



PR 2018/10 - Income tax and goods and services tax: tax consequences for a Participant in an urBau joint venture project

 This cover sheet is provided for information only. It does not form part of *PR 2018/10 - Income tax and goods and services tax: tax consequences for a Participant in an urBau joint venture project*

 This document has changed over time. This is a consolidated version of the ruling which was published on *27 March 2019*



Product Ruling

Income tax and goods and services tax: tax consequences for a Participant in an urBau joint venture project

Contents	Para
LEGALLY BINDING SECTION:	
What this Ruling is about	1
Date of effect	10
Ruling	15
Scheme	16
NOT LEGALLY BINDING SECTION:	
Appendix 1:	
<i>Explanation</i>	21
Appendix 2:	
<i>Detailed contents list</i>	43

📌 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, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is 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 Commissioner **does not** sanction or guarantee this product. Further, the Commissioner gives 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. The Commissioner recommends 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 provisions identified in the Ruling section 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 Product Ruling the scheme is offered by urBau Pty Ltd (urBau) and involves entry into a joint venture (the Joint Venture) regulated by, and under the terms of, a Joint Venture Deed to facilitate a Project constituting the development of land (the Land) as a residential development comprising Apartment Lots and Retail Lots^{A1}, if any (the Development), each of which, upon conclusion of the Development, will be strata divided, partitioned and transferred to a Participant (as a Joint Venturer).
3. This Product Ruling does not address:
 - the tax consequences for Participants that are not individuals
 - the tax consequences for Participants that intend to use their Apartment Lot for a purpose other than as their main residence
 - the tax consequences for Participants that enter into a Joint Venture Deed for the purpose of occupying a Retail Lot
 - the tax consequences associated with the holding of the Land by the Development Company on trust for Participants
 - the GST consequences for Participants, other than to the extent addressed in paragraphs 15(h) and 38 to 41 of this Product Ruling
 - the tax consequences to arise in the event the Development does not proceed under the

^{A1} An Apartment Lot is a Lot that is designated, and permitted to be used, as a dwelling and a Retail Lot is a Lot that is not an Apartment Lot.

circumstances set out in paragraph 19(l) of this Product Ruling

- for the purposes of section 104-10, the cost base and reduced cost base of either an Outgoing Participant's or a defaulting Participant's Participating Interest at the time of its transfer
- the tax consequences to arise in the event a Participant either gives a disposal notice to the Development Company, or transfers their Participating Interest to a related party as permitted by the Joint Venture Deed
- a Participant's tax obligations and benefits in relation to the holding and sale of their Apartment Lot, and
- whether the scheme constitutes a financial arrangement for the purposes of Division 230 (Taxation of financial arrangements).

Class of entities

4. This part of the Product Ruling specifies which entities can rely on the Ruling section of this Product Ruling and which entities cannot rely on the Ruling section. In this Product Ruling, those entities that can rely on the Ruling section are referred to as Participants.

5. The class of entities that can rely on the Ruling section of this Product Ruling consists of those entities who:

- are individuals
- as a Participant, execute a Joint Venture Deed and enter into the scheme described in paragraphs 16 to 20 of this Product Ruling on or after the date this Product Ruling is made and on or before 30 June 2021, and
- at the time of entering into the scheme, intend to use the Apartment Lot to be transferred to them (alone or together with another individual as co-owner) as their main residence.

6. The class of entities that can rely on the Ruling section of this Product Ruling does **not** include entities:

- who are non-residents for Australian taxation purposes
- that are not individuals
- who enter into the scheme described in paragraphs 16 to 20 of this Product Ruling before the date of this Product Ruling or after 30 June 2021

- that enter into the scheme for the purpose of having a Retail Lot transferred to them
- who, at the time of entering into the scheme, intend to use the Apartment Lot to be transferred to them for a purpose other than as their main residence, or
- who are subject to Division 230 in respect of this scheme. Division 230 will generally not apply to individuals, unless they have made an election for it to apply to them.

