


PR 2007/51 - Income tax: tax consequences of investing in Calliva SuperAccess Property Notes and entering into the Lease Agreement

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Product Ruling

Income tax: tax consequences of investing in Calliva SuperAccess Property Notes and entering into the Lease Agreement

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❗ This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

No guarantee of commercial success

The Tax Office **does not** sanction or guarantee this product. Further, we give no assurance that the product is commercially viable, that charges are reasonable, appropriate or represent industry norms, or that projected returns will be achieved or are reasonably based.

Potential participants must form their own view about the commercial and financial viability of the product. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential participants by confirming that the tax benefits set out in the **Ruling** part of this document are available, **provided that** the scheme is carried out in accordance with the information we have been given, and have described below in the **Scheme** part of this document. If the scheme is not carried out as described, participants lose the protection of this Product Ruling.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the entity(s) who applied for the Product Ruling, and their associates, will abide by strict terms of use. Any failure to comply with the terms of use may lead to the withdrawal of this Product Ruling.

What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated.
2. In this Ruling this scheme is referred to as the Calliva SuperAccess arrangement or simply as the scheme. The Calliva SuperAccess scheme consists of the acquisition of Property Notes, to be issued by Calliva Finance Ltd (CFL), and the Lease which will be entered into by the participant in the scheme and AET Structured Finance Services Pty Ltd as trustee for Calliva Series 2006-1 Asset Trust ('Asset Trustee' or 'Lessor').

Class of entities

3. This part of the Product Ruling specifies which entities can rely on the tax outcomes set out in the Ruling section of this Product Ruling and which entities can not rely on those tax outcomes.
4. The class of entities to which this Ruling applies consists of trustees of complying regulated self managed superannuation funds who enter into the scheme described below on or after the date this Product Ruling is published. For the purpose of this Ruling these trustees of complying regulated self managed superannuation funds are referred to as 'Investor(s)' or 'Lessee'.
5. The class of entities who can rely on the tax outcomes set out in the Ruling section of this Product Ruling does **not** include entities:
 - who are not Australian residents for taxation purpose;
 - who are not trustees of complying regulated self managed superannuation funds;
 - who do not fund the subscription amount from their resources;
 - who refinance the Property Notes with further senior debt from AET SPV Management Pty Ltd (Funding Trustee);
 - who enter into a scheme that differs materially from the scheme provided to the Tax Office with the application for this Product Ruling and described below; and
 - who are accepted or participate in the scheme prior to the issue of this Product Ruling or after 30 June 2007.

Superannuation Industry (Supervision) Act 1993

6. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993). The trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this product may contravene the provisions of SISA 1993.

Qualifications

7. The class of entities defined in this Product Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 23 to 26 of this Ruling.

8. If the scheme actually carried out is materially different from the scheme that is described in this Product Ruling, then:

- this Product Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Product Ruling may be withdrawn or modified.

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Date of effect

10. This Product Ruling applies prospectively from 30 May 2007, the date this Ruling is published. It therefore applies to the specified class of entities that enter into the scheme from 30 May 2007 until 30 June 2007. This Product Ruling provides advice on the availability of tax benefits to the specified class of entities up to 30 June 2010.

11. However, the Product Ruling only applies to the extent that:

- there is no change in the scheme or in the entity's involvement in the scheme;
- it is not later withdrawn by notice in the *Gazette*; or
- the relevant provisions are not amended.

12. If this Product Ruling is inconsistent with a later public or private ruling, the relevant class of entities may rely on either ruling which applies to them (item 1 of subsection 357-75(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA)).

13. If this Product Ruling is inconsistent with an earlier private ruling, the private ruling is taken not to have been made if, when the Product Ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

If the above two conditions do not apply, the relevant class of entities may rely on either ruling which applies to them (item 3 of subsection 357-75(1) of Schedule 1 to the TAA).

Changes in the law

14. Although this Product Ruling deals with the laws enacted at the time it was issued, later amendments may impact on this Product Ruling. Any such changes will take precedence over the application of the Ruling and, to that extent, this Product Ruling will have no effect.

15. Entities who are considering participating in the scheme are advised to confirm with their taxation adviser that changes in the law have not affected this Product Ruling since it was issued.

