


# ***PR 2011/11 - Income tax: Questus Residential Investment Fund***

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## Product Ruling

### Income tax: Questus Residential Investment Fund

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#### **! This publication provides you with the following level of protection:**

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

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

If you rely on this ruling, 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**

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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**

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

## What this Ruling is about

1. This Product Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified in the Ruling section (below) apply to the defined class of entities, who take part in the scheme to which this Ruling relates. In this Product Ruling this scheme is referred to as the Questus Residential Investment Fund or QRIF or simply as 'the Scheme'.
2. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997* (ITAA 1997) unless otherwise indicated. Where used in this Product Ruling, the word 'associate' has the meaning given in section 318 of the *Income Tax Assessment Act 1936* (ITAA 1936). In this Product Ruling, terms defined in the Scheme agreements have been capitalised.

### Class of entities

3. This part of the Product Ruling specifies which entities can rely on the tax benefits set out in the Ruling section of this Product Ruling and which entities cannot rely on those tax benefits. In this Product Ruling, those entities that can rely on the tax benefits set out in this Ruling are referred to as Investor.
4. The class of entities who can rely on those tax benefits consists of those entities that are accepted to participate in the scheme specified below on or after the date this Product Ruling is made and which execute relevant Scheme Agreements mentioned in paragraph 19.
5. The class of entities who can rely on the tax benefits set out in the Ruling section of this Product Ruling does **not** include entities who:
  - are accepted into this Project before the date of this Ruling; or
  - participate in the scheme through offers made other than through the Product Disclosure Statement; or
  - who enter into an undisclosed arrangement with:
    - the promoter or a promoter associate, or
    - an independent adviserthat is interdependent with scheme obligations and/or scheme benefits (which may include tax benefits) in any way.

***Superannuation Industry (Supervision) Act 1993***

6. 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. The 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**

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 19 to 35.

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

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

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**Date of effect**

10. This Product Ruling applies prospectively from 4 May 2011, the date it is published. It therefore applies only to the specified class of entities that enter into the scheme from 4 May 2011 until the earlier of the term of the offer contained in the Product Disclosure Document dated 9 November 2010 or 30 June 2013. This Product Ruling provides advice on the availability of tax benefits to the specified class.

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.

## **Goods and Services Tax**

15. All fees and expenditure referred to in this Product Ruling include the Goods and Services Tax (GST) where applicable. In order for an entity (referred to in this Ruling as a Investor) to be entitled to claim input tax credits for the GST included in its expenditure, it must be registered or required to be registered for GST and hold a valid tax invoice.

# **Ruling**

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## **Application of this Ruling**

16. Subject to stated qualifications, this part of the Product Ruling deals only with eligibility for tax offset available under Division 380 for an Investor in the defined class of entities who enters into the scheme described at paragraphs 19 to 35 of this Ruling. Tax obligations and benefits in relation to the holding of an eligible property, such as interest expense, management fees etc., are outside the scope of this Product Ruling.

## **Section 995-1(1): non-entity joint venture**

17. The QRIF is a non-entity joint venture (NEJV) in accordance with the definition in subsection 995-1(1).

**Subdivision 380-A: National Rental Affordability Scheme Tax Offset*****Section 380-10: claims by a party to a NEJV***

18. For the purposes of section 380-10 each Investor is a party to a NEJV that has been issued with a certificate under the *National Rental Affordability Scheme Act 2008* (NRAS) in relation to the dwelling acquired by the investor, and where that Investor derives NRAS rent in relation to the dwelling they will be eligible for a tax offset under subsection 380-10(1).

## **Scheme**

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

- application for a Product Ruling received on 12 November 2010;
- Product Disclosure Statement of the Questus Residential Investment Fund (QRIF), dated 9 November 2010, received on 12 November 2010;
- **Application Form**, contained within the Product Disclosure Statement, received on 12 November 2010;
- Constitution for the QRIF, dated 18 March 2009, received on 12 November 2010;
- Draft **Management Agreement**, to be executed by the Questus Funds Management Limited (Manager) and each Investor, received on 12 November 2010; and
- Compliance Plan for the QRIF, dated 11 May 2009, received on 12 November 2010.

