



PR 1999/104 - Income Tax: SellTheHouse.net Franchise Project

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Product Ruling

Income tax: SellTheHouse.net Franchise Project

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Preamble

*The number, subject heading, and the **What this Product Ruling is about** (including **Tax law(s)**, **Class of persons** and **Qualifications** sections), **Date of effect**, **Withdrawal**, **Arrangement** and **Ruling** parts of this document are a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**. Product Ruling PR 1999/95 explains Product Rulings and Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

No guarantee of commercial success

The Australian Taxation Office (ATO) **does not** sanction or guarantee this product as an investment. 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 investors must form their own view about the commercial and financial viability of the product. This will involve a consideration of important issues such as whether projected returns are realistic, the 'track record' of the management, the level of fees in comparison to similar products, how the investment fits an existing portfolio, etc. We recommend a financial (or other) adviser be consulted for such information.

This Product Ruling provides certainty for potential investors by confirming that the tax benefits set out below in the **Ruling** part of this document are available, **provided that** the arrangement is carried out in accordance with the information we have been given, and have described below in the **Arrangement** part of this document.

If the arrangement is not carried out as described below, investors lose the protection of this Product Ruling. Potential investors may wish to seek assurances from the promoter that the arrangement will be carried out as described in this Product Ruling.

Potential investors should be aware that the ATO will be undertaking review activities in future years to confirm the arrangement has been implemented as described below and to ensure that participants in the arrangement include in their income tax returns income derived in those future years.

Terms of use of this Product Ruling

This Product Ruling has been given on the basis that the person(s) who applied for the 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 Ruling.

Potential investors may wish to refer to the ATO's Internet site at <http://www.ato.gov.au> or contact the ATO directly to confirm the currency of this Product Ruling or any other Product Ruling that the ATO has issued.

What this Product Ruling is about

1. This Ruling sets out the Commissioner's opinion on the way in which the 'tax law(s)' identified below apply to the defined class of persons, who take part in the SellTheHouse.net Franchise arrangement to which this Ruling relates. In this Ruling this arrangement is sometimes referred to as the SellTheHouse.net Project, or just simply as 'the Project'.

Tax law(s)

2. The tax law(s) dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* ('ITAA1997');
- section 8-1 (ITAA 1997);
- Part 3-1 (ITAA 1997);
- section 82KL of the *Income Tax Assessment Act 1936* ('ITAA 1936');
- section 82KZM (ITAA 1936); and
- Part IVA (ITAA 1936).

3. This Ruling does not deal with the consequences or effects of the Goods and Services Tax or any associated 'A New Tax System' legislative reforms, including the proposed changes announced as part of the New Business Tax System or their effect on the various Income Tax Acts (including the provisions set out above).

4. On 21 September 1999, the Government announced a number of changes to the tax system as part of the New Business Tax System. A number of those changes could affect the tax laws dealt with in this Ruling. On 11 November 1999 the Government announced further changes, some of which could also affect the tax laws dealt with in this Ruling, especially those to do with 'tax shelters'. Some of those changes apply from the dates of announcements and others are proposed to apply from nominated dates in the future.

5. This Ruling does not deal with the announced changes. We cannot rule on those changes until the relevant legislation is enacted.

Class of persons

6. The class of persons to whom this Ruling applies is those who enter into the arrangement described below on or after the date this Ruling is made. They will have a purpose of staying in the arrangement until it is completed (i.e., being a party to the relevant

agreements until their term expires) and deriving assessable income from this involvement as set out in the description of the arrangement. In this Ruling these persons are referred to as 'Franchisees'.

7. The class of persons to whom this Ruling applies does not include persons who intend to terminate their involvement in the arrangement prior to its completion, or who otherwise do not intend to derive assessable income from it.

Qualifications

8. If the arrangement described in the Ruling is materially different from the arrangement that is actually carried out:

- the Ruling has no binding effect on the Commissioner, as the arrangement entered into is not the arrangement ruled upon; and
- the Ruling will be withdrawn or modified.

Note: a material difference may arise in relation to a variation in the facts of the arrangement described in the Ruling. It may also arise in circumstances where the person otherwise included in the class of persons enters into the arrangement as described, but also enters into transactions or arrangements (including financial arrangements) that, when viewed as a whole with the arrangement described in the Ruling, will produce a different tax consequence for the arrangement. This might include, for example, where the Participant borrows to enter into the arrangement by way of limited non-recourse loan and the overall consequence might be that the arrangement is one that would have attracted the application of a tax avoidance provision.