Superannuation Industry (Supervision) Act 1993

7. This Product Ruling does not address the provisions of the *Superannuation Industry (Supervision) Act 1993* (SISA). The Commissioner gives no assurance that the scheme is an appropriate investment for a superannuation fund. Trustees of superannuation funds are advised that no consideration has been given in this Product Ruling as to whether investment in this scheme may contravene the provisions of SISA.

Qualifications

8. 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 16 to 20 of this Product Ruling.

9. 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.

Date of effect

10. This Product Ruling applies prospectively from 22 August 2018, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 22 August 2018 until 30 June 2021, being its period of application. This Product Ruling will continue to apply to those entities even after its period of application has ended for the scheme entered into during the period of application.

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.

Changes in the law

12. Although this Product Ruling deals with the income tax 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 this Product Ruling and, to that extent, this Product Ruling will have no effect.

13. 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

14. 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 Commissioner suggests that promoters and advisers ensure that participants are fully informed of any legislative changes after the Product Ruling has issued.

Ruling

15. Subject to paragraph 3 of this Product Ruling and the assumptions in paragraph 20 of this Ruling:

- (a) As intended pursuant to the terms of the Joint Venture Deed, the relationship of Participants who have a respective Participating Interest in the Land (and all other Joint Venture Assets) will be one of joint venturers in an unincorporated joint venture and will not constitute a partnership for tax purposes as defined in subsection 995-1(1).
- (b) Where, for the purposes contemplated by the Joint Venture Deed and the Enduring Power of Attorney, the managing director of the Development Company acts within the scope of authority that the Participants will give to the managing director as their Attorney under the Enduring Power of Attorney, such acts done on behalf of the Participants will be acts of the Participants, and any tax consequences which arise from such acts will apply to the Participants (and not to the managing director or the Development Company).
- (c) The Participants will hold their Participating Interest in the Land (and all other Joint Venture Assets) on capital account.

- (d) CGT event A1 under section 104-10 will happen when a partial interest in the various Lots is transferred by Participants on partition. However, any capital gain or capital loss made under subsection 104-10(4) by a Participant from such transfers will be disregarded pursuant to section 118-42.
- (e) Participants can choose to obtain a roll-over pursuant to section 124-190 as a result of the particular Apartment Lot they will have the right to occupy being transferred to them. The consequences of choosing to obtain the roll-over are determined by section 124-10 (see paragraph 33 of this Product Ruling).
- (f) CGT event A1 under section 104-10 will happen when an Outgoing Participant under a reformulated Development ceases to have an interest in the Joint Venture and all of the Participating Interest of that Outgoing Participant is transferred to the other Participants in proportion to each of their respective Participating Interests (see paragraph 19(k) of this Product Ruling). The Outgoing Participant's capital proceeds under section 116-20 from the transfer will be their Initial Equity Contribution, as paid to the Outgoing Participant for the transfer.
- (g) CGT event A1 under section 104-10 will happen when a defaulting Participant's interest in the Joint Venture terminates and all of the Participating Interest of that Participant is transferred to a new Participant (see paragraph 19(o) of this Product Ruling). The defaulting Participant's capital proceeds under section 116-20 from the transfer will be their Initial Equity Contribution, as paid by the new Participant.
- (h) The supply of a partial interest in the various Lots by Participants under the partition will not be a taxable supply pursuant to section 9-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) on the basis that:
 - (i) Participants will not, as a consequence of their participation in the Joint Venture and on the basis of the assumption in paragraph 20(b) of this Product Ruling, be carrying on an enterprise pursuant to section 9-20 of the GST Act, and
 - (ii) Participants who are otherwise registered or required to be registered for GST will not, for the purpose of paragraph 9-5(b) of the GST Act, be supplying a partial interest in the various Lots 'in the course or furtherance of an enterprise' they carry on.

