the supplier and the recipient are not associated persons and the supply is not the only matter to which the consideration relates, the lesser of—

(i) the tax fraction of the purchase price; and

(ii) the tax fraction of the open market value of the supply; or

(e) in all other cases, the tax fraction of the consideration in money for the supply.

5. Section 5 provides :

5 Meaning of term "supply"

...

(14) If a supply is charged with a tax under section 8, but section 11, 11A, 11AB, 11B, or 11C requires part of the supply to be charged at the rate of 0%, that part of the supply is treated as being a separate supply.

(14B) 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

(15) When either of the following supplies are included in a supply, they are deemed to be a separate

supply from the supply of any other real property that is included in the supply:

(a) a supply of a principal place of residence:

(b) a supply referred to in section 14(1)(d).

...

(24) If a supply that wholly or partly consists of land is made, and the supply includes the provision of services, the supply of the services is treated as a supply of goods for the purposes of section 11(1)(mb).

6. Section 9(3)(a) provides:

9 Time of supply

...

(3) Notwithstanding anything in subsection (1) or subsection (2),—

(a) where goods are supplied under an agreement to hire, or where services are supplied under any agreement or enactment which provides for periodic payments, they shall be deemed to be successively supplied for successive parts of the period of the agreement or the enactment, and each of the successive supplies shall be deemed to take place when a payment becomes due or is received, whichever is the earlier:

7. Section 10 provides:

10 Value of supply of goods and services

(1) For the purposes of this Act the following provisions of this section shall apply for determining the value of any supply of goods and services.

(2) 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,—

(i) the open market value of that consideration, if subparagraph (ii) does not apply; or

(ii) the value of the consideration agreed by the supplier and the recipient, if subsection (2B) applies.

...

(6) 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% of the amount that would, if that part of that supply were chargeable with tax at the rate of 9%, 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% of the amount that would, if that supply were chargeable with tax at the rate of 9%, be the value of that supply of domestic goods and services.

...

(18) 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

8. Section 11(1)(mb) and (8B) provide:

11 Zero-rating of goods

(1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations:

...

(mb) the supply wholly or partly consists of land, being a supply—

(i) made by a registered person to another registered person who acquires the goods with the intention of using them for making taxable supplies; and

(ii) that is not a supply of land intended to be used as a principal place of residence of the recipient of the supply or a person associated with them under section 2A(1)(c); or

...

(8B) Whether a supply of goods is zero-rated under subsection (1)(mb) is determined at the time of settlement of the transaction relating to the supply.

9. Section 14(1)(a), (c), (ca), (d) and (1B) provide:

14 Exempt supplies

(1) 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:

(ca) the supply of leasehold land by way of rental (not being a grant or sale of the lease of that land) to the extent that that land is used for the principal purpose of accommodation in a dwelling erected on that land:

...

(d) the supply, being a sale, by any registered person in the course or furtherance of any taxable activity of—

(i) any dwelling; or

(ii) the reversionary interest in the fee simple estate of any leasehold land,—

that has been used by the registered person for a period of 5 years or more before the date of the supply exclusively for the making of any supply or supplies referred to in paragraph (c) or paragraph (ca):

(1B) 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 0% under section 11A

(b) a supply described in paragraph (b) of the definition of associated party:

(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.

10. Section 20 provides:

(3C) For the purposes of subsection (3), and if subsections (3D) or (3L) do not apply,—

(a) input tax as defined in section 3A(1)(a) or (c) may be deducted to the extent to which the goods or services are used for, or are available for use in, making taxable supplies:

(b) input tax as defined in section 3A(1)(b) may be deducted to the extent to which the goods are used for, or are available for use in, making taxable supplies other than—

(i) the delivery of the goods to a person in New Zealand:

(ii) arranging or making easier the delivery of the goods to a person in New Zealand.

(3D) A registered person is not required to apportion input tax in an adjustment period if they make both taxable and exempt supplies and have reasonable grounds to believe that the total value of their exempt supplies will not be more than the lesser of—

(a) $90,000:

(b) 5% of the total consideration for all their taxable and exempt supplies for the adjustment period.

(3E) A registered person who principally makes supplies of financial services may choose to use a fair and reasonable method of apportionment, as agreed with the Commissioner, in relation to the supply for an apportionment on acquisition. For this purpose,—

(a) the method must have regard to the tenor of subsections (3C) to (3J):

(b) the person may include a group of companies.

(3F) The method used to calculate the amount that may be deducted on acquisition is set out in subsections (3C) to (3J). The rules for calculating adjustments are set out in sections 21 to 21H.