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Date of effect

10. This Ruling applies prospectively from 15 December 1999, the date this Ruling is made. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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11. If a taxpayer has a more favourable private ruling (which is legally binding), the taxpayer can rely on the private ruling if the income year to which the private ruling relates has ended, or has commenced but not yet ended. However, if the arrangement covered by the private ruling has not begun to be carried out, and the income year to which it relates has not yet commenced, the Product Ruling applies to the taxpayer to the extent of the inconsistency only (see Taxation Determination TD 93/34).

Withdrawal

12. This Product Ruling is withdrawn and ceases to have effect after 30 June 2002. The Ruling continues to apply, in respect of the tax law(s) ruled upon, to all persons within the specified class who enter into the specified arrangement during the term of the Ruling. Thus, the Ruling continues to apply to those persons, even following its withdrawal, for arrangements entered into prior to withdrawal of the Ruling. This is subject to there being no change in the arrangement or in the persons' involvement in the arrangement.

Previous Rulings

13. There are no previous rulings in relation to the arrangement.

Arrangement

14. The arrangement that is the subject of this Ruling is described below. This description is based on the following documents. These documents, or relevant parts of them, as the case may be, form part of and are to be read with this description. The relevant documents or parts of documents incorporated into this description of the arrangement are:

- Product Ruling application dated 6 August 1999;
- SellTheHouse.net Franchise Information Memorandum;
- SellTheHouse.net Franchise Disclosure Document;
- Franchise Agreement between SellTheHouse.net Pty Ltd (as Franchisor) and the Franchisee; and
- additional correspondence received from the applicant dated 6 October 1999, 22 November 1999, and 3 December 1999.

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

15. For the purpose of describing the arrangement to which this Ruling applies, there are no other agreements, whether formal or informal, and whether or not legally enforceable, which a Franchisee, or any associate of the Franchisee, will be party to. The effect of these agreements is summarised as follows.

Overview

16. The Project is being established as a marketing program for the advertising of real estate through the Internet. Franchisees will enter into a Franchise Agreement with SellTheHouse.net Pty Ltd which will provide Franchisees with rights including:

- use of the SellTheHouse.net brand name, intellectual property and system to provide Internet advertising services to vendors of real estate within an exclusive territory;
- the provision of equipment, training, marketing and promotional materials; and
- administrative services in relation to the collection and disbursement of income earned in the franchise business.

17. The exclusive territory is identified by postcode number(s). A typical exclusive territory will contain approximately 7,000 houses; however, territory sizes range from approximately 5,000 houses to approximately 12,000 houses. The Franchise fees charged in the first year by the Franchisor are directly related to the number of houses within an exclusive territory.

18. The franchise is for a period of 10 years with an opportunity for Franchisees to extend the franchise for a further 5 years.

19. A Franchisee has the option of appointing a manager to conduct the day-to-day operations of the franchise business on behalf of the Franchisee. However, the Franchisee retains overall control of the franchised business at all times.

20. The projected returns for the franchise business indicate that, whether a manager is used or not, the Franchisee should be in net profit in the second year of the arrangement.

Franchise Agreement

21. Under the Franchise Agreement a Franchisee makes payment in relation to the grant of the franchise. The payments will be an Establishment of Franchise Fee and a Franchise Fee.

22. The Franchisor grants the Franchisee a licence and franchise to operate a SellTheHouse.net franchise business in an exclusive territory. Some terms and conditions in relation to the grant of the franchise include:

- the obligation for the Franchisee to actively promote the business in their exclusive territory;
- the obligation for the Franchisee to perform services in accordance with the SellTheHouse.net system and comply with the operating policies and standards at all times;
- the Franchisee acknowledges that the Franchisor has exclusive rights to the SellTheHouse.net name, system, operations manual and other intellectual property; and
- the Franchisee has the option to appoint a Manager to conduct the day-to-day operations of the franchise business.

23. In return for the payment of the Establishment of Franchise Fee, the Franchisor will:

- grant a franchisee an exclusive territory in which to operate a SellTheHouse.net franchise business; and
- provide such training as is necessary to enable the Franchisee to commence and conduct the franchise business.