- (i) Provided the scheme ruled on is entered into and carried out as described in this Product Ruling, the anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) will not apply to the Participant in respect of their entry into a Joint Venture.

Scheme

16. The scheme that is the subject of this Product Ruling is identified and described in the following:

- application for a Product Ruling as constituted by documents and information received on 21 February 2018, 8 March 2018, 21 May 2018, 20 June 2018 and 1 February 2019
- draft Joint Venture Deed between the Participants and the Development Company, received on 1 February 2019
- draft Enduring Power of Attorney between the Participants and the managing director of the Development Company, received on 21 February 2018, and
- draft Consultancy Agreement between the Participants, the Development Company and urBau, received on 21 May 2018.

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

17. 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 a Participant, will be a party to, which are a part of the scheme. Unless otherwise defined, capitalised terms in this Product Ruling take their meaning as per the draft Joint Venture Deed referred to in paragraph 16 of this Product Ruling.

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

Overview

19. Following is a summary of the scheme:

- (a) By and upon their respective execution of the Joint Venture Deed each of the Participants, as Joint Venturers, will establish a Joint Venture to facilitate a

Project involving the Development with the primary intent of providing an individual Lot on the Land to each Participant upon completion of the Development, as desired by them, by way of strata subdivision, partition and transfer in accordance with the terms of the Joint Venture Deed.

- (b) As provided for in the Joint Venture Deed, the Participants will agree and covenant that:
 - (i) their relationship shall be one of unincorporated joint venturers, and that nothing in the Joint Venture Deed shall be intended to constitute or create a commercial partnership, and
 - (ii) the liability of the Participants with respect to the Joint Venture will be several (and not joint and several) from the date of the Joint Venture Deed until the date the Land is transferred to the Participants; and joint and several from the date the Land is transferred to the Participants until the date the individual Lots have been partitioned and transferred to the Participants.
- (c) The Development Company (and/or its nominee) will either be the owner of the Land or, at the request of the Participants, the purchaser of the Land pursuant to a Contract of Sale. Where the Development Company (and/or its nominee):
 - (i) is the owner of the Land as at the date of the Joint Venture Deed, it will make a declaration effective from that same date that it holds the Land on trust for the Participants until such time as it is required to transfer the Land to the Participants as tenants in common
 - (ii) is the purchaser of the Land under a Contract of Sale as at the date of the Joint Venture Deed, it will settle the purchase of the Land as bare trustee for the Participants and hold it for them until such time as it is required to transfer the Land to the Participants as tenants in common, and
 - (iii) is the purchaser of the Land under a Contract of Sale as at the date of the Joint Venture Deed and has negotiated an extended settlement such that settlement will take place following completion of construction, it will nominate the Participants as tenants in common as the purchaser under the Contract of Sale.

In each of the above scenarios the Participants will be the registered proprietors of the Land prior to subdivision and partition.

- (d) The Participant will appoint the Development Company, an entity with expertise in property development, to manage and undertake the Development in accordance with both the plans and specifications contained in the Joint Venture Deed and the conditions of the Planning Permits. In so doing, the Participants will acknowledge that complete control and management of the Development vests in the Development Company.
- (e) Each Participant will execute an Enduring Power of Attorney appointing the Development Company's managing director as its Attorney and authorising the managing director, as Attorney, to conduct all and any financial matters relating to the Development and all matters contemplated by the Joint Venture Deed, including the making of all decisions and the conducting of all activities necessary to carry out the Development.
- (f) Pursuant to the Consultancy Agreement, the Participants and the Development Company will appoint urBau as a 'Baugruppen Consultant' for the Development. The services to be provided by urBau to the Joint Venture will be set out in the Consultancy Agreement.
- (g) Each Participant will have a respective Participating Interest in the Joint Venture which is set out in the Joint Venture Deed and proportionate to their interest as tenant in common with the other Participants in the Joint Venture Assets.
- (h) Each Participant's liability for Project Costs incurred and payable in relation to the Joint Venture is capped at the amount of their Equity Contribution (discussed in subparagraph 19(i) of this Ruling). Such Project Costs will be paid for by the Development Company, and advanced to the Development Company for that purpose by both the Participants via the payment of their Equity Contributions and by any Borrowings procured by the Development Company from the Financier in accordance with the terms set out in the Joint Venture Deed.
- (ha) Any Borrowings provided by the Financier to the Development Company is conditional upon each and every Participant:
 - (i) entering into a home loan facility with the Financier to the extent required for the purpose of enabling them to pay the balance of their Equity Contribution, or

