

file note

Subject: **Vidler v Commissioner of Taxation [2010] FCAFC 59**

The appellant purchased two separate parcels of vacant land in 2004. He later sold the land but did not pay GST on the supplies on the basis that the land was an input taxed supply of residential premises. The Commissioner issued notices of assessment for the payment of GST on the supplies. The taxpayer lodged notices of objection that were disallowed and on hearing at the Administrative Appeals Tribunal (AAT) the Commissioner was successful. The taxpayer subsequently appealed to the Full Federal Court.

Section 40-65(1) of *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* (the GST Act) provides that:

“A sale of real property is input taxed, but only to the extent that the property is residential premises to be used predominantly for residential accommodation (regardless of the term of occupation).”

The term residential premises is in turn defined as:

“land or a building that:

(a) is occupied as a residence or for residential accommodation; or

(b) is intended to be occupied and is capable of being occupied, as a residence or for residential accommodation;

(regardless of the term of the occupation or intended occupation) and includes a floating home.”

Where a supply is an input taxed supply, no GST is payable on the supply, but the supplier is not entitled to an input tax credit for things acquired to make the supply.

AAT Decision

The question before the primary judge was whether the two properties were intended to be occupied and [were] capable of being occupied, as a residence or for residential accommodation as is required by the definition of “residential premises”.

Concurring with the decision in *South Steyne Hotel Pty Ltd v Federal Commissioner of Taxation* (2009) 71 ATR 228 Stone J stated that to come within the definition of residential premises there must at the time, have been premises capable of providing some shelter and basic living facilities. In the present situation, the two properties were materially the same in that they were vacant and electricity, water and sewerage services were available in both cases, even if not actually connected at the time. Both properties were zoned residential.

The taxpayer’s application was dismissed on the ground that the “capable of being occupied” limb of the definition was not satisfied. The land was vacant and there were no facilities on the land that made it capable of being occupied.

Full Federal Court Decision

The taxpayer's ground of appeal was that the primary judge erred in holding that the land was not "residential premises" unless some shelter and basic living facilities were erected on the land.

The first limb of the definition of residential premises requires the land or building to be occupied as a residence or for residential accommodation. The Court found that the phrase "residential accommodation" connotes lodging, sleeping or overnight accommodation. The Full Court considered at length the decision in *Marana Holdings Pty Ltd v Commissioner of Taxation* (2004) 141 FCR 299 where a motel was converted into apartments.

In *Marana Holdings*, the Full Court held that the words "reside" and "residence" had the connotation of permanent or at least long term commitment to occupation of the premises in question. This concept was later rejected and the definition of residential premises amended post the *Marana Holdings* decision such that premises could be residential premise irrespective of the term of actual or intended accommodation.¹

The Court found that the word "occupied" in the phrase "intended to be occupied and is capable of being occupied" means living within a structure. Further, the Court rejected the idea of someone being able to occupy vacant land for residential accommodation.

The taxpayer argued that this second limb of the test was broad enough to encompass situations where shelter or living facilities will be constructed in the future. Further, the appellant argued that the use of the words "land or building" at the beginning of the definition of residential premises meant that residential premises could include land alone given the use of the alternative "or". The appellant relied on comments in the Explanatory Memorandum that accompanied the *Marana Holdings* amendments to the definition of residential premises. At paragraph 1.167, the Explanatory Memorandum stated that "it is permissible to use the land for residential purposes and the land has some facilities ordinarily associated with residences (i.e. water and sewerage)"

The Full Court found that while the comments were correct in that the definition of residential premises requires that it be both lawful to use the land for such purposes and that the connection of utilities was also required for residential purposes, these two requirements were not of their own enough to satisfy the test. The reference to land being serviced by water and sewerage contemplates the existence of structures on the land that themselves are serviced by these utilities. The Court agreed with the Commissioner's submission that the existence of a tap in the middle of vacant land was of itself insufficient to transform the land into residential premise for the purposes of the GST Act.

On this basis this Court found that as no shelter or basic living facilities were present on the land at the time of the sales, neither parcel of land was residential premise within the meaning of s. 40-65(1) of the GST Act because the land was not capable of being occupied as a residence or for residential accommodation.

Decision Impact Statement

¹ It should be noted that following the decision in *Marana Holdings*, two changes were made to the definition of residential premises. The first was to insert the words "regardless of the term of the occupation or intended occupation" and the second was to insert the words "or for residential accommodation". The purpose of these amendments was to broaden the scope of the words "residential" and "residence" so that they were no longer limited to permanent or long term occupation.

On 13 July 2010, the ATO issued a Decision Impact Statement (DIS)² in relation to the case. The DIS noted that the case confirmed the Commissioner's view in GST Ruling GSTR 2000/20 that vacant land does not have sufficient physical characteristics to mark it as being able to be or intended to be occupied as a residence of for residential accommodation.

² Decision Impact Statements are not public rulings (unless otherwise specified) but provide a statement of the Commissioner's position in relation to a decision and how the law will be administered as a consequence of the decision.