24. In return for the payment of the Franchise Fee, the Franchisor will:

- display real estate advertisements obtained and prepared by Franchisees on the SellTheHouse.net Internet site;
- allow the Franchisee to use the SellTheHouse.net brand name, insignia symbols, trademarks, image, intellectual property and system of marketing real estate advertising;
- provide and maintain an email and Internet access account for each Franchisee;

- operate a central point for the public and forward those customers details to the Franchisee located closest to the location where the services are to be provided;
- supply the Franchisee with an operations manual;
- provide equipment (including a computer and camera) and maintain the equipment to be used by the Franchisee in the operation of the franchised business. The Franchisor will also ensure Franchisees receive such training as is necessary for them to effectively and efficiently operate the equipment;
- provide marketing and promotional materials;
- provide a business consultant to provide advice and assistance to the Franchisee in operating a small business; and
- provide administrative services in relation to the collection and disbursement of income earned in the franchise business.

25. The Franchise Agreement also provides the option to Franchisees of purchasing equipment through the Franchisor for use in the franchise business.

Appointment of Manager

26. The Franchisee has the option to appoint a Manager, from any source, to conduct the day-to-day operations of the franchised business on behalf of the Franchisee. However, the Franchisee retains overall control of the franchised business at all times.

27. A manager appointed by a Franchisee must be approved by the Franchisor and satisfy the Franchisor that they are sufficiently qualified through training and experience to conduct the operations of the franchise business.

28. The Franchisor will maintain a list of approved Managers that is likely to be comprised of Franchisees. The Franchisor or an associate (other than Franchisees) will not be a Manager; this does not include areas that the Franchisor owns and operates.

29. There is no proposed agreement in relation to the appointment of a Manager and the terms and conditions of any agreement will be determined between a Franchisee and the respective Manager.

Fees

30. In the first year of the project Franchisees are required to pay an Establishment of Franchise Fee and a Franchise Fee, the total of which varies from a minimum of \$25,000 to a maximum of \$60,000, in accordance with the size of their exclusive territory, as follows:

- an Establishment of Franchise Fee of \$4,500 (this is a fixed fee and does not vary); and
- a Franchise Fee in the range of \$20,500 to \$55,500 that varies in accordance with the number of houses in the Franchisee's exclusive territory.

31. The Franchisees are required to pay ongoing fees in relation to the franchised business in the second and subsequent years until the completion of the franchise period. The fees will be deducted from the franchised business sales revenue collected by the Franchisor on the Franchisee's behalf on a monthly in arrears basis. Those fees will be:

- a Franchisee Fee of \$9,000 or 45% of the franchise business sales revenue, whichever is greater; and
- an Advertising Levy of \$1,000 or 5% of the franchise business sales revenue, whichever is greater.

32. If the Franchisee elects to engage a Manager, a Management Fee will be payable, the amount of which will be determined between the Franchisee and the Manager. The Franchisor has indicated that a Management fee of 25% of the franchise business sales revenue would be an appropriate amount to be paid to the Manager for the services to be provided.

Finance

33. Franchisees can fund their investment in the Project themselves, borrow from an independent lender, or borrow through finance arrangements organised by the Franchisor.

34. The Franchisor has engaged the services of AustAsia Finance Brokers Pty Ltd ('AustAsia'), a company associated with the Franchisor, to broker loans from unrelated independent lenders to cover the fees payable to the Franchisor.

35. This Ruling does not apply if a Franchisee enters into a finance agreement with any of the following features:

- there are split loan features of a type referred to in Taxation Ruling TR 98/22;

- entities associated with the Project (other than AustAsia) are involved in the provision of finance for the Project;
- there are indemnity arrangements or other collateral agreements in relation to the loan designed to limit the borrower's risk;
- additional benefits will be granted to the borrowers for the purpose of section 82KL or the funding arrangements transform the Project into a 'scheme' to which Part IVA applies;
- the loan is non-arm's length;
- repayments of the principal and interest are linked to the derivation of income from the Project;
- the funds borrowed, or any part of them, will not be available for the conduct of the Project but will be transferred (by any mechanism) back to the lender or any associate; or
- lenders do not have either the capacity under the loan agreement, or a genuine intention, to take legal action against defaulting borrowers.

36. Apart from the arrangement with AustAsia there is no agreement, arrangement or understanding between any entity or party associated with the Project and any financial or other institution for the provision of any finance to the Franchisees for any purpose associated with the Project.