- (ii) where a Participant is able to satisfy payment of the balance of their Equity Contribution from their own cash reserves, depositing that balance into an account with the Financier.
- (i) Participants will be required to pay their Equity Contribution to the Development Company, the value of which will be set out in the Joint Venture Deed and comprise:
 - (i) an Initial Equity Contribution of 10 per cent of a Participant's Equity Contribution (or such lesser amount as the Development Company may accept), payable on or about the date of entering into the Joint Venture Deed, and
 - (ii) the balance of a Participant's Equity Contribution, payable at the time the Land is transferred to the Participant.

The proportionate value of each Participant's Equity Contribution will be equivalent to the proportion that their Participating Interest bears to all Participating Interests in the Joint Venture (their Participating Interest Proportion).

- (j) In the event that the total of all Participants' Contributions exceed the total Project Costs, the Development Company may elect to reduce each Participant's Equity Contribution proportionately to their Participating Interest.
- (k) The Participants and the Development Company will acknowledge that the number of Participants in the Joint Venture as at the commencement date will be as a result of the Development Company's preliminary feasibility for the Development resulting in the same number of Lots. In the event, however, that planning approval is only granted for a lesser number of Lots than that applied for, and the Development Company decides to proceed with the reformulated Development, the Development Company will advise the Participants (the Outgoing Participants) that they will no longer receive a Lot as part of the Development. Under such circumstances, an Outgoing Participant:
 - (i) will immediately cease to have an interest in the Joint Venture and, to that end, will have their Participating Interest transferred to the other Participants in proportion to each of their Participating Interest
 - (ii) must have their Initial Equity Contribution refunded in full within 21 days of receipt of this notice (as consideration for the transfer of their Participating Interest), and

- (iii) must be released from any home loan facility entered into with the Financier.
- (l) If planning approval for the Development isn't obtained (with a permissible variance) by the relevant sunset date stipulated in the Joint Venture Deed and the Development Company, having assessed the commercial viability of continuing the Project as contemplated under the Joint Venture Deed, gives notice to the Participants that it will not proceed with the Development, then:
 - (i) the Joint Venture will end
 - (ii) the Land will be sold by the Development Company, and
 - (iii) to the extent that there are any surplus funds from the sale after application against certain costs and expenses incurred by the Joint Venture to that point, each Participant's Initial Equity Contribution will be refunded in proportion to their Participating Interest Proportion.
- (m) Under the terms of the Joint Venture Deed:
 - (i) the Participants will acknowledge and agree that they will each have the exclusive right to occupy a particular Lot (as identified in the Joint Venture Deed) as soon as practicable after partition of the Land, and
 - (ii) as soon as possible after registration of the plan of strata subdivision for the Development, the Development Company will partition the Participants' Participating Interests in the Joint Venture Assets so that their legal and equitable interests in the Joint Venture Assets with effect from Completion (that is, from the execution, completion and stamping of the Transfers of Land to enable the Lots to be transferred to the Participants) are held such that each Lot identified in the Joint Venture Deed will be owned absolutely by the relevant Participant.
- (n) Each Participant will be liable, at its cost, for the payment of the stamp duty assessed on the transfer of land for its Lot.
- (o) Upon the occurrence of an Event of Default by the Participant, the Development Company will be required to give written notice to the defaulting Participant requesting them to remedy the default (to the extent possible) within 14 days of service of default

notice. Where the default is not remedied by the defaulting Participant by that time:

