


PR 2021/14 - 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 2021/14 - Tax consequences for a Participant in an Urbau joint venture project*



Status: **legally binding**

Product Ruling

Tax consequences for a Participant in an Urbau joint venture project

📌 Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Table of Contents	Paragraph
What this Ruling is about	1
Date of effect	9
Ruling	14
Scheme	15
Appendix – Explanation	20

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.

Status: **legally binding**

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 which takes part in the scheme to which this Ruling relates. All legislative references in this Product Ruling are to the *Income Tax Assessment Act 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 Lots¹, 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).²

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 goods and services tax (GST) consequences for Participants, other than to the extent addressed in paragraphs 14(h) and 37 to 40 of this Product Ruling
- the tax consequences to arise in the event the Development does not proceed under the circumstances set out in paragraph 18(n) 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 Urbau (as the Joint Venture Manager) 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
- a Participant's liability to stamp duty as a consequence of their participation in the Joint Venture, 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

¹ 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.

² Unless otherwise defined, capitalised terms in this Product Ruling take their meaning as per the draft Joint Venture Deed and/or the draft Development Management Agreement referred to in paragraph 15 of this Product Ruling.

Status: **legally binding**

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 15 to 19 of this Product Ruling on or after the date this Product Ruling is made and on or before 30 June 2024, 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 tax purposes
- that are not individuals
- who enter into the scheme described in paragraphs 15 to 19 of this Product Ruling before the date of this Product Ruling or after 30 June 2024
- 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.

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 15 to 19 of this Product 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
- may be withdrawn or modified.

Date of effect

9. This Product Ruling applies from 17 November 2021. It applies only to the specified class of entities that enter into the scheme from 17 November 2021 until 30 June 2024, 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.

Status: **legally binding**

10. 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

11. 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.

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

Note to promoters and advisers

13. 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

14. Subject to paragraph 3 of this Product Ruling and the assumptions in paragraph 19 of this Product Ruling:

- (a) As intended pursuant to the terms of the Joint Venture Deed, the relationship of Participants that 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 Joint Venture Manager 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 Joint Venture Manager).
- (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

Status: **legally binding**

- roll-over are determined by section 124-10 (see paragraph 32 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 18(m) 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 18(q) 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 19(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

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

- application for a Product Ruling as constituted by documents and information received on 22 April 2021, 28 September 2021 and 20 October 2021
- draft Joint Venture Deed between the Participants and the Joint Venture Manager, received on 20 October 2021
- draft Development Management Agreement between the Joint Venture Manager and the Development Manager, received on 28 September 2021
- draft Enduring Power of Attorney between the Participants and the managing director of the Joint Venture Manager, received on 20 October 2021, and

Status: **legally binding**

- draft Consultancy Agreement between the Participants, the Joint Venture Manager and Urbau, received on 20 October 2021.

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

16. For the purposes of describing the scheme to which this Product Ruling applies, and aside from any relevant Contract of Sale to be executed between the vendor and the Participants in respect of the Land, 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.

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

Overview

18. The 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 individual Lots have been partitioned and transferred to the Participants.
- (c) The Joint Venture Manager (or a related entity to the Joint Venture Manager) will either own the Land as at the date of the Joint Venture Deed or be named as the purchaser of the Land pursuant to a Contract of Sale as at the date of the Joint Venture Deed. Where the Joint Venture Manager (or a related entity to the Joint Venture Manager) is the
 - (i) owner of the Land as at the date of the Joint Venture Deed, it will transfer the Land to the Participants as tenants in common in their Participating Interest Proportion as from the date of the Joint Venture Deed, and
 - (ii) purchaser of the Land under a Contract of Sale as at the date of the Joint Venture Deed, it will nominate the Participants to complete the purchase of the Land under the Contract of Sale as tenants in common in accordance with their Participating Interest Proportion.

In each of the prior scenarios, the Participants (as tenants in common) will be the registered proprietor of the Land prior to Development, subdivision and partition.

Status: **legally binding**

- (d) Each Participant will execute an Enduring Power of Attorney appointing the Joint Venture Manager'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.
- (e) The Participants will acknowledge that complete control and management of the Joint Venture remains with the Joint Venture Manager at all times.
- (f) The Joint Venture Manager will enter into a Development Management Agreement appointing the Development Manager, an entity with expertise in property development and management, to manage and undertake the Development in accordance with both the plans and specifications contained in the Joint Venture Deed and the conditions of any Planning Permit.
- (g) The Development Management Agreement provides that the
 - (i) Development Manager³ will carry out the Development Management Activities and provide the Services in accordance with the Concept Plan and the Project Budget, and incur the Project Costs
 - (ii) Joint Venture Manager will grant the Development Management Rights and pay the Development Management Fees to the Development Manager, and
 - (iii) Development Manager will procure and enter into the necessary finance facilities for the Project.
- (h) Pursuant to the Consultancy Agreement, the Participants and the Joint Venture Manager 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.
- (i) 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.
- (j) Project Costs will be initially incurred by the Development Manager (pursuant to the Development Management Agreement), reimbursed to the Development Manager by the Joint Venture Manager, and advanced to the Joint Venture Manager for that purpose by the Participants via the payment of their Equity Contributions (discussed in subparagraph 18(k) of this Product Ruling).
- (k) Participants will be required to pay their Equity Contribution to the Joint Venture Manager, 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 greater or lesser amount as the Joint Venture Manager may require), payable on the earlier of 30 days from the date of the Joint Venture Deed and the date settlement is due under the Contract of Sale (where the Land is not already owned by the

³ The Development Manager is referred to as the 'Developer' in the Development Management Agreement.