(3G) In determining the extent to which goods or services are used for making taxable supplies, a person must estimate at the time of acquisition how they intend to use the goods or services, choosing a determination method that provides a fair and reasonable result. The determination is expressed as a percentage of the total use.

(3H) The extent to which a deduction for input tax is allowed is calculated using the formula—

full input tax deduction × percentage intended use.

(3I) In the formula in subsection (3H),—

(a) **full input tax deduction** is the total amount of input tax on the supply:

(b) **percentage intended** use has the meaning set out in section 21G(1)(b).

(3J) For a supply to which section 11(1)(mb) applies, the recipient must,—

(a) on acquisition,—

(i) identify the nominal amount of tax (the **nominal GST component**) that would be chargeable on the value of the supply, as if the value were equal to the consideration charged for the supply, at the rate set out in section 8(1); and

(ii) determine the extent to which they intend to use the goods or services as described in subsection (3G); and

(iii) account for output tax under section 20(4) for the proportion of the nominal GST component for any non-taxable use of the goods or services; and

(b) for later adjustment periods, make adjustments under the apportionment rules set out in sections 20G and 21 to 21H in relation to the taxable supply referred to in paragraph (a).

…

(4) For the purpose of subsection (3), output tax in relation to a supply made by a registered person must be attributed to a taxable period—

(a) in the case of a registered person who is required to account for tax payable on an invoice or a hybrid basis under section 19, if the supply is made or is deemed to be made during the taxable period; or

(b) in the case of a registered person who is required to account for tax payable on a payments basis under section 19—

(i) to the extent that payment for the supply has been received during the taxable period, if the supply is a supply of goods and services which is deemed to take place under any one of sections 9(1), 9(3)(a), 9(3)(aa), 9(6), 9(8), 25(2)(a), 25(4) and is not treated by section 8(4B) as being made in New Zealand; or

(ib) to the extent that payment for the supply has been made during the taxable period, if the supply is a supply of services that is treated as being made in New Zealand by section 8(4B) together with any one of sections 9(1), 9(3)(a), 9(3)(aa), 9(6), 9(8), 25AA(2)(a) or 25AA(3)(a); or

(ii) if the supply of goods and services is made during the taxable period by the registered person and neither of subparagraphs (i) and (ib) applies; or

(c) in the case of a registered person who is required to account for tax payable under section 21D(1) and (3)(b), for the relevant adjustment period.

11. Section 21 provides:

21 Adjustments for apportioned supplies

(1) A registered person must ascertain at the end of an adjustment period whether an adjustment is required to be made for any percentage difference in a supply of goods or services for the period in relation to the actual use of those goods or services for making taxable supplies.

(2) Despite subsection (1), the person is not required to make an adjustment if—

(a) section 20(3D) applies to them:

(b) the value of the goods or services, excluding GST, is $5,000 or less:

(c) the difference between the percentage intended use on acquisition and the percentage actual use for the relevant adjustment period is less than 10 percentage points, but this paragraph does not apply if the adjustment amounts to more than $1,000:

(d) the difference between the previous actual use calculated for the most recent adjustment period in which an adjustment was made and the percentage actual use for the relevant adjustment period is less than 10 percentage points, but this paragraph does not apply if the adjustment amounts to more than $1,000.

(3) An adjustment arises on the last day of the relevant adjustment period.

12. Section 21A provides:

21A When adjustments required

A registered person must, at the end of an adjustment period,—

(a) identify the percentage actual use of the goods or services in making taxable supplies in the period; and

(b) compare the percentage actual use with percentage intended use or previous actual use, as applicable; and

(c) if a percentage difference arises and section 21(2)(c) or (d) does not apply, make an adjustment for any percentage difference for the adjustment period.

13. Section 21B provides:

21B Adjustments when person or partnership becomes registered after acquiring goods and services

(1) This section applies when—

(a) before becoming a registered person, a person acquires—

(i) goods or services on which tax has been charged under section 8(1):

(ii) goods entered by them for home consumption under the Customs and Excise Act 1996 on which tax has been levied under section 12(1):

(iii) secondhand goods—

(A) that are supplied to the person by way of sale; and

(B) that have always been situated in New Zealand or have had tax

levied on them as described in subparagraph (ii); and

(C) the supply of which is not a taxable supply; and

(b) at the time of registration or at a later time, the person or, if the person is a member of a partnership, the partnership uses the goods or services for making taxable supplies.