- (i) the defaulting Participant's interest in the Joint Venture will terminate with immediate effect and, to that end, will have their Participating Interest transferred to a new Participant for consideration equal to the defaulting Participant's Initial Equity Contribution, and
 - (ii) the defaulting Participant will have no other rights under the Joint Venture Deed.
- (p) The defaulting Participant will forfeit the consideration payable by the new Participant to the defaulting Participant in relation to the disposal of its Participating Interest to the Development Company (and the consideration will be paid directly to the Development Company). The new Participant, will then only be responsible for the remainder of the Equity Contribution, being the difference between the Equity Contribution and the amount paid by the new Participant on entry into the Joint Venture.
- (q) The Joint Venture shall continue until the earlier of the Joint Venture Vesting Time, as defined in the Joint Venture Deed, and the date the Joint Venture is terminated in accordance with the terms of the Joint Venture Deed.

Assumptions

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

- (a) The Participant is an Australian resident for taxation purposes.
- (b) An Apartment Lot transferred to a Participant under the terms of the Joint Venture Deed will be the main residence of the Participant (either alone or together with another individual as co-owner), as intended at the time of entering into the Joint Venture Deed.
- (c) An Apartment Lot transferred to a Participant under the terms of the Joint Venture Deed will be a 'stratum unit' as defined in subsection 124-190(3).
- (d) The Participants will not elect to form a GST joint venture for the purpose of Division 51 of the GST Act.
- (e) The scheme will be executed in the manner described in the Scheme section of this Product Ruling and the documents referred to in paragraph 16 of this Product Ruling.

- (f) All dealings between the Participants, the Development Company and urBau will be at arm's length.

Commissioner of Taxation

22 August 2018

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.***

Participants constitute an unincorporated joint venture

21. To determine whether a particular arrangement is a joint venture or partnership, consideration must be given to the true character of the relationship between the parties to the arrangement by reference to all the facts and circumstances of the arrangement.

22. The distinction between a joint venture and a partnership was observed in the decision of the High Court of Australia in *United Dominions Corporation Ltd v. Brian Pty Ltd* (1985) 60 ALR 741; (1985) 157 CLR 1, where Dawson J stated:

Perhaps, in this country, the important distinction between a partnership and a joint venture is, for practical purposes, the distinction between an association of persons who engage in a common undertaking for profit and an association of those who do so in order to generate a product to be shared among the participants. Enterprises of the latter kind are common enough in the exploration for and exploitation of mineral resources and the feature which is most likely to distinguish them from partnerships is the sharing of product rather than profit.

23. The distinction between a joint venture and a partnership was also observed in the decision of the Supreme Court of NSW in *A.R.M. Constructions Pty Ltd and Others v. Federal Commissioner of Taxation* (1987) 87 ATC 4790; (1987) 19 ATR 337 (*A.R.M. Constructions*), where Yeldham J stated:

... I am clearly of the opinion that ... there was merely a joint venture between the appellants to construct buildings, in contrast to an agreement to make profits for sharing, and it was the intention of the parties at all material times to retain the units and town houses so erected, except to the extent that sales might be necessary to repay moneys borrowed from lending institutions ... In my view the parties associated together to produce a product, a building of units capable of partition between them, so that each could thereafter go their own respective ways. Their expressed intention so to do was duly manifested in what they thereafter did and achieved, and their agreement constituted in law something in the nature of a joint venture to construct the building, in contrast to an agreement to make profits for sharing, *inter se*.