Note to promoters and advisers

16. Product Rulings were introduced for the purpose of providing certainty about tax consequences for entities in schemes such as this. In keeping with that intention the Tax Office suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling is issued.

Goods and Services Tax

17. The rent and outgoings referred to in this Product Ruling include the Goods and Services Tax (GST). For an entity (referred to in this Product Ruling as a Investor) to be entitled to claim input tax credits for the GST included in these expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

Ruling

18. This part of the Product Ruling sets out the taxation outcomes for an Investor who enters into the scheme described at paragraphs 23 to 26 of this Ruling.

19. Subject to the assumptions listed in paragraph 20 of this Ruling:

- (a) Division 16E of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) (Division 16E) will apply to the Property Note which constitutes a qualifying security as defined in subsection 159GP(1) of the ITAA 1936.
- (b) The Investor will, by virtue of section 159GQ of the ITAA 1936, include in its assessable income the accrual amount on the Property Note calculated under Division 16E of the ITAA 1936, where the accrual amount is positive.
- (c) Rent derived by the Investor under the Sublease is assessable income to the Investor under 6-5(1) of the ITAA 1997. This income will not be considered to be 'special income' for the purpose of section 273 of the ITAA 1936.
- (d) The contractual right embedded in the Lease, which will be granted by the Lessor in the consideration of \$1,850 to the Investor as the Lessee, is a CGT asset under subsection 108-5(1).
- (e) Rent and outgoings payable by the Lessee under the Lease are deductible in the income year in which they are incurred under section 8-1.
- (f) Rent payable by the Lessee does not fall within the scope of sections 82KZME and 82KZMF of the ITAA 1936.
- (g) Section 82KL of the ITAA 1936 will not apply to deny the deductions otherwise available.
- (h) The anti-avoidance provisions contained in Part IVA of the ITAA 1936 will not apply to deny tax benefits that the Investor may have during the term of the scheme.

Assumptions

20. This Ruling is made on the basis of the following assumptions:

- (a) all of the Investors are Australian residents for taxation purposes;
- (b) the Investor must be a regulated self-managed superannuation fund;

- (c) the contractual right embedded in the Lease is not assigned to a third party by the Investor at the time that the Lease is executed;
- (d) the Investor is not a trader in property and will not be treated for income tax purposes as either trading in the property or carrying on a business of investing in the property, or holding the property as a revenue asset; and
- (e) all dealings between the Investor and the Asset Trustee will be at arm's length.

21. This Product Ruling does not address the tax implications of CGT events arising from:

- **assigning and then exercising the right, or simply exercising the right, to acquire the option by paying an option fee; or**
- **the termination of the Lease.**

The Investor may request a private ruling for advice on possible tax outcomes on these events.

Scheme

22. The scheme that is the subject of this Product Ruling is described below. The scheme is incorporated within the following documents:

- Application for a Product Ruling for Calliva SuperAccess, dated on 29 May 2006 and additional correspondence and emails dated 25 July 2006, 6 and 10 November 2006, 4, 8, 12 and 22 December 2006, 5 and 19 March 2007, 18 April 2007, 4, 7, 11, 21 and 22 May 2007;
- **Prospectus** for Calliva SuperAccess Property Notes, to be issued by Calliva Group Ltd (CGL), received 22 May 2007;
- Master Trust Deed between AET Structured Finance Services Pty Ltd (Asset Trustee), the Funding Trustee and Calliva SuperAccess Pty Ltd (Trust Manager), received 8 November 2006;
- Asset Trust Series Supplement Calliva Series 2006-1 Asset Trust, received 8 November 2006;
- **Note Trust Deed – CFL Junior Note Trust 2006-1** between CFL (the Issuer) and Australian Executor Trustees Ltd (the Trustee), received 8 November 2006;

- **Draft Lease** between the Investor as the Lessee and AET Structured Finance Services Pty Ltd as the Lessor, received 8 November 2006 and revised 15 May 2007;
- **Draft Sublease between Investor (as Sublessor) and Sublessee**, received 8 November 2006;
- Draft Management Agreement between the Asset Trustee and Calliva Asset Management Pty Ltd (Property Manager), received 12 December 2006; and
- Draft Mortgage document between AET Structured Finance Services Pty Ltd (the 'Mortgagor') and AET SPV Management Pty Ltd (the 'Mortgagee') and Calliva SuperAccess Pty Ltd (the 'Covenanter'), received 12 December 2006.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

23. The documents highlighted are those that an Investor may enter into. For the purposes of describing the scheme to which this Product Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which an Investor or any associate of an Investor, will be a party to, which are a part of the scheme. The effect of these agreements is summarised as follows.