(2) The person or partnership, as applicable, may make an adjustment under sections 20G, 21, and 21A, as applicable, treating as the first adjustment period, the period that—

(a) starts on the date of the acquisition of the goods or services; and

(b) ends on the first balance date that falls after the events referred to in subsection (1)(b).

(3) For the purposes of this section,—

(a) the person or partnership, as applicable, must either—

(i) provide a tax invoice in relation to the supply, as required by section 20(2); or

(ii) have adequate records that enable the identification of the particulars of an invoice as required by section 24(3) or (7), as applicable:

(b) in identifying the percentage actual use of the goods or services in the first adjustment period referred to in subsection (2), the person or partnership, as applicable, may use a method that provides a fair and reasonable result.

(4) ...

(5) In relation to a supply of secondhand goods, the tax fraction applying to the supply is the tax fraction that applied at the time the goods were purchased by the person.

14. Section 21C provides:

21C Adjustments for first and subsequent adjustment periods

For the purposes of section 21A(b),—

(a) for the first adjustment period applying to the goods or services, the person must compare the percentage intended use of the goods or services with their percentage actual use:

(b) for a subsequent adjustment period, the person must compare the percentage actual use of the goods or services with—

(i) their percentage actual use in an earlier period that is the most recent period in which an adjustment has been made (the **previous actual use**):

(ii) their percentage intended use, if no adjustment has been made in an earlier period.

15. Section 21D provides:

21D Calculating amount of adjustment

(1) If a percentage difference arises for an adjustment period, a registered person must make a positive or negative adjustment for the period of an amount calculated using the formula—

full input tax deduction × percentage difference.

(2) In the formula,—

(a) **full input tax deduction** is the total amount of input tax on the supply, including any nominal GST component chargeable under section 20(3J)(a)(i):

(b) **percentage difference** has the meaning set out in section 21G(1)(c).

(3) For the purposes of subsection (1) and section 20G,—

(a) if the adjustment is positive and the percentage actual use is more than the person's percentage intended use or previous actual use, as applicable, the person is entitled to an additional deduction under section 20(3)(e) or (hb), as applicable:

(b) if the adjustment is negative and the percentage actual taxable use is less than the person's percentage intended use or previous actual use, as applicable, the person must treat the amount as a positive amount of output tax and account for it under section 21A.

16. Section 21E provides:

21E Concurrent uses of land

(1) This section applies when a registered person simultaneously uses the same area of land during an adjustment period for making concurrent taxable and non-taxable supplies. The percentages determined under this section apply for the purposes of sections 21A and 21G.

(2) This section does not apply if the Commissioner agrees that the registered person may use another calculation method.

(3) The extent to which the land is used for making taxable supplies is calculated as a percentage using the formula—

consideration for taxable supply × 100/ total consideration for supply

(4) In the formula in subsection (3),—

(a) **consideration for taxable supply** is,—

(i) on a disposal of the land in the adjustment period, the amount paid or payable; or

(ii) the market value of the land at the time of making the adjustment:

(b) **total consideration for supply** is the sum of

the amount referred to in paragraph (a) and the amount of—

(i) all rental income that is the consideration for the supply of a dwelling paid or payable since the land was acquired; and

(ii) if no rental income is paid or payable in relation to the non-taxable use of the land, the market value of rental income that would have been paid or payable since the land was acquired if the land had been used for this purpose.

17. Section 21F provides:

21F Treatment on disposal

(1) This section applies when a registered person—

(a) acquires goods or services in relation to which they do not have a full deduction, taking into account any adjustments made to input tax in adjustment periods after acquisition; and

(b) subsequently disposes, or is treated as disposing, of the goods or services in the course or furtherance of a taxable activity.

(2) The person must make a final adjustment of an amount calculated using the formula—
tax fraction × consideration × (1 – (actual deduction ÷ full input tax deduction)).

(3) For the purposes of the formula in subsection (2),—

(a) **tax fraction** has the meaning given in section 2(1), unless subsection (7) applies to the disposal:

(b) **consideration** is the amount of consideration received, or treated as received, for the supply:

(c) **actual deduction** is the amount of deduction already claimed, taking into account adjustments made up to the date of disposal:

(d) the amount, when added to any deduction already claimed, must not be more than the amount of the **full input tax deduction** on acquisition referred to in section 21D(2).

(4) Despite subsection (2), if the acquisition referred to in subsection (1)(a) relates to a supply that is charged at the rate of 0% under section 11(1)(mb), on a disposal referred to in subsection (1)(b), the person must make a final adjustment of an amount calculated using the formula—

tax fraction × consideration × (1 – previous use).