24. As per the mutual assent and intention of all the Participants who have a Participating Interest in the Joint Venture Assets, their relationship will constitute an unincorporated joint venture, and not a partnership, primarily on the basis that they will be an association of persons engaging in a specific project (the Development) in order to generate a product (a building of Lots capable of partition between them) to be shared among them as they each thereafter go their separate ways (as opposed to engaging in a

continuing business or some other form of common undertaking to derive income or profits for sharing).

Application of CGT provisions to the Participants

Participating Interest in Joint Venture Assets held on capital account

25. Where, on an assessment of all the facts, an asset held or investment made is a part of a normal operation in the course of carrying on a business; or an asset held or investment made is for the purposes of making a profit or gain either outside the normal course of a business or in the carrying out of an isolated or one-off business operation or commercial transaction¹, that asset or investment will generally be on revenue account.

26. Pursuant to the terms of the Joint Venture Deed, there is no intention for a Participant to derive a profit or gain from the disposal of their Participating Interest in the Land (and other Joint Venture Assets). Further, and despite the fact that a Participant's Participating Interest will be transferred as a preliminary step in obtaining their particular Apartment Lot, the character of that Participating Interest may be taken from the Participant's original intention in relation to the Apartment Lot (see *A.R.M. Constructions*), as objectively determined on all the relevant facts. On the basis of a Participant's clear intention to retain their Apartment Lot as their main residence, as assumed at paragraph 20(b) of this Product Ruling, their Partnership Interest, like their Apartment Lot, will be on capital account (in contrast to the circumstances noted in paragraph 25 above).

Strata subdivision of Apartment Lots

27. Pursuant to section 112-25, where an original asset is split into two or more new assets and you are the beneficial owner of the original asset and each new asset, the splitting is not a CGT event (subsection 112-25(2)), and each element of the cost base and reduced cost base of the original asset (worked out at the time of the split) is apportioned in a reasonable way and included in the corresponding element of the cost base and reduced cost base of each new asset (subsection 112-25(3)).

28. The property consisting of the Lots developed on the Land under the Project (that is, the original asset), beneficially owned by the Participants pursuant to their respective Participating Interests will be split via a strata subdivision into more Lots (i.e. new assets), each of which will continue to be beneficially owned by each Participant in the same proportions.

¹ The treatment of isolated profits is discussed in detail in Taxation Ruling TR 92/3 *Income tax: whether profits on isolated transactions are income*.

29. As the subdivision will not result in the change of beneficial owner of the original and each new asset, it will not give rise to a CGT event in accordance with subsection 112-25(2).

Partition of Apartment Lots

30. The disposal of a partial interest in the various Lots by Participants (via their Attorney) by way of transfer on partition will give rise to a CGT event A1 under section 104-10 at the time of disposal. A capital gain from this CGT event may be made if the capital proceeds from the disposal of the asset are more than the asset's cost base or, alternatively, a capital loss from this CGT event may be made if those capital proceeds are less than the asset's reduced cost base (subsection 104-10(4)).

31. However, any capital gain or capital loss made by a Participant under those circumstances will be disregarded in accordance with section 118-42 as:

- (a) they will each own the Land (as tenants in common) on which there will be a building (as developed under the Project)
- (b) via their Attorney, they will subdivide the building into stratum units, as defined in subsection 124-190(3)² (as assumed at paragraph 20(c) of this Product Ruling), and
- (c) via their Attorney, they will transfer each unit (Lot) to the Participant who will have an exclusive right to occupy it as at the commencement of the Joint Venture (and therefore 'just before the subdivision').

32. Subsection 124-190(1) may provide roll-over relief, at the option of the Participants, in relation to the transfer to them of partial interests in the particular Apartment Lot they will have the right to occupy, as:

- (a) they will each own property (i.e. the holding of a tenancy in common interest in the land and building developed under the Project) that will give them a right to occupy a unit (Apartment Lot) in that building
- (b) they, being a group of Participants who own the building as tenants in common, will subdivide it into stratum units, as defined in subsection 124-190(3) (as assumed at paragraph 20(c) of this Product Ruling), and

² The term 'stratum unit' is defined in subsection 124-190(3) as a lot or unit, however described in an Australian or foreign law relating to strata title or similar title, and any accompanying common property.