24. All Australian Securities and Investment Commission (ASIC) requirements are, or will be, complied with for the term of the agreements.

Overview

25. The details of the scheme subject to this Ruling are summarised as follows:

- (a) An offer to invest in Property Notes will be made through the Prospectus. The Investor is invited to purchase the Property Notes from CFL and to enter into a Lease with the Asset Trustee over an Eligible Acquisition Property (Property).
- (b) Prior to being permitted to invest in the Property Notes, the Investors must complete the Application Form in the Prospectus, nominate an Acquisition Property and pay the initial subscription amount to CGL.
- (c) Upon receiving the application and the initial payment, CGL will engage an independent valuer to assess the nominated Acquisition Property and to determine whether or not it meets the eligibility criteria and, if so, determine the market value of the Acquisition Property and the market rental on the Acquisition Property.

- (d) Once all of the conditions are satisfied, the Investor will be required to pay the final subscription amount to purchase the Property Notes issued by CFL. CFL will apply the proceeds raised to fund its investment in the Subordinated Notes issued by the Asset Trustee.
- (e) Upon receiving the payment from the issue of the Subordinated Notes, the Asset Trustee will apply the proceeds towards the acquisition of the Property and to pay the costs associated with the acquisition of the Property. The Asset Trustee will also secure a loan from the Funding Trustee for up to 70% of the appraised value of the Property to fund the balance of the acquisition cost of the Property. The Funding Trustee will hold the first mortgage over the Property.
- (f) The terms and conditions of the Property Notes provide that no interest or principal will be payable on the Property Notes for the Investor until the time that the Trustees secured loan in relation to the Property has been repaid.
- (g) The Investor who purchases the Property Notes will enter into a Lease with the Asset Trustee, who will be in the capacity as the Lessor of the Property. The initial term of the Lease is 5 years.
- (h) Under the Lease, the Investor, as the Lessee of the Property, agrees to pay all of the outgoings and the rental, which will be indexed by the Consumer Price Index annually over the term of the Lease, on a monthly basis. The Lessee will acquire a right, which will enable the right holder to acquire, at a time of its choosing during the term of the Lease, an option by paying an option fee. The cost of the right is \$1,850.
- (i) The option gives the right holder the right to acquire the Property within 60 days from the date that the option is purchased for the price equal to the initial price paid by the Asset Trustee at the beginning of the scheme.
- (j) The Lessee is able to assign the right acquired to a third party at any time during the term of the Lease.
- (k) The Lessee may sublease the Property to a third party through the Sublease and is required to remit rental income arising out of the Sublease directly to the Lessor who, after deducted outgoings and tax adjustments and interest, will apply any surplus rental to reduce the loan advanced by the Funding Trustee.
- (l) Subject to certain terms and conditions, the Lease also provides the Lessee the right to renew the Lease for up to three further 5 year terms at expiry of the initial term.

- (m) The Lessee may notify the Lessor at anytime during the term of the Lease that it wishes to terminate the Lease and exit the scheme, provided that the Lessee is not otherwise in default of its obligations under the Lease.
- (n) Upon the termination of the scheme:
- the Asset Trustee will have already repaid (from prior rent), or will apply the option exercise price paid by the investor to repay the outstanding balance of the loan advanced by the Funding Trustee, and will redeem the Subordinated Notes issued in full together with a payment of all accrued and unpaid interest to CFL who will then surrender the Subordinated Notes in return for the payment;
 - CFL will then redeem the Property Notes acquired by the Investor with a payment, which consists of all accrued and unpaid interest and the capital amount, to the Investor on the Property Notes redeemed; and
 - the mortgage and security interest held by the Funding Trustee over the Property will be discharged.