(5) For the purposes of the formula in subsection (4),—

(a) **tax fraction** has the meaning given in section 2(1), unless subsection (7) applies to the disposal:

(b) **consideration** is the amount of consideration received, or treated as received, for the supply:

(c) **previous use** is the percentage intended use or the previous actual use in the period before the period in which the disposal occurs.

(6) The amount given by the formula in subsection (4) must not be more than the amount of output tax that is accounted for by the person under section 20(3J)(a)(iii), taking into account any later adjustments made under the apportionment rules in sections 21 to 21H.

(7) In the formulas in subsections (2) and (4), on the disposal of the goods or services, if the supply is charged at the rate of 0%, the item **tax fraction** is treated as 15%.

18. Section 21FB provides:

21FB Treatment when use changes to total taxable or non-taxable use

(1) This section applies when—

(a) a person makes an adjustment under section 21A or 21B; and

(b) the person's use of the goods or services in making taxable supplies changes in an adjustment period to either total taxable use or total non-taxable use; and

(c) the total taxable use or non-taxable use remains unchanged for an unbroken period that is—

(i) the remainder of the adjustment period in which the use was changed; and

(ii) the adjustment period following the period in which the use was changed.

(2) If the use changes to total taxable use, the person's adjustment for the adjustment period referred to in subsection (1)(c)(ii) is an amount of input tax calculated using the formula—

full input tax deduction – actual deduction.

(3) In the formula,—

(a) **full input tax deduction** is the total amount of input tax on the supply, after taking into account any nominal GST component chargeable under section 20(3J)(a)(i):

(b) **actual deduction** is the amount of deduction already claimed, taking into account adjustments made up to the end of the adjustment period referred to in subsection (1)(c)(ii).

(4) If the use changes to total non-taxable use, the person's adjustment for the adjustment period referred to in subsection (1)(c)(ii) is an amount of output tax that is equal to the amount of the person's actual deduction as described in subsection (3)(b).

19. Section 21G provides:

21G Definitions and requirements for apportioned supplies and adjustment periods

(1) For the purposes of this section and sections 8(4B)(b), 9(2)(h), 20(3H), 20G, 21 to 21F, and 21H,—

(a) **percentage actual use**, for a registered person and an adjustment period,—

(i) means the extent to which the goods or services are actually used by the person for making taxable supplies; and

(ii) is calculated for the period that starts when the goods or services are acquired and finishes at the end of the relevant adjustment period; and

(iii) is expressed as a percentage of total use:

(b) **percentage intended use**, for a registered person, means the extent to which the goods or services are intended to be used by the person for making taxable supplies, estimated at the time of acquisition under section 20(3G) and expressed as a percentage of total use:

(c) **percentage difference** means the difference between the percentage actual use determined under paragraph (a) and, as applicable,—

(i) the percentage intended use determined under paragraph (b); or

(ii) for a subsequent adjustment period following a period in which a person has made an adjustment, the previous actual use of the goods or services in the earlier period.

(2) For the purposes of this section and sections 20G, 21 to 21F and 21H,—

(a) the first adjustment period is a period that—

(i) starts on the date of acquisition; and

(ii) ends on the date as the person chooses that either corresponds to the person's first balance date described in section 15B(6) that falls after the date of acquisition, or corresponds to the person's first balance date that falls at least 12 months after the date of acquisition:

(b) a subsequent adjustment period is a period of 12 months that—

(i) starts on the day after the end of an earlier adjustment period; and

(ii) ends on the last day of the equivalent taxable period in which the first adjustment period ended.

(3) For the purposes of subsection (2)(b), a registered person who chooses under section 38(1) of the Tax Administration Act 1994 to change their balance date at some time in an income year may realign their subsequent adjustment periods with the new balance date. However, an affected adjustment period must be of at least 12 months duration and, if the new balance date causes an adjustment period to be shorter than 12 months, the relevant period is extended to the balance date of the following income year.

(4) The number of adjustment periods in which a registered person must determine whether an adjustment is required under sections 20G and 21A, as applicable, may, as the person chooses, be limited to—

(a) one of the following based on the value of the goods or services, excluding GST:

(i) 2 adjustment periods for goods or services valued at more than $5,000 but not more than $10,000:

(ii) 5 adjustment periods for goods or services valued at more than $10,000 but not more than $500,000:

(iii) 10 adjustment periods for goods or services valued at more than $500,000; or

(b) the relevant adjustment periods that is equal to the number of years for the estimated useful life of the relevant asset as determined under the Tax Depreciation Rates Determinations set by the Commissioner under section 91AAF of the Tax Administration Act 1994.