- (c) following the subdivision, they will have the stratum unit (Apartment Lot) that corresponds to the Apartment Lot they had the right to occupy just before the subdivision transferred to them by the other Participants (as owners of the building).

33. The choice to obtain roll-over relief under subsection 124-190(1) must be made by the time the Participant lodges their income tax return for the income year in which the transfer occurs, or within any further period allowed by the Commissioner (subsection 103-25(1)). The consequences of choosing to obtain the roll-over are set out in section 124-10, and includes:

- (a) any capital gain or capital loss the Participant makes from the disposal of their tenancy in common interest (the 'original asset') is disregarded: subsection 124-10(2); and
- (b) the first element of that original asset's cost base and reduced cost base are carried over and included in the first element of the cost base and reduced cost base of the Apartment Lot transferred to the Participant (the 'new asset'): subsection 124-10(3).

Transfer of Participating Interest by Outgoing Participant under reformulated Development

34. The transfer of the Participating Interest of an Outgoing Participant under a reformulated Development to each of the other Participants (in proportion to their respective Participating Interests) will give rise to a CGT event A1 under section 104-10 in respect of the Outgoing Participant at the time of the transfer. A capital gain from this CGT event may be made if the capital proceeds from the transfer of the Participating Interest are more than the asset's cost base or, alternatively, a capital loss from this CGT event may be made if those capital proceeds are less than the asset's reduced cost base (subsection 104-10(4)).

35. Pursuant to the general rules about capital proceeds under subsection 116-20(1), the Outgoing Participant's capital proceeds from the transfer of their Participating Interest will be their Initial Equity Contribution, being the money the Outgoing Participant receives, or is entitled to receive, proportionately from the other Participants in respect of the transfer. None of the modifications to the general rules about capital proceeds (as set out in Division 116) apply in relation to the Outgoing Participant's transfer of their Participating Interest.

Transfer of Participating Interest by defaulting Participant

36. The transfer of the Participating Interest of a defaulting Participant to a new Participant will give rise to a CGT event A1 under

section 104-10 in respect of the defaulting Participant at the time of the transfer. A capital gain from this CGT event may be made if the capital proceeds from the transfer of the Participating Interest are more than the asset's cost base or, alternatively, a capital loss from this CGT event may be made if those capital proceeds are less than the asset's reduced cost base (subsection 104-10(4)).

37. Pursuant to the general rules about capital proceeds under subsection 116-20(1), the defaulting Participant's capital proceeds from the transfer of their Participating Interest will be their Initial Equity Contribution, being the money the defaulting Participant receives, or is entitled to receive, from the new Participant in respect of the transfer. None of the modifications to the general rules about capital proceeds (as set out in Division 116) apply in relation to the defaulting Participant's transfer of their Participating Interest.

Application of GST provisions to the Participants

38. Subsection 7-1(1) of the GST Act provides that GST is payable on taxable supplies. A taxable supply is made if, among other requirements, the supply is made in the course or furtherance of an enterprise that the supplier carries on, and the supplier is registered or required to be registered (paragraphs 9-5(b) and (d) of the GST Act).

39. An 'enterprise' is defined in subsection 9-20(1) of the GST Act to include an activity, or series of activities, done in the form of a business, an adventure or concern in the nature of trade or on a regular or continuous basis in the form of a lease, licence or other grant of an interest in property. Pursuant to paragraph 9-20(2)(c) of the GST Act, an enterprise does not, however, include an activity, or series of activities, done by an individual without a reasonable expectation of profit or gain.