Status: **legally binding**

Joint Venture Manager, or its related entity, as at the date of the Joint Venture Deed), and

- (ii) the balance of a Participant's Equity Contribution, payable at the time the Lot 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).

- (l) The Participant's Equity Contribution
 - (i) will be increased proportionately to each Participant's Participating Interest where the Joint Venture Manager considers that the Project Costs have, or will, increase beyond original projections, or
 - (ii) may be reduced in the event that the total of all Participants' Contributions exceed the total Project Costs and the Joint Venture Manager elects to reduce each Participant's Equity Contribution proportionately to their Participating Interest.
- (m) The Participants and the Joint Venture Manager will acknowledge that the number of Participants in the Joint Venture as at the commencement date will be as a result of the Development Manager'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 Joint Venture Manager decides to proceed with the reformulated Development, the Joint Venture Manager 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, and
 - (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).
- (n) If planning approval for the Development is not obtained (with a permissible variance) by the relevant sunset date stipulated in the Joint Venture Deed and the Development Manager, 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 Joint Venture Manager, 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.

Status: **legally binding**

- (o) Under the terms of the Joint Venture Deed
 - (i) the Participants will acknowledge and agree that they will each have the exclusive right to a particular Lot (as identified in the Joint Venture Deed), and
 - (ii) as soon as possible after registration of the plan of strata subdivision for the Development, the Development Manager 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.
- (p) Each Participant will be liable, at its cost, for the payment of the stamp duty assessed on the transfer of land for its Lot.
- (q) Upon the occurrence of an Event of Default by the Participant, the Joint Venture Manager 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.
- (r) 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 Joint Venture Manager (and the consideration will be paid directly to the Joint Venture Manager). 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.
- (s) 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

19. This Product Ruling is made on the basis of the following necessary assumptions:
- (a) The Participant is an Australian resident for tax 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.

Status: **legally binding**

- (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 15 of this Product Ruling.
- (f) All dealings between the Participants, the Joint Venture Manager, the Development Manager and Urbau will be at arm's length.

Commissioner of Taxation

17 November 2021

 Status: **not legally binding**

Appendix – 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.*

Table of Contents	Paragraph
Participants constitute an unincorporated joint venture	20
Application of capital gains tax provisions to the Participants	24
<i>Participating Interest in Joint Venture Assets held on capital account</i>	24
<i>Strata subdivision of Apartment Lots</i>	26
<i>Partition of Apartment Lots</i>	29
<i>Transfer of Participating Interest by Outgoing Participant under reformulated Development</i>	33
<i>Transfer of Participating Interest by defaulting Participant</i>	35
<i>Application of goods and services tax provisions to the Participants</i>	37

Participants constitute an unincorporated joint venture

20. 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.

21. 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) HCA 49, 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.

22. The distinction between a joint venture and a partnership was also observed in the decision of the Supreme Court of New South Wales in *A.R.M. Constructions Pty. Limited and Ors v Federal Commissioner of Taxation* (1987) 87 ATC 4790 (*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.

Status: **not legally binding**

23. 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 capital gains tax provisions to the Participants

Participating Interest in Joint Venture Assets held on capital account

24. 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 transaction⁴, that asset or investment will generally be on revenue account.

25. 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 19(b) of this Product Ruling, their Participating Interest, like their Apartment Lot, will be on capital account (in contrast to the circumstances noted in paragraph 24 of this Product Ruling).

Strata subdivision of Apartment Lots

26. 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)).

27. 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 (that is, new assets), each of which will continue to be beneficially owned by each Participant in the same proportions.

28. 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).

⁴ The treatment of isolated profits is discussed in detail in Taxation Ruling TR 92/3 *Income tax: whether profits on isolated transactions are income*.

Status: **not legally binding**

Partition of Apartment Lots

29. 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)).

30. 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)⁵ (as assumed at paragraph 19(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').

31. 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 (that is, 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 19(c) of this Product Ruling), and
- (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).

32. 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 include:

- (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)).

⁵ 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.

Status: **not legally binding**

Transfer of Participating Interest by Outgoing Participant under reformulated Development

33. 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)).

34. 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

35. 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)).

36. 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 goods and services tax provisions to the Participants

37. 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).

38. 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.

39. As the Participants will not, as a consequence of their participation in the Joint Venture and on the basis of the assumption in paragraph 19(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

Status: **not legally binding**

partition, other than their particular Apartment Lot being retained, will therefore not be a taxable supply under section 9-5 of the GST Act.

40. 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 will not (for the purposes of paragraph 9-5(b) of the GST Act) be 'in the course or furtherance of an enterprise' they carry on.

Status: **not legally binding**

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 92/3

Legislative references:

- ITAA 1936 Pt IVA
- 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(1)
- 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
- TAA 1953

Case references:

- A.R.M. Constructions Pty. Limited and Ors v Federal Commissioner of Taxation (1987) 87 ATC 4790; (1987) 19 ATR 337
- United Dominions Corporation Ltd v Brian Pty Ltd (1985) HCA 49; (1985) 157 CLR 1; 59 ALJR 676; 60 ALR 741

ATO references

NO: 1-P6TLCOW
 ISSN: 2205-6114
 BSL: PW
 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).