(5) Subsection (4) does not apply in relation to a supply of land.

(6) An election by a registered person under subsection (4) to limit the number of adjustment periods applying to goods or services acquired by them cannot subsequently be changed.

(7) Despite subsection (4) if, after making adjustments for goods or services for the number of adjustment periods, the person subsequently disposes, or is treated as disposing, of the relevant asset, they must make a final adjustment under section 21F in the taxable period in which the disposal occurs.

(7B) If a person disposes, or is treated as disposing, of an asset before the last required adjustment period under subsection (4), then for the purposes of subsection (2)(a)(ii) and (b)(ii), the current adjustment period is treated as—

(a) ending immediately before the date of the disposal; and

(b) the final adjustment period.

(8) If a person does not choose the number of adjustment periods for an apportioned supply, the limits set out in subsection (4)(a) apply.

Residential Tenancies Act 1986

20. Section 38 provides:

> **38 Quiet enjoyment**
>
> (1) The tenant shall be entitled to have quiet enjoyment of the premises without interruption by the landlord or any person claiming by, through, or under the landlord or having superior title to that of the landlord.
>
> (2) The landlord shall not cause or permit any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises by the tenant.
>
> (3) Contravention of subsection (2) in circumstances that amount to harassment of the tenant is hereby declared to be an unlawful act.
>
> (4) In this section **premises** includes facilities.

Securities Act 1978

21. Section 2 provides:

> **2 Interpretation**
>
> (1) In this Act, unless the context otherwise requires,—
>
> ...
>
> **contributory scheme** means 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

NEW LEGISLATION

This section of the *TIB* covers new legislation, changes to legislation including general and remedial amendments, and Orders in Council.

ORDER IN COUNCIL

FIF DEEMED RATE OF RETURN SET FOR 2014–15

The deemed rate of return for taxing foreign investment fund (FIF) interests is 7.71% for the 2014–15 income year, down from 7.99% for the previous income year.

The deemed rate of return is set annually and is one of the methods that can be used to calculate income from foreign investment fund interests. The rate is based on taking an average of the five-year Government bond rate at the end of each quarter, plus a 4% margin.

The new rate was set by Order in Council on 9 November 2015.

Income Tax (Deemed Rate of Return on Attributing Interests in Foreign Investment Funds, 2014–15 Income Year) Order 2015 (LI 2015/265)

REGULAR CONTRIBUTORS TO THE TIB

Office of the Chief Tax Counsel

The Office of the Chief Tax Counsel (OCTC) produces a number of statements and rulings, such as interpretation statements, binding public rulings and determinations, aimed at explaining how tax law affects taxpayers and their agents. The OCTC also contributes to the "Questions we've been asked" and "Your opportunity to comment" sections where taxpayers and their agents can comment on proposed statements and rulings.

Legal and Technical Services

Legal and Technical Services contribute the standard practice statements which describe how the Commissioner of Inland Revenue will exercise a statutory discretion or deal with practical operational issues arising out of the administration of the Inland Revenue Acts. They also produce determinations on standard costs and amortisation or depreciation rates for fixed life property used to produce income, as well as other statements on operational practice related to topical tax matters.

Legal and Technical Services also contribute to the "Your opportunity to comment" section.

Policy and Strategy

Policy advises the Government on all aspects of tax policy and on social policy measures that interact with the tax system. They contribute information about new legislation and policy issues as well as Orders in Council.

Litigation Management

Litigation Management manages all disputed tax litigation and associated challenges to Inland Revenue's investigative and assessment process including declaratory judgment and judicial review litigation. They contribute the legal decisions and case notes on recent tax decisions made by the Taxation Review Authority and the courts.

GET YOUR TAX INFORMATION BULLETIN ONLINE

The *Tax Information Bulletin (TIB)* is available online as a PDF at **www.ird.govt.nz** (search keywords: Tax Information Bulletin). You can subscribe to receive an email alert when each issue is published. Simply go to **www.ird.govt.nz/aboutir/newsletters/tib** and complete the subscription form.

An index to the TIB is also available at **www.ird.govt.nz/technical-tax/tib** (scroll down the page to "Volume indexes"). This is updated about twice a year.

Our website has other Inland Revenue information you may find useful, including draft binding rulings and interpretation statements.