40. As the Participants will not, as a consequence of their participation in the Joint Venture and on the basis of the assumption in paragraph 20(b) of this Product Ruling, expect to make a profit or gain from that participation, they will not be carrying on an enterprise pursuant to paragraph 9-20(2)(c) of the GST Act. The supply by the Participant (via their Attorney) of a partial interest held by them in various Lots under the partition, other than their particular Apartment Lot being retained, will therefore not be a taxable supply under section 9-5 of the GST Act.

41. The supply of a partial interest in various Lots under the partition by Participants otherwise carrying on an enterprise and registered or required to be registered for GST will not be connected to their enterprise or done for the purpose or object of furthering their enterprise, or achieving its goals, and therefore won't (for the purposes of paragraph 9-5(b) of the GST Act) be 'in the course or furtherance of an enterprise' they carry on.

Part IVA – anti-avoidance

42. Provided that the scheme ruled on is entered into and carried out as described in this Ruling, it is accepted that the scheme is an ordinary commercial transaction and Part IVA of the ITAA 1936 will not apply.

Appendix 2 – Detailed contents list

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

	Paragraph
What this Ruling is about	1
Class of entities	4
<i>Superannuation Industry (Supervision) Act 1993</i>	7
Qualifications	8
Date of effect	10
Changes in the law	12
Note to promoters and advisers	14
Ruling	15
Scheme	16
Overview	19
Assumptions	20
Appendix 1 – Explanation	21
Participants constitute an unincorporated joint venture	21
Application of CGT provisions to the Participants	25
<i>Participating Interest in Joint Venture Assets held on capital account</i>	25
<i>Strata subdivision of Apartment Lots</i>	27
<i>Partition of Apartment Lots</i>	30
<i>Transfer of Participating Interest by Outgoing Participant under reformulated Development</i>	34
<i>Transfer of Participating Interest by defaulting Participant</i>	36
Application of GST provisions to the Participants	38
Part IVA – anti-avoidance	42
Appendix 2 – Detailed contents list	43

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 92/3

Legislative references:

- ITAA 1936
- ITAA 1936 Pt IVA
- ITAA 1997
- ITAA 1997 103-25(1)
- ITAA 1997 104-10
- ITAA 1997 104-10(4)
- ITAA 1997 112-25
- ITAA 1997 112-25(2)
- ITAA 1997 112-25(3)
- ITAA 1997 Div 116
- ITAA 1997 116-20
- ITAA 1997 116-20(1)
- ITAA 1997 118-42
- ITAA 1997 124-10
- ITAA 1997 124-10(2)
- ITAA 1997 124-10(3)
- ITAA 1997 124-190
- ITAA 1997 124-190(1)
- ITAA 1997 124-190(3)
- ITAA 1997 Div 230
- ITAA 1997 995-1
- ANTS(GST)A 1999
- ANTS(GST)A 1999 7-1(1)
- ANTS(GST)A 1999 9-5
- ANTS(GST)A 1999 9-5(b)
- ANTS(GST)A 1999 9-5(d)
- ANTS(GST)A 1999 9-20
- ANTS(GST)A 1999 9-20(1)
- ANTS(GST)A 1999 9-20(2)(c)
- ANTS(GST)A 1999 Div 51
- SISA 1993
- TAA 1953

Case references:

- United Dominions Corporation Ltd v. Brian Pty Ltd (1985) 60 ALR 741; (1985) 157 CLR 1
- A.R.M. Constructions Pty Ltd and Others v. Federal Commissioner of Taxation (1987) 87 ATC 4790; (1987) 19 ATR 337

ATO references

NO: 1-DZ0A408

ISSN: 2205-6114

BSL: PGH

ATOlaw topic: Income tax ~~ Financial arrangements ~~ Other

© AUSTRALIAN TAXATION OFFICE FOR THE COMMONWEALTH OF AUSTRALIA

You are free to copy, adapt, modify, transmit and distribute this material as you wish (but not in any way that suggests the ATO or the Commonwealth endorses you or any of your services or products).