26. Entities are outside the scope of this Product Ruling if entities do not fall within the class of entities to which this Ruling applies, or are outside the assumption outlined in paragraph 20 of this Ruling, or the scheme actually carried out is not carried out in accordance with the scheme described in paragraph 26 of this Ruling. Entities who are outside the scope of this Ruling may request a private ruling for advice on possible tax outcomes on these events.

Appendix 1 – Explanation

❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

Ordinary income under section 6-5

27. Subsection 6-5(1) provides that the assessable income of an Australian resident includes income according to ordinary concepts. Whether or not a particular amount is income according to ordinary concepts depends on the nature and character of the receipt in the hands of the taxpayer.

28. Under the scheme, the Investor will sublease the Property to a sublessee after entering into the Lease with the Asset Trustee over the Property. The sublessee agrees to pay the Investor the commercial rent, which will be determined by an independent real estate valuer, during the term of the Sublease.

29. The characterisation of the Sublease which the Investor and the sublessee are party to indicates that the Sublease is a genuine and commercial arrangement. The rent which will be paid by the sublessee to the Investor under the Sublease is dealt with at arms-length.

30. Therefore, whilst the rent due from the sublessee will be remitted to the Asset Trustee directly, it is assessable in the hand of the Investor under section 6-5 as income according to ordinary concepts.

Division 16E of Part III

31. The return on the Property Notes is deferred until the scheme is terminated and the Property Notes are redeemed. Division 16E of the ITAA 1936 sets out the timing of taxation consequences for holders and issuers of certain securities. It contains a formula for working out the amount to be included in assessable income of the holder and the amount to be allowed as a deduction to the issuer.

32. The Property Notes fall within the definition of 'qualifying security' in section 159GP(1) of the ITAA 1936 and are thus securities to which Division 16E of the ITAA 1936 applies. Section 159GQ of the ITAA 1936 provides that if a taxpayer holds a qualifying security for all or part of a year of income, the accrual amount for each accrual period in the year of income must be added together to determine the effect on the taxpayer's taxable income. If the sum of the accrual amounts is a positive amount, the amount is included in the assessable income of the taxpayer for that income year.

33. Under section 159GQ of the ITAA 1936 the Investor will be assessed on the deferred return over the term of the scheme. The Investor will, by virtue of section 159GQ, include in its assessable income the accrual amount on the Property Note calculated under Division 16E of the ITAA 1936 for a particular income year, where the accrual amount is positive.

Section 273

34. Where the sublessee is an associate of the Investor the rental income is determined at a market rate by an independent valuer. As the Investor deals with the sublessee on an arms length basis, the rent is not greater than the rental income that would otherwise be expected and is not 'special income' of the Investor for the purpose of section 273 of the ITAA 1936.

35. This is further supported by the fact that where the parties to the Lease are not associates, the market value of the Property, which is also determined by the independent valuer, will be used to determine the rent under the Lease.

Capital gains and losses under Part 3-1

36. Under subsection 108-5(1) a CGT asset is any kind of property or a legal or equitable right that is not property.

37. On entering into the Lease, the Investor acquires a CGT asset being the contractual right granted to the Investor to acquire an option to purchase the Property.

38. The contractual right is acquired by the Investor when the contract is entered into, or if there is no contract, when the right is granted (Event Number D1 in the table in subsection 109-5(2)).

39. The first element of the cost base and reduced cost base of the contractual right will be \$1,850 being the cost of the contractual right (subsection 110-25(2)).

Deductibility of rent and outgoings

Section 8-1

40. The rent and outgoings payable under the Lease by the Investor will relate to the gaining of the rental income from the sublessee, and hence have a sufficient connection to overall investment activities of the Investor under the scheme. They will thus be deductible under subsection 8-1(1). The exclusions in subsection 8-1(2) do not apply.

41. The fact that the rent derived from the Sublease will be paid directly to the Asset Trustee itself will not deny the Investor's entitlement to claim the rent as a deduction under section 8-1.