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

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

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

## Overview

22. Questus Funds Management Limited (Questus) has established the Questus Residential Investment Fund (QRIF), a registered Managed Investment Scheme under the *Corporations Act 2001* (Corporations Act).

23. The QRIF was established to enable Investors who receive rental income from an 'Approved NRAS Property' (under the NRAS) to obtain the Federal, State and Territory Government incentives provided for under the NRAS and associated consequential amendments and regulations including the NRAS Regulations.

## Participants

24. The entities involved in the scheme are:

- **Investor:** an entity that, upon completing the Application Form and being accepted into the QRIF, will acquire Approved NRAS Property.
- **Responsible Entity:** Questus will act as Responsible Entity of the QRIF.
- **Approved Participant:** Questus is the Approved Participant (under the NRAS) of the QRIF and holds the tax offset certificate under the NRAS on trust for the scheme in its capacity as Responsible Entity (section 601FC(2) of the Corporations Act ).
- **Manager:** Questus is the Manager of the QRIF.

## Role of the Manager

25. The Manager on behalf of itself and the QRIF is responsible for applying for houses, apartments and other property to be approved under NRAS so that they constitute Approved NRAS Property.

26. The Manager has applied to and has received approval from the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) to offer Approved NRAS Properties available for sale under NRAS. NRAS is now administered by the Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC).

27. The Manager has applied for, and received, a refundable tax offset certificate under the NRAS which was issued in the name of *Questus Funds Management Limited as Responsible Entity for the Questus Residential Investment Fund*.

28. To ensure compliance with the NRAS, insofar as it relates to the proposed tenants constituting eligible tenants under the NRAS, the Manager will assist in identifying suitable property and tenancy management service providers for QRIF investors. These service providers will manage the ongoing tenancy, including the collection of rent and payment of rental proceeds to the Investors in respect of their Approved NRAS Properties. These service providers will contract directly with the Investors.

29. No head lease will be entered into between the Manager and the Investors.

30. The Manager will receive the relevant certificate and incentives under the NRAS, and will pass the Incentives onto Investors, as owners of each Approved NRAS Property to which the certificate and incentives relate (in accordance with clause 6.2 of the Management Agreement).

#### **Role of Investors**

31. In order to enter into the QRIF, Investors must determine which Approved NRAS Property they wish to acquire and subsequently complete the Application Form (contained in the Product Disclosure Statement) together with payment of a once-off nominal Establishment Fee of \$11. The Manager will then process the application for an interest in the QRIF.

32. Upon being accepted into the QRIF, Investors will be required to enter into contracts to acquire and/or construct or acquire Approved NRAS Property. Each Investor will enter into a Management Agreement with the Manager pursuant to which each Investor will appoint the Manager to manage ongoing compliance with NRAS in relation to the Investor's Approved NRAS Property, including lodging Statements of Compliance with DSEWPaC.

33. Investors will be obliged to pay an annual Management Fee to the Manager, representing 5.5% of the Incentives and service fees which may become payable in certain circumstances (specifically 'Dishonour Cheque Fee' and 'Repeat Statement Fee').

34. Investors will be required to maintain premises that are capable of constituting Approved NRAS Property, such that they can comply with the further mandatory requirements that are contained in Item 4 of the Schedule to the Management Agreement.

35. The Investors, as registered proprietors of an Approved NRAS Property, will directly enter into lease agreements with eligible tenants. The Investors will be responsible for payment of all property and tenancy management fees to their respective service providers.



## 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.*

**Is the QRIF a non-entity joint venture?**

### **Subsection 995-1(1)**

36. A 'non-entity joint venture' (NEJV) is defined in subsection 995-1(1) to mean:

an arrangement that the Commissioner is satisfied is a contractual arrangement:

- (a) under which 2 or more parties undertake an economic activity that is subject to the joint control of the parties; and
- (b) that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than joint or collective profits for all the parties.

37. The QRIF is undertaking the economic activity of renting dwellings in a manner that will obtain both rent and NRAS incentives. As a condition of entry into the QRIF each Investor ventures their dwelling as part of the scheme. It is the QRIF that is covered by the NRAS certificate and the relevant economic activity is the collective renting of the dwellings in an NRAS compliant manner.