Ruling

37. For a Franchisee who invests in the SellTheHouse.net Franchise Project the following deductions will be available in the year incurred:

- the Franchise Fee (section 8-1 of the ITAA 1997);
- the Advertising Levy (section 8-1 of the ITAA 1997); and
- the Management Fee (section 8-1 of the ITAA 1997), where applicable.

Sections 82KZM, 82KL and Part IVA

38. For a Franchisee who invests in the Project the following provisions have application as indicated:

- the expenditure by Franchisees does not fall within the scope of section 82KZM;
- section 82KL does not apply to deny the deductions otherwise allowable; and
- the relevant provisions in Part IVA will not be applied to cancel a tax benefit obtained under a tax law dealt with in this Ruling.

Explanations

Section 8-1: Franchise Fee, Advertising Levy and Management Fee

39. It is appropriate, as a starting point, to consider whether franchise fees are deductible under paragraph 8-1(1)(a). This consideration proceeds on the following basis:

- the outgoing in question must have a sufficient connection with the operations or activities that directly gain or produce the taxpayer's assessable income;
- the outgoing is not deductible under paragraph 8-1(1)(b) if it is incurred when the business has not commenced; and
- where a taxpayer contractually commits themselves to a venture that may not turn out to be a business, there can be doubt about whether the relevant business has commenced and, hence, whether paragraph 8-1(1)(b) applies. However, that does not preclude the application of paragraph 8-1(1)(a) in determining whether the outgoing in question would have a sufficient connection with activities to produce assessable income of the taxpayer.

40. A franchise project can constitute the carrying on of a business. Where there is a business, or a future business, the gross receipts from the sale of advertising services will constitute assessable income in their own right. The generation of 'business income' from such a business, or future business, provides the backdrop against which to judge whether the outgoings in question have the requisite connection with the operations that more directly gain or produce this income.

41. Generally, a Franchisee will be carrying on a business of real estate advertising where:

- the Franchisee has an identifiable interest;

- the franchise activities are carried out on the Franchisee's behalf; and
- the weight and influence of the general indicators of a business, as used by the Courts, point to the carrying on of a business.

42. The Franchise Agreement gives Franchisees an identifiable interest in a right to an exclusive geographical location in which to exercise the right to use a system of service delivery and the right to use the associated brand name. Franchisees have a continuing interest in those rights from the time they are acquired until the end of the project.

43. Under the Franchise Agreement, Franchisees have the option to appoint a Manager to conduct the day-to-day operations of the franchise business. The Franchise agreement provides that the Franchisee maintains overall control of the franchise business at all times.

44. The general indicators of a business, as used by the Courts, are described in Taxation Ruling TR 97/11. Positive findings can be made from the arrangement's description for all the indicators. Franchisees to whom this Ruling applies intend to derive assessable income from the franchise business. This intention is related to projections in the Information Memorandum that suggest that the franchise business should return a 'before-tax' profit to the Franchisees, that is, a 'profit' in cash terms that does not depend on its calculation, on the fees in question being allowed as a deduction.

45. The Franchise Fee, Advertising Levy and Management Fee (where applicable) associated with the franchised business will relate to the gaining of income from this business and, hence, have a sufficient connection to the operations by which this income (from the sale of advertising services) is to be gained from this business. They will, thus, be deductible under the first limb of section 8-1. Further, no 'non-income producing' purpose in incurring the fee is identifiable from the arrangement. No capital component is identifiable. The tests of deductibility under paragraph 8-1(1)(a) are met. The exclusions of subsection 8-1(2) do not apply.

Expenditure of a capital nature

46. Any part of the expenditure of a Franchisee entering into the franchised business that is attributable to acquiring an asset or advantage of an enduring kind is generally capital or capital in nature and will not be an allowable deduction under section 8-1 of the ITAA 1997.

47. In this Project the Establishment of Franchise Fee is considered to be a capital expense. This fee is not deductible under section 8-1 of the ITAA 1997.

Section 82KZM: prepaid expenditure

48. Section 82KZM operates to spread over more than one income year a deduction for prepaid expenditure that would otherwise be immediately deductible, in full, under section 8-1. The section applies if certain expenditure incurred under an agreement is in return for the doing of a thing under the agreement that is not wholly done within 13 months after the day on which the expenditure is incurred.

49. Under the Franchise Agreement the initial Franchise Fee will be incurred on execution of the Agreement. This fee is charged for providing services to a Franchisee from that time until the end of that financial year only. For this Ruling's purposes, no explicit conclusion can be drawn from the arrangement's description that the fee has been inflated to result in reduced fees being payable for subsequent years. The fee is expressly stated to be for a number of specified services.

50. Thus, for the purposes of this Ruling, it is accepted that no part of the initial Franchise Fee of is for the Franchisor to do 'things' that are not to be done wholly within 13 months of the fee being incurred. On this basis, the basic precondition for the operation of section 82KZM is not satisfied and it will not apply to the expenditure by Franchisees.

Section 82KL

51. Section 82KL is a specific anti-avoidance provision that operates to deny an otherwise allowable deduction for certain expenditure incurred, but effectively recouped, by the taxpayer. Under subsection 82KL(1), a deduction for certain expenditure is disallowed where the sum of the 'additional benefit' plus the 'expected tax saving' in relation to that expenditure equals or exceeds the 'eligible relevant expenditure'.

52. 'Additional benefit' (see the definition of 'additional benefit' at subsection 82KH(1) and paragraph 82KH(1F)(b)) is, broadly speaking, a benefit received that is additional to the benefit for which the expenditure is ostensibly incurred. The 'expected tax saving' is essentially the tax saved if a deduction is allowed for the relevant expenditure.

53. Section 82KL's operation 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. It will not apply to deny the deduction otherwise allowable under section 8-1.

Part IVA: general tax avoidance provision

54. For Part IVA to apply there must be a 'scheme' (section 177A); a 'tax benefit' (section 177C); and a dominant purpose of entering into or carrying out the scheme to enable the relevant taxpayer to obtain a tax benefit in connection with the scheme (section 177D).

55. The SellTheHouse.net Franchise Project will be a 'scheme'. The Franchisees will obtain a 'tax benefit' from entering into the scheme, in the form of the tax deductions per franchise 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 enabling the relevant taxpayer to obtain this tax benefit.

56. Franchisees to whom this Ruling applies intend to stay in the scheme for its full term and derive assessable income from the sale of the advertising services. Further, there are no features of the Project, such as the payment of excessive management fees and non-recourse loan financing by any entity associated with the Project, that might suggest the Project was so 'tax driven', and so designed to produce a tax deduction of a certain magnitude, that it would attract the operation of Part IVA. No ruling is given on the application of Part IVA to financing arrangements entered into between investors and other financiers in respect of lending arrangements to invest in the Project.

Section 6-5: assessable income

57. Gross sale proceeds derived from the sale of advertising services will be assessable income of the Franchisees, under section 6-5.

Part 3-1: capital gains tax

58. The grant of the franchise by the Franchisor to the Franchisee results in the Franchisee acquiring a CGT asset. The Establishment of Franchise Fee of \$4,500 forms part of the cost base of the CGT asset. A capital gain or loss may arise on the happening of a CGT event under Part 3-1 of the ITAA 1997. The happening of a CGT event includes the transfer, disposal or loss of that asset.

59. Any capital gain will be included in the assessable income of the Franchisee in the year in which the CGT event occurs.

Conversely, any capital loss will be taken into account in the calculation of the net capital gain to be included in the Franchisee's assessable income or the net capital loss to be carried forward.

Detailed contents list

60. Below is a detailed contents list for this Product Ruling:

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Commissioner of Taxation

15 December 1999

Previous draft:

Not previously released to the public in draft form

- tax benefits under tax avoidance schemes
- tax shelters
- tax shelters project

Related Rulings/Determinations:

IT 175; IT 2001; PR 1999/95;
TR 92/1; TR 97/11; TR 97/16;
TD 93/34

Legislative references:

- ITAA1936 82KH(1)
- ITAA1936 82KH(1F)(b)
- ITAA1936 82KL
- ITAA1936 82KL(1)
- ITAA1936 82KZM
- ITAA1936 Pt IVA
- ITAA1936 177A
- ITAA1936 177C
- ITAA1936 177D
- ITAA1997 6-5
- ITAA1997 8-1
- ITAA1997 8-1(1)(a)
- ITAA1997 8-1(1)(b)
- ITAA1997 8-1(2)
- ITAA1997 Pt 3-1

Subject references:

- carrying on a business
- commencement of business
- fee expenses
- management fees expenses
- primary production
- primary production expenses
- producing assessable income
- product rulings
- public rulings
- schemes and shams
- taxation administration
- tax avoidance

Case references:

ATO references:

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