Prepayment provisions

Sections 82KZL to 82KZMF

42. The prepayment provisions contained in Subdivision H of Division 3 of Part III of the ITAA 1936 affect the timing of deductions for certain prepaid expenditure. These provisions apply to certain expenditure incurred under an agreement in return for the doing of a thing under the agreement (for example, the performance of management services or the leasing of land) that will not be wholly done within the same year of income as the year in which the expenditure is incurred. If expenditure is incurred to cover the provision of services to be provided within the same year, then it is not expenditure to which the prepayment rules apply.

43. For this Project, the only prepayment provisions that are relevant are section 82KZL of the ITAA 1936 (an interpretive provision) and sections 82KZME and 82KZMF of the ITAA 1936 (operative provisions).

Application of the prepayment provisions to the scheme

44. Under the scheme to which this Product Ruling applies rent payable by the Lessee to the Lessor is incurred monthly in advance, payable on the first day of the month. Accordingly, the prepayment provisions in sections 82KZME and 82KZMF of the ITAA 1936 have no application to this scheme.

45. However, sections 82KZME and 82KZMF of the ITAA 1936 may have relevance if a Lessee prepays all or some of the rent payable under the Lease.

46. Lessees who prepay rent are not covered by this Product Ruling and may instead request a private ruling on the tax consequences of their participation in this Project.

Section 82KL – recouped expenditure

47. The operation of section 82KL of the ITAA 1936 depends, among other things, on the identification of a certain quantum of 'additional benefit(s)'. Insufficient 'additional benefits' will be provided to trigger the application of section 82KL of the ITAA 1936. It will not apply to deny the deductions otherwise allowable under section 8-1 of the ITAA 1997.

Part IVA – general anti-avoidance provisions

48. For Part IVA of the ITAA 1936 to apply there must be a 'scheme' (section 177A), a 'tax benefit' (section 177C) and a dominant purpose of entering into the scheme to obtain a tax benefit (section 177D).

49. An Investor participating in the Calliva SuperAccess Property Notes and entering into the Lease will be a 'scheme'. An Investor will obtain a 'tax benefit' from entering into the scheme, in the form of tax deductions detailed in paragraph 19 of this Ruling. Tax deductions that would not have been obtained but for the scheme. However, it is not possible to conclude the scheme will be entered into or carried out with the dominant purpose of obtaining this tax benefit.

50. Investors to whom this Ruling applies intend to carry out the scheme described. There are no facts that would suggest that Investors have the opportunity of obtaining a tax advantage other than the tax advantages identified in this Ruling. There is no indication that the parties are not dealing at arm's length or, if any parties are not dealing at arm's length, that any adverse tax consequences result. Further, having regard to the factors to be considered under paragraph 177D(b) of the ITAA 1936 it cannot be concluded, on the information available, that participants will enter into the scheme for the dominant purpose of obtaining a tax benefit.

Appendix 2 – Detailed contents list

51. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

PR 1999/95

Subject references:

- capital gains
- deductions
- financial products
- ordinary income
- product rulings
- public rulings
- qualifying security
- special income
- tax avoidance

Legislative references:

- ITAA 1936 82KL
- ITAA 1936 82KZL
- ITAA 1936 82KZM
- ITAA 1936 82KZMA
- ITAA 1936 82KZMB
- ITAA 1936 82KZMC
- ITAA 1936 82KZMD
- ITAA 1936 82KZME

- ITAA 1936 82KZME(2)
 - ITAA 1936 82KZME(3)
 - ITAA 1936 82KZME(7)
 - ITAA 1936 82KZMF
 - ITAA 1936 Pt IVA
 - ITAA 1936 177A
 - ITAA 1936 177C
 - ITAA 1936 177D
 - ITAA 1936 177D(b)
 - ITAA 1936 Pt III Div 16E
 - ITAA 1936 159GP(1)
 - ITAA 1936 159GQ
 - ITAA 1936 273
 - ITAA 1997 6-5
 - ITAA 1997 6-5(1)
 - ITAA 1997 8-1
 - ITAA 1997 8-1(1)
 - ITAA 1997 8-1(2)
 - ITAA 1997 Part 3-1
 - ITAA 1997 108-5(1)
 - ITAA 1997 109-5(2)
 - ITAA 1997 110-25(2)
 - TAA 1953
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ATO references

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