38. Each Investor incurs their own rental property expenses and finances the acquisition cost of their property (if finance is necessary). No Investor has any liability or obligations to any other Investor (clause 15.2 of the Management Agreement).

39. Each Investor solely derives rent in relation to their property, but the Investors share in the benefits that flow from their joint participation in the scheme, including the benefit of the QRIF having a tax offset certificate. The certificate which creates the entitlement to the tax offset is issued to Questus as Responsible Entity for the QRIF. The certificate is held in trust by Questus for the Investors. By agreement on entering the scheme their share of this output is that specified for their property on the certificate.

40. Each Investor realises their own share of the Commonwealth NRAS incentive – through their tax return. Administration of the state incentive amount will vary between the states but each Investor appears to have the power to deal with their share.

41. Each Investor is bound by the Constitution of the QRIF and the Management Agreement that they enter into with Questus, as Responsible Entity. Although there may be no direct contractual relations between the joint venture parties (the Investors), the Responsible Entity is the conduit for binding each Investor together to act collectively as the QRIF. The Constitution and Management Agreement set out the operation, management, bearing of costs and sharing of outputs of the QRIF.

42. The operation and management of the QRIF scheme is done by Questus. Questus is bound to act in accordance with the constituent documents of the scheme and Investors are not directly involved nor can they control the performance of specific tasks. However, ultimately Investors acting jointly have the power to remove Questus as Responsible Entity and appoint any other person as a new Responsible Entity. That power is recited by Clause 25.2 (Constitution) and in any case is provided for all such schemes by section 601FM of the Corporations Act. There is high level joint control by the Investors and ultimate authority lies with that collective body.

43. The members of the QRIF scheme are collectively engaged in an economic activity, being the rental of their properties in an NRAS compliant manner that obtains the benefit of the tax offset certificate issued to QRIF. They incur their own expenses, raise their own finance (if necessary) and share the outputs consisting of the NRAS incentives. They also determine the disposal or realisation of their tax offset, are bound to operate in concert by contract and ultimately jointly control the Fund.

44. The relevant parties of the NEJV are considered to be confined to the collective of Investors who are members of QRIF.

45. The Commissioner is satisfied that the QRIF scheme is a non-entity joint venture in accordance with the definition in subsection 995-1(1).

#### **Section 380-10: claims by a party to a NEJV**

46. Subdivision 380-A sets out the conditions under which a taxpayer may be entitled to a tax offset under NRAS. In particular, section 380-10 provides that an entity may be entitled to a tax offset for an income year where:

- the entity is a party to a NEJV;
- the entity is an individual, a corporate tax entity or superannuation fund;
- NRAS rent is derived by the entity in relation to a dwelling for an income year for which the Housing Secretary has issued the NEJV with a certificate under the NRAS; and
- the income year begins in the NRAS year to which the certificate relates.

47. The Manager has applied for, and received, a refundable tax offset certificate under the NRAS which was issued in the name of *Questus Funds Management Limited as Responsible Entity for the Questus Residential Investment Fund*. The QRIF is the NEJV for which the certificate is issued.

48. An Investor who is an individual, a corporate tax entity or superannuation fund and is accepted into the QRIF will be a party to a NEJV, deriving NRAS rent in respect of a dwelling for which the Housing Secretary has issued the NEJV with a certificate under the NRAS and will therefore be eligible for the tax offset under section 380-10 in the income year(s) for which the certificate relates.

49. An Investor will be eligible for a tax offset calculated in accordance with the formula in subsection 380-10(4).

## **Appendix 2 – Detailed contents list**

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

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## References

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*Previous draft:*

Not previously issued as a draft

*Subject references:*

- incentives
- investors
- management fee
- non-entity joint venture
- product rulings
- rental income
- scheme
- tax offsets

*Legislative references:*

- ITAA 1997 995-1(1)
- ITAA 1997 Subdiv 380-A
- ITAA 1997 380-10
- ITAA 1997 380-10(2)
- ITAA 1997 380-10(4)
- SISA 1993
- TAA 1953
- Copyright Act 1968
- Corporations Act 2001
- National Rental Affordability Scheme Act 2008
- National Rental Affordability Scheme Regulations 2008

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